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ERRATA

On page 224, the date of approval of regulations should be March 11, 1936.

On page 226, the date, February 19, 1935, in the first paragraph, should be February 8, 1935.

On page 246, fifth line, "D. D." should read "L. D."

On page 378, line 3, of first headnote, "with" should read "within."

On page 384, the date 1936 should be 1935.

On page 564, the date 1936 should be 1935.

Circular No. 1412, referred to on page 593, appears in Vol. 56 I. D.

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PREFACE

In 1883 the Department of the Interior began publication of the more important decisions of the Land Department with the view to preserving in authentic manner and in permanent form convenient for reference a line of consistent precedents in departmental rulings illustrating the land laws of the United States. Prior to that time the only published decisions of the Department were those by private reporters, the more familiarly known being Brainard, Copp, and Lester. As originally conceived, the publication entitled "Decisions of the Department of the Interior relating to the Public Lands", and thereafter referred to as the "Land Decisions", pertained almost exclusively to matters coming under the jurisdiction of the General Land Office and a few matters from the Indian Office. Gradually the jurisdiction of the Department has been enlarged by the creation of new bureaus, among them being the Bureau of Reclamation, the Geological Survey, and the National Park Service. Many new laws have been enacted and policies established relating to the Indians and Indian Affairs. New and important problems in other bureaus and services are constantly arising and call for solution. Consequently, there has been an increasingly growing demand for the publication of decisions by the Secretary and his Assistant Secretaries, and opinions by the Solicitor, relating to matters other than those pertaining to the public lands. On July 7, 1930, the Secretary issued an order amending the title so as to read "Decisions of the Department of the Interior", and directing that thereafter leading decisions and important opinions relating to all activities of the Department be published in future volumes. Including this volume, 55 volumes have been published, covering the period from July 1881 to September 9, 1936. Volumes 1 to 52 are referred to as the "Land Decisions" (L. D.). The abbreviation "I. D." when used in cited decisions of the Department and in the opinions of the Solicitor has reference to volume 53 and later volumes of this work. While a chronological order has been generally observed in the present volume, this has at times proved impracticable, so that final resort should be had to the tables of cases, opinions, etc., reported, appearing in the fore part of the volume.

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*The period covered is October 1934 to September 1936. The above list does not include the names of all attorneys in the Office of the Solicitor during the period indicated, but those only of attorneys who assisted in the preparation of departmental decisions and opinions of the Solicitor.

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NOTE.—The abbreviations used in this title refer to the following publications: "B. L. P." to Brainard's Legal Precedents in Land and Mining Cases, vols. 1 and 2; "C. L. L." to Copp's Public Land Laws, edition of 1875, 1 volume, edition of 1882, 2 volumes, edition of 1890, 2 volumes; "C. L. O." to Copp's Land Owner, vols. 1-18; "I. D." to Decisions of the Department of the Interior, beginning with vol. 53; "L. and R." to records of the former division of Lands and Railroads; "L. D." to the Land Decisions of the Department of the Interior, vols. 1-52.—EDITOR.

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DECISIONS
OF THE
DEPARTMENT OF THE INTERIOR

JOSEPH CUNNINGHAM

Decided October 4, 1934

OIL AND GAS LANDS—PROSPECTING LEASE—TIDE AND SUBMERGED LANDS—TITLE, SOVEREIGNTY AND JURISDICTION.

Absolute property in and dominion and sovereignty over the soils beneath their tide waters have been reserved to the several States, so that land in the State of California below the line of ordinary high tide is not subject to prospecting under a Federal oil and gas prospecting permit, title to said land having passed to the State, subject only to the paramount right of navigation over the waters so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States.

WALTERS, First Assistant Secretary:

On February 6, 1934, Joseph Cunningham filed an application to prospect for oil and gas upon a certain tract of land, described by metes and bounds and comprising about 1,600 acres, lying west of Huntington Beach along the ocean in Orange county, California. The applicant alleged—

That the oil and gas deposits contained in the above land is owned by the United States of America. That said land to the best of applicant's knowledge is within a known geological structure, and that offset wells have been drilled and for a period of years have had, and are now producing, large quantities of oil. That every known device has been and is now being used to extract oil from said lands. That said lands are submerged and unoccupied or claimed by anyone to the applicant's knowledge. That said lands have never been conveyed by the United States to anyone.

By decision of April 18, 1934, the Commissioner of the General Land Office rejected the application, stating—

Huntington Beach is located in Las Bolsas private land grant in California, and the west boundary of said grant is the Pacific Ocean. Therefore, the land applied for in this application is either within the exterior boundaries of the confirmed Las Bolsas land grant, title to which has passed from the Government, or in the Pacific Ocean. If it is below the line of ordinary high tide, jurisdiction thereover is in the State of California, as upon its admission to the Union it became, by virtue of its sovereignty, the owner of all lands extending seaward so far as its municipal domain extends, subject to the public right of navigation.

The applicant, by his attorney, has appealed on the following grounds:

1. That an important question, not only of law but of public policy, is involved and neither has probably ever heretofore been presented, argued, or discussed so thoroughly as now proposed.

2. That, in addition to the above, the question has never been fully and completely considered in the light and trend of present-day thought, legislation, and decisions.

3. That the decision appealed from is contrary to law and the rights of the United States.

4. That the Supreme Court of California has decided and recognized that the State does not acquire title to minerals by virtue of its so-called "sovereignty."

5. That the United States has never by act of Congress or otherwise specifically granted, ceded, relinquished, or patented tide or submerged lands to the State of California or to any citizen.

6. That the State of California accepted statehood with the express stipulations and conditions that it would never interfere with the primary disposal of the public lands within its limits, and that it would pass no law and do no act whereby the title of the United States to, and the right to dispose of, the same should be impaired or questioned.

7. That certain decisions of the courts which may be viewed by some people as lending color or support to the view expressed by the Commissioner can be fully and completely explained and distinguished.

8. That in view of new conditions and trend of thought fancied precedents should be overruled and the true rule or new precedents established.

9. That the limited political jurisdiction of California over tide and submerged lands is in trust to police locally and to prevent improper uses of such lands.

10. That the unit plan of development contemplated by the appellant will not interfere with the development or pursuit of fishing, commerce, or navigation.

11. That the granting of a permit, and a lease after discovery, will result in the payment of large sums of money to the Federal Government, of which the State of California will receive a large share.

The appellant and his attorney ask that opportunity be given for oral presentation and argument before the Department and that they be given "the maximum of time in which to prepare a comprehensive brief covering the history, constitution, laws, decisions, and present trend of opinion, which will be helpful and determinative of the question."

In the case of *Knight v. U. S. Land Association* (142 U. S. 161) the court said:

It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original

States were reserved to the several States, and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders. *Martin v. Waddell* (16 Pet. 367, 410); *Pollard v. Hagan* (3 How. 212, 229); *Goodtitle v. Kibbe* (9 How. 471, 478); *Mumford v. Wardwell* (6 Wall. 423, 436); *Weber v. Harbor Commissioners* (18 Wall. 57, 65).

The case last cited involved tide lands in the State of California, and with respect thereto the court said:

Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tidewaters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the General Government.

See also *Shively v. Bowlby* (152 U. S. 1), and the cases therein cited; *Coburn v. San Mateo County* (75 Fed. 520); *United States v. Holt Bank* (270 U. S. 49).

There is in the State of California a law providing for the issuance of oil and gas prospecting permits and leases on State lands, including tide and submerged lands (Stat. 1921, p. 404, as amended by Stat. 1923, p. 593). In the case of *Boone v. Kingsbury* (273 Pac. 797) the Supreme Court of California upheld the law, stating—

We are satisfied that the State act under consideration is a valid exercise of a right which inheres in the State by virtue of its sovereign power. It does not impinge upon the State or Federal constitutions and is not in conflict with any act of Congress or the State of California.

It is probable that the land in question has not been leased by the State because the law referred to provides that no permits or leases shall be granted for tide or submerged lands fronting on an incorporated city or for a distance of 1 mile on either side thereof.

It is clear that this Department has no jurisdiction. The State of California asserts title to tide and submerged lands under the common law as it has repeatedly been laid down by the Supreme Court of the United States. If any question of title to such lands as between the State of California and the United States is to be tried, it is for the Federal courts.

Attention may be called to the fact that even if public land were involved no prospecting permit could be granted, because the appellant alleged that the land was within the geologic structure of a producing oil field.

No useful purpose would be served in any oral hearing before the Department and the request therefor is denied.

The decision appealed from is

Affirmed.

WILLIAM WALLACE WHATLEY

Decided October 4, 1934

HOMESTEAD APPLICATION—RAILROAD GRANT LANDS—SETTLEMENT RIGHTS.

A proviso to section 2 of the act of February 8, 1887 (24 Stat. 391), granting to the New Orleans Pacific Railway Company lands for a right-of-way, excepted from the grant and made subject to entry under the public land laws "lands occupied by actual settlers at the date of the definite location of the said road and still remaining in the possession of their heirs or assigns." *Held*, That in order to be entitled to the benefit of said proviso the claimant must show unbroken occupation of the land on the part of the settler, his heirs and assigns, and that all the occupants had been otherwise qualified to make homestead entry.

COURT DECISIONS CITED AND APPLIED.

United States v. New Orleans Pacific Railway Company (248 U. S. 507), and *United States et al. v. New Orleans Pacific Railway Company et al.* (235 Fed. 833, 840), cited and applied.

WALTERS, *First Assistant Secretary*:

On December 29, 1932, William Wallace Whatley made homestead application for lots 1, 3, 4, and 6, Sec. 23, T. 2 S., R. 1 E., La. M.

By decision dated February 16, 1934, the Commissioner of the General Land Office rejected the application on the grounds that title to the said land is vested in the Crowell-Spencer Lumber Company and that the applicant is not entitled to favorable consideration, in accordance with the holding in *United States v. New Orleans Pacific Railway Company* (248 U. S. 507). Whatley has appealed from this decision.

The land involved in Whatley's application is within the primary limits of the grant to the New Orleans, Baton Rouge and Vicksburg Railroad Company under the act of February 8, 1887 (24 Stat. 391). December 28, 1892, pursuant to this statute, the land was patented to the New Orleans Pacific Railway Company, successor in interest to the New Orleans, Baton Rouge and Vicksburg Railroad Company. In successive conveyances the land was transferred by the New Orleans Pacific Railway Company to the Kissatchie Land Company, Ltd.; by the Kissatchie Land Company, Ltd., to E. F. Wesche; and finally on December 20, 1905, by E. F. Wesche to the Crowell-Spencer Lumber Company, in whom record title is vested at the present time.

The appellant's claim is based on the following provisions of the act of February 8, 1887, *supra*:

Provided, That all said lands occupied by actual settlers at the date of the definite location of the said road and still remaining in the possession of their heirs or assigns shall be held and deemed excepted from said grant and shall be subject to entry under the public land laws of the United States.

* * * * *

The Secretary of the Interior is hereby fully authorized and instructed * * * to protect any and all settlers on said lands in all their rights under the said section of this act.

By both judicial and departmental decision, the words "occupied by actual settlers" in the above-quoted statute have been interpreted to mean settlers qualified to make entry under the homestead laws. *United States v. New Orleans Pacific Railway Company, supra; Pennington v. New Orleans Pacific Railway Company* (25 L. D. 61).

It appears that on November 17, 1882, the date of the definite location of the railroad, the land was occupied by one George Neal, a qualified settler. In 1883 Neal transferred his claim to S. H. Knapp, who was also a qualified settler. Knapp lived on the land until 1892, when he sold his claim to Sam Haas, who, since he was the owner of approximately a million acres of land, was not qualified to make homestead entry. Haas, in 1904, sold his claim to Willis Whatley, the father of the applicant, who also was not qualified to make homestead entry. In 1922 Willis Whatley transferred his interest to the present claimant.

Although it is true that, since the land was occupied by a qualified settler at the date of the definite location of the railroad, the issuance of patent on December 28, 1892, to the New Orleans Pacific Railway Company was erroneous, the title so erroneously issued cannot now be annulled because the time within which such action can be taken, as provided in the act of March 2, 1896 (29 Stat. 42), has expired. Therefore, the only remedy which may be available to the applicant is to have a trust in his favor declared and enforced under the authority of the decision of the United States Supreme Court in *United States v. New Orleans Pacific Railway Company, supra*.

The question which immediately presents itself is whether such a trust may be declared and enforced where, although the land was occupied by a qualified settler at the date of the definite location of the railroad, one or more of the subsequent claimants were not qualified to make homestead entry.

This question was considered and decided in *United States et al. v. New Orleans Pacific Railway Company et al.* (235 Fed. 833, 840). In that case it was held that the equitable right was extinguished upon assignment to a person not qualified to make homestead entry, and a subsequent assignee, although himself a qualified settler, was precluded from establishing and enforcing a trust. An extract from the decision follows:

But if at any time Wiley Terrel was entitled to acquire the land in question by a homestead entry, he relinquished that right in 1899 by homesteading other land. After he took that step he was without color of right to challenge the action of the Land Department in patenting the land in question to the New Orleans Pacific Railway Company, or to claim that the land continued to be held in trust for him, or subject to his homestead right to it, and the rights of the patentee and its assigns took precedence of any subsequently arising claim by an occupant of a right to acquire the same land from the Government.

* * * The sale to McCullough in 1902 or 1903 did not have the effect of

conferring such a right. The assignor did not possess it, as, if he had ever had it, he had lost it by abandoning it, and the assignee was disqualified to acquire it as a result of his having already exhausted his privilege of homesteading land. As the immediate predecessors of the interveners in the occupancy of the land did not possess the right claimed, their sales to the latter could not confer it on them. In short, the claims of the interveners are based upon asserted rights which, if they ever existed, had by abandonment ceased to exist years before either of the interveners had any connection with the land in question.

Applying this decision to the instant case it would appear that the right to establish and enforce a trust existed in George Neal, who was a qualified settler, and in his transferee, S. H. Knapp, who was also a qualified settler. However, neither Haas nor Willis Whatley, the next successive settlers, was qualified to make homestead entry, and for this reason neither possessed the right to impress the land with a trust. When Willis Whatley transferred his claim to the appellant he could only transfer what right and interest he possessed, and, since he did not possess the right to have a trust declared and enforced for his benefit, the appellant cannot be said to possess such a right.

For this reason the institution of suit by the Government in behalf of the appellant is not recommended.

The appellant also contends that since the land was approved to the State of Louisiana in 1859 pursuant to the act of June 3, 1856 (11 Stat. 18), and was not reconveyed to the United States until February 24, 1888, the United States did not have title in 1887 and could not have granted the land to the New Orleans Pacific Railway Company by the act of February 8, 1887. In this connection it is pointed out that the lands granted to the State of Louisiana by the act of June 3, 1856, were forfeited by the act of July 14, 1870 (16 Stat. 277), and by the terms of the act title to the lands reverted in the United States at that time. Therefore, the contention advanced by the appellant must be rejected.

The decision of the Commissioner is

Affirmed.

AMENDMENT OF PARAGRAPH 37 (b) OF MINING REGULATIONS

[Circular No. 1337]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 5, 1934.

REGISTERS, UNITED STATES LAND OFFICES:

Paragraph 37 (b) of the Mining Regulations (circular No. 430), approved April 11, 1922 (49 L. D. 15), is amended to read as follows:

(b) Upon application to make agricultural entry of the residue of any original lot or legal subdivision reduced by mining claims, and which residue has been

already relotted in accordance therewith, the local officers will accept and approve the application as usual, if found to be regular. When such an application is filed for any such original lot or subdivision, reduced in available area by patented mining claims but not yet relotted accordingly, or where such lot or subdivision is affected by pending applications for mineral patent, none of which the agricultural applicant desires to contest, or by approved surveys of mining claims, the mineral character of which has been duly established, the Register of the local land office will accept and allow the application (if otherwise regular), exclusive of the conflict with the mining claims. The Register will advise this office promptly when the agricultural entryman is ready to make final proof, whereupon the proper public survey office will be advised by this office of such mining claims or portions thereof as are proper to be segregated, and directed to prepare at once, upon the usual drawing-paper township blank, diagram of amended township survey of such original lot or legal subdivision so made fractional by such mineral segregation, designating the agricultural portion by appropriate lot number, beginning with no. 1 in each section, and giving the area of each lot, and will forthwith transmit one approved copy to the local land office and one to this office.

D. K. PARROTT,

Acting Assistant Commissioner.

Approved, October 5, 1934:

T. A. WALTERS,

First Assistant Secretary.

ISSUE OF PATENTS TO STATES TO DESIGNATED SCHOOL SECTIONS IN PLACE

REGULATIONS

[Circular No. 1338]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., October 19, 1934.

REGISTERS, UNITED STATES LAND OFFICES:

The Act of Congress approved June 21, 1934 (Public No. 440-73d Congress), entitled "An Act Authorizing the Secretary of the Interior to issue patents to the numbered school sections in place, granted to the States by the Act approved February 22, 1889, by the Act approved January 25, 1927 (44 Stat. 1026), and by any other Act of Congress", reads as follows:

That the Secretary of the Interior shall upon the application by a State cause patents to be issued to the numbered school sections in place, granted for the support of common schools by the Act approved February 22, 1889, by the Act approved January 25, 1927 (44 Stat. 1026), and by any other Act of Congress, that have been surveyed, or may hereafter be surveyed, and to which title has vested or may hereafter vest in the grantee States, and which have not been reconveyed to the United States or exchanged with the United States for other lands. Such patents shall show the date when title vested in the State and the extent to which the lands are subject to prior conditions, limitations, easements,

or rights, if any. In all inquiries as to the character of the land for which patent is sought the fact shall be determined as of the date when the State's title attached.

The purpose of this act is to provide the States, upon application, with evidence of title to the designated school section lands granted by the enabling acts, by the Act of January 25, 1927 (44 Stat. 1026), and by any other act of Congress. The words "and by any other Act of Congress" are construed to embrace any grant or grants of numbered school sections in place made to any of the public-land States.

There will be no filing or conveyance fees required on the part of the States in connection with the patenting of school sections in place under this act.

The act places no limitation upon the areas which may be applied for under one application. No fixed rule is necessary in regard to the area which may be included in any one patent. This matter will be handled in such manner as will permit the best results from an administrative standpoint.

Application for patent should be filed in the district land office where the land is located and when so filed you will assign a current serial number thereto and transmit the application immediately to this office with a detailed report as to any conflict or adverse claim that may be found of record. Where there is no district land office, the application should be filed in this office, after which it will be given a current G. L. O. serial number.

An applicant for patent under this act will be required to publish notice of its application, at its own expense, in a daily, weekly, or semiweekly paper, published in the vicinity of the land, once each week for five consecutive weeks, and to furnish proof thereof by affidavit of the publisher or foreman of the newspaper employed. A copy of such notice will be posted in the district land office, or in this office, and remain so posted during the entire period of publication. Notices for publication will be prepared by the Register, or by this office, and will be transmitted to the proper State official for publication in the paper designated. Where publication is made in a daily paper, the notice should appear in the Wednesday issue for five consecutive weeks; if in a semiweekly paper, in either issue for five consecutive weeks. The notice should require persons asserting claims to any of the lands advertised to file protest or notice of their claims in the district land office, or in this office, within thirty days from the date of last publication, in order to receive proper consideration before the issuance of patent. Protests or contests should be transmitted to this office, with the evidence of publication, at the expiration of such thirty-day period.

Determination of the date when title vested in the State and of "prior conditions, limitations, easements, or rights, if any," to which

the land is subject, will be ascertained from the records in this office and in the Geological Survey, and appropriate mention of such facts made in the patent.

You will give these regulations the widest possible publicity without expense to the Government.

Should hearings be ordered the costs will be assessed between the parties thereto in the manner provided by the Rules of Practice.

FRED W. JOHNSON,
Commissioner.

Approved, October 19, 1934:

T. A. WALTERS,
First Assistant Secretary.

LAND EXCHANGE WITH STATES UNDER TAYLOR GRAZING ACT

Opinion, October 25, 1934

TAYLOR GRAZING ACT LANDS—EXCHANGE OF LANDS WITH STATES—DUTY AND AUTHORITY OF SECRETARY OF THE INTERIOR.

Section 8 of the Taylor Grazing Act (48 Stat. 1269, 1272) authorizes such exchanges of State lands for public lands as will benefit the public interests in control of grazing on the public range under said act. Determination of whether such interests will be benefited by a proposed exchange is to be made by the Secretary of the Interior.

TAYLOR GRAZING ACT LANDS—AUTHORITY OF THE SECRETARY OF THE INTERIOR—EXCHANGES—REGULATIONS.

Under the authority conferred by section 2 of the Taylor Grazing Act, the Secretary of the Interior is empowered to make rules and regulations and to do any and all things necessary to accomplish the purposes of the act, including those of section 8; and in the exercise of this authority he may promulgate regulations governing the exchanges of lands authorized by section 8, determine the form of applications, the manner of their presentation, and the procedure by which they should be considered and ruled upon.

TAYLOR GRAZING ACT LANDS—EXCHANGES—SEGREGATIVE EFFECT OF APPLICATION TO EXCHANGE—REGULATIONS.

Applications, properly filed by States to exchange State lands within a Taylor Act grazing district for other public lands, may be given the effect of segregating the lands applied for from further disposition under the public land laws pending disposition of the applications; but the selected lands may nevertheless be included in a grazing district, authority to do so being an integral part of the Secretary's power to determine whether a proposed exchange will benefit the public interests in regulating grazing on the public range under the Taylor Grazing Act.

MARGOLD, *Solicitor:*

Section 8 of the Taylor Grazing Act (Act of June 28, 1934, 48 Stat. 1269, 1272) makes limited provision for exchanges of privately

owned and State lands for public lands. Several States have submitted or are preparing to submit applications for land exchanges under this section; and on October 4 you requested my opinion upon "the effect of filing of such applications for exchanges not only from the viewpoint of the State but from the Government as well." You also requested my opinion "as to whether such applications for exchange by the State filed in district land offices have the effect of segregating the land from any further disposition and whether the lands included in these exchange applications can be included in a grazing district."

I

The opinion requested depends upon analysis and interpretation of section 8 which, insofar as pertinent here, reads as follows:

Sec. 8. That where such action will promote the purposes of the district or facilitate its administration, the Secretary is authorized and directed to accept on behalf of the United States any lands within the exterior boundaries of a district as a gift, or, when public interests will be benefited thereby, he is authorized and directed to accept on behalf of the United States title to any privately owned lands within the exterior boundaries of said grazing district, and in exchange therefor to issue patent for not to exceed an equal value of surveyed grazing district land or of unreserved surveyed public land in the same State or within a distance of not more than fifty miles within the adjoining State nearest the base lands. *Provided*, That before any such exchange shall be effected, notice of the contemplated exchange, describing the lands involved, shall be published by the Secretary of the Interior once each week for four successive weeks in some newspaper of general circulation in the county or counties in which may be situated the lands to be accepted, and in the same manner in some like newspaper published in any county in which may be situated any lands to be given in such exchange; lands conveyed to the United States under this Act shall, upon acceptance of title, become public lands and parts of the grazing district within whose exterior boundaries they are located: * * * Upon application of any State to exchange lands within or without the boundary of a grazing district the Secretary of the Interior is authorized and directed, in the manner provided for the exchange of privately owned lands in this section, to proceed with such exchange at the earliest practicable date and to cooperate fully with the State to that end but no State shall be permitted to select lieu lands in another State.

It is clear, upon reading section 8, that it is an integral part of the act to regulate grazing on the public lands, administration of which is placed in the Secretary of the Interior. This section authorizes and directs the Secretary to accept on behalf of the United States gifts of land within the exterior boundaries of a district "where such action will promote the purposes of the district or facilitate its administration." It authorizes and directs the Secretary to exchange for privately owned land within a district other land in the district or in the same State or the State nearest to the district "when public interests will be benefited thereby." Finally,

it authorizes and directs the Secretary to exchange for State lands within or without a district public lands within the State applying, "in the manner provided for the exchange of privately owned lands in this section." This section thus authorizes and directs acceptance of gifts and land exchanges, when the proposed gifts or exchanges will benefit the public interests which are enunciated in the Taylor Grazing Act and are served thereby. It cannot be doubted that Congress therein authorized only those exchanges which will benefit the public interests in regulation of grazing on the public range under the Taylor Act. Exchanges other than these would be without legal authority.

Also, it cannot be doubted that whether a proposed exchange will benefit the public interests involved is a matter for determination by the Secretary of the Interior. In the leading case of *Bishop of Nesqually v. Gibbon* (158 U. S. 155, 167) the Supreme Court of the United States stated:

It may be laid down as a general rule that, in the absence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the land department. It falls there unless there is express direction to the contrary.

This leading case was followed in *Cosmos v. Gray Eagle Co.* (190 U. S. 301, 309) in which the court said:

Unless taken away by some affirmative provision of the law, the Land Department has jurisdiction over the subject. *Catholic Bishop v. Gibbons*, 158 U. S. 155, 166, 167. There is no such law, and we must hold that the Land Department has full jurisdiction over matters involving the right of parties to a patent for lands selected under that act (June 4, 1897, 30 Stat. 11, 36) in lieu of lands relinquished in a forest reservation.

This general rule has regularly been recognized and applied by the court. *Johanson v. Washington* (190 U. S. 179, 185); *Burke v. Southern Pacific Ry. Co.* (234 U. S. 669, 684); *Cameron v. United States* (252 U. S. 450, 460, 462). Upon the same authority it is for the Secretary to determine that the lieu lands selected do not exceed the value of the lands offered for exchange.

Furthermore, it is clear that the last sentence of section 8, which makes provision for exchanges of State land, is an integral part of the section. Congress provided that States could offer base lands "within or without the boundary of a grazing district", whereas it authorized exchange of only those private lands which are located within a grazing district. On the other hand, there is provision that "no State shall be permitted to select lieu lands in another State", whereas lieu lands exchanged for privately owned lands may be lo-

cated "within a distance of not more than fifty miles within the adjoining State nearest the base lands." Aside from these provisions peculiar to exchanges of State lands, Congress provided that these exchanges should be made "in the manner provided for the exchange of privately owned lands in this section." As shown in the preceding paragraphs, this manner of exchange requires a determination by the Secretary of the Interior of the question whether the exchange applied for will benefit the public interests.

In view of the foregoing, it is my opinion that section 8 authorizes only those exchanges of State lands which will benefit the public interests in control of grazing on the public range under the Taylor Act; and that it is the duty of the Secretary of the Interior, upon the filing of a proper application, to determine whether the public interests will be benefited by the proposed exchange.

II

The form of applications, the manner in which they should be presented, and the procedure by which they should be considered and ruled upon are matters for administrative determination. Section 2 of the Taylor Grazing Act confers upon the Secretary of the Interior power to make rules and regulations and to do any and all things necessary to accomplish the purposes of the act, including those of section 8. He may, therefore, promulgate regulations governing the exchanges authorized by section 8.

The segregative effect of properly filed applications is also a matter for administrative determination. Departmental decisions in cases involving school land indemnity selections by States and indemnity selections by railroad companies show that applications properly filed may be given the effect of segregating the land selected from any further disposition under the public land laws, pending disposition of the applications. (34 L. D. 12; 34 L. D. 119; 45 L. D. 17; 45 L. D. 535; 46 L. D. 109.)

It should be noted, however, that if such segregative effect is given to applications for exchange, yet the selected lands may be included in a grazing district. The power to include such lands in a grazing district is an integral part of the Secretary's power to determine whether a proposed exchange will benefit the public interests in regulating grazing on the public range under the Taylor Grazing Act.

The foregoing analysis and interpretation of section 8 adequately answers, I believe, the questions presented for my opinion.

Approved, October 25, 1934:

OSCAR L. CHAPMAN,
Assistant Secretary.

D. E. JENKINS

Decided October 25, 1934

MINERAL LANDS—COAL PROSPECTING PERMIT—AUTHORITY OF SECRETARY OF THE INTERIOR.

The Secretary of the Interior has discretionary authority over the issuance of permits to prospect for coal, and in the exercise of this authority may decide, in a given case, that no permit shall be issued.

MINERAL LANDS—COAL PROSPECTING PERMITS—APPLICATIONS.

Where potential production of coal mines already opened within a given area is in excess of demand, further applications for permission to prospect are for the time being properly denied.

MINERAL LANDS—APPLICATION FOR PROSPECTING PERMIT—RIGHTS OF APPLICANT.

The mere filing of an application for a prospecting permit does not give the applicant any right as against the Government, but merely a prior right over any subsequent applicant, the Department involved being under no obligation to issue a permit if it is in the general interest that no permit be issued.

MINERAL LANDS—APPLICANT FOR PROSPECTING PERMIT—EXPENDITURES MADE PRIOR TO APPLICATION—EQUITABLE RIGHTS.

Expenditures in connection with the land made by an applicant for permit before the granting thereof are at his own risk and establish no equity obligating the Department to grant a permit.

WALTERS, *First Assistant Secretary:*

On January 5, 1934, D. E. Jenkins filed an application for a permit to prospect for coal upon all of Secs. 1, 11, and 12, T. 22 S., R. 4 E., W $\frac{1}{2}$ Sec. 6, and W $\frac{1}{2}$ Sec. 7, T. 22 S., R. 5 E., S. L. M., Utah, containing approximately 2,560 acres. On March 19, 1934, he filed a supplemental showing as to the need for additional production of coal.

On June 19, 1934, the Director of the Geological Survey, after consideration of the full record, made a report and recommendation as follows:

The records of the Geological Survey indicate that the market available to the land applied for can be reasonably supplied from mines already opened.

Accordingly I recommend that the application for a coal prospecting permit be held for rejection.

In a decision of June 27, 1934, the Commissioner of the General Land Office held the application for rejection, pursuant to the report and recommendation above quoted. The applicant has appealed upon stated grounds as follows:

1. The Commissioner erred in holding that the application was subject to the departmental instructions of January 24, 1934, because the application was filed prior to that date and the applicant had established an equity through the expenditure of more than \$150 for

geological work and advice and legal assistance in connection with the application.

2. The Commissioner and the Geological Survey erred in holding that it was a fact that an additional coal mine was not needed.

3. The applicant is entitled to the issuance of a permit for the lands in his application under existing laws and regulations. He is entitled to a hearing to present proof of the correctness of the allegations made in his application that an additional coal mine is needed.

The Secretary of the Interior has discretionary authority in the issuance of permits. He may decide that no permit should be issued. In this situation the mere filing of a permit application does not give the applicant any right against the Government. He has a prior right over any subsequent applicant, but the Department is under no obligation to issue a permit to him if it is in the general interest that no permits be issued. See *United States v. Wilbur* (283 U. S. 414). If the applicant made expenditures in connection with the land before he had any rights through the granting of a permit he did so at his own risk. No equity which would obligate the Department to grant a permit was established.

In the appeal no additional facts are alleged. It is well known that the potential production of coal mines already opened in Utah cannot be disposed of. There is no ground for stating that the Director of the Geological Survey erred in reporting that there was no need for an additional coal mine. Numerous applications have been filed for the maximum area of coal prospecting lands in Utah, and the same general arguments appear to be advanced why permits should be granted. On the other hand, many of those who have been granted leases are asking for relief because they can find no market for their coal.

As has been shown above, the applicant has no legal right to demand that a permit be issued. In the general interest of the coal industry, permits or leases are not being issued unless need therefor is shown. None has been satisfactorily shown here, nor has there been any showing which would warrant ordering a hearing.

The decision appealed from is

Affirmed.

POWERS OF INDIAN TRIBES

Opinion, October 25, 1934

INDIAN TRIBES—ORIGINAL STATUS.

The Indian tribes were originally regarded as enjoying full powers of sovereignty, internal and external.

INDIAN TRIBES—TERMINATION OF EXTERNAL SOVEREIGNTY.

Conquest has terminated the external powers of sovereignty of the Indian tribes.

INDIAN TRIBES—INTERNAL SOVEREIGNTY.

Conquest has brought the Indian tribes under the control of Congress, but except as Congress has expressly restricted or limited the internal powers of sovereignty vested in the Indian tribes such powers are still vested in the respective tribes and may be exercised by their duly constituted organs of government.

INDIAN TRIBES—INTERNAL SOVEREIGNTY—EFFECT OF STATUTES AND TREATIES.

The acts of Congress which appear to limit the powers of an Indian tribe are not to be unduly extended by doubtful inference.

INDIAN TRIBES—INTERNAL SOVEREIGNTY—EFFECT OF ADMINISTRATIVE ACTION.

Attempts of administrative officials to interfere in the exercise by the Indian tribes of their powers of self-government, or to supplant tribal authorities in the administration of these powers, have not terminated or impaired the legal rights and powers vested in the various Indian tribes.

INDIAN TRIBES—FORM OF GOVERNMENT.

It is the prerogative of any Indian tribe to determine its own form of government.

INDIAN TRIBES—MEMBERSHIP.

It is within the power of an Indian tribe to determine its own membership, but such power is subject to the supervision of the Secretary of the Interior where rights to Federal property are involved.

INDIAN TRIBES—DOMESTIC RELATIONS—INDIAN CUSTOM MARRIAGE AND DIVORCE.

The domestic relations of members of an Indian tribe are subject to the customs, laws, and jurisdiction of the tribe.

INDIAN TRIBES—DESCENT AND DISTRIBUTION OF PROPERTY.

Except with respect to allotted lands, the inheritance laws and customs of the Indian tribes are still of supreme authority.

INDIAN TRIBES—POWER OF TAXATION.

Among the powers of sovereignty vested in an Indian tribe is the power to tax members of the tribe and nonmembers accepting privileges of trade or residence, to which taxes may be attached as conditions.

INDIAN TRIBES—EXCLUSION OF NONMEMBERS FROM TERRITORY.

An Indian tribe may, either in its capacity as landowner or in the exercise of local self-government, exclude from the territory subject to the jurisdiction of the tribe persons who are not members of the tribe, except where such persons occupy reservation lands under lawful authority.

INDIAN TRIBES—TRIBAL PROPERTY.

The powers of an Indian tribe over tribal property are no less absolute than the powers of any property owner, save as restricted by general acts of Congress restricting the alienation or leasing of tribal property, and particular acts of Congress designed to control the disposition of particular funds or lands.

INDIAN TRIBES—RIGHTS OF OCCUPANCY IN TRIBAL LANDS.

Occupancy of tribal land by members of the tribe does not create any vested rights in the occupant as against the tribe, and such occupancy is subject to whatever limitations the tribe may see fit to impose.

INDIAN TRIBES—JURISDICTION OVER PROPERTY OF MEMBERS.

It is within the sovereign powers of an Indian tribe to adopt police regulations governing the property and contracts of members of the tribe.

INDIAN TRIBES—ADMINISTRATION OF JUSTICE.

The judicial powers of a tribe are coextensive with its legislative or executive powers, and, except as criminal or civil jurisdiction has been transferred by statute to Federal or State courts, plenary civil and criminal jurisdiction rests with the duly constituted authorities of the Indian tribe. Such authority is not destroyed or limited by administrative action of the Interior Department in the establishment and operation of courts of Indian offenses.

INDIAN TRIBES—SUPERVISION OF FEDERAL EMPLOYEES.

Although the power to supervise Federal employees is not an inherent power of Indian tribal sovereignty, it is a power which is specifically granted to the Indian tribes by Revised Statutes, section 2072 (U. S. Code, title 25, sec. 48), subject to the discretion of the Secretary of the Interior.

INDIAN TRIBES—POWERS—SPECIAL RESTRICTIONS.

The foregoing powers are vested in the various Indian tribes under existing law, except as modified for particular tribes by special treaties or by special legislation.

STATUTORY CONSTRUCTION—ACT OF JUNE 18, 1934—"POWERS NOW VESTED IN ANY INDIAN TRIBE OR TRIBAL COUNCIL BY EXISTING LAW."

The foregoing enumerated powers, vested in the Indian tribes prior to the enactment of the act of June 18, 1934 (48 Stat. 984), are safeguarded and protected by section 16 of this act, and the manner of their exercise may be expressly defined or limited by the terms of a constitution adopted by the tribe and approved by the Secretary of the Interior pursuant to section 16 of the act of June 18, 1934 (48 Stat. 984).

SUMMARY

Under section 16 of the Wheeler-Howard Act (48 Stat. 984, 987) the "powers vested in any Indian tribe or tribal council by existing law" are those powers of local self-government which have never been terminated by law or waived by treaty. Among these powers are the following:

1. The power to adopt a form of government, to create various offices and to prescribe the duties thereof, to provide for the manner of election and removal of tribal officers, to prescribe the procedure of the tribal council and subordinate committees or councils, to provide for the salaries or expenses of tribal officers and other expenses of public business, and, in general, to prescribe the forms through which the will of the tribe is to be executed.

2. To define the conditions of membership within the tribe, to prescribe rules for adoption, to classify the members of the tribe and to grant or withhold the right of tribal suffrage, and to make all other necessary rules and regulations governing the membership of the

tribe so far as may be consistent with existing acts of Congress governing the enrollment and property rights of members.

3. To regulate the domestic relations of its members.

4. To prescribe rules of inheritance with respect to all personal property and all interests in real property other than regular allotments of land.

5. To levy dues, fees, or taxes upon the members of the tribe and upon nonmembers residing or doing any business of any sort within the reservation, so far as may be consistent with the power of the Commissioner of Indian Affairs over licensed traders.

6. To remove or to exclude from the limits of the reservation nonmembers of the tribe, excepting authorized Government officials and other persons now occupying reservation lands under lawful authority, and to prescribe appropriate rules and regulations governing such removal and exclusion, and governing the conditions under which nonmembers of the tribe may come upon tribal land or have dealings with tribal members, providing such acts are consistent with Federal laws governing trade with the Indian tribes.

7. To regulate the use and disposition of all property within the jurisdiction of the tribe, and to make public expenditures of tribal funds, where legal title to such funds lies in the tribe.

8. To administer justice with respect to all disputes and offenses of or among the members of the tribe, other than the ten major crimes reserved to the Federal courts.

9. To prescribe the duties and to regulate the conduct of Federal employees, but only insofar as such powers of supervision may be expressly delegated by the Interior Department.

MARGOLD, *Solicitor*:

My opinion has been requested on the question of what powers may be secured to an Indian tribe and incorporated in its constitution and by-laws by virtue of the following phrase, contained in section 16 of the Wheeler-Howard Act (48 Stat. 984, 987) :

In addition to *all powers vested in any Indian tribe or tribal council by existing law*, the constitution adopted by said tribe shall also vest * * *. [Italics added.]

The question of what powers are vested in an Indian tribe or tribal council by existing law cannot be answered in detail for each Indian tribe without reference to hundreds of special treaties and special acts of Congress. It is possible, however, on the basis of the

reported cases, the written opinions of the various executive departments, and those statutes of Congress which are of general import, to define the powers which have heretofore been recognized as lawfully within the jurisdiction of an Indian tribe. My answer to the propounded question, then, will be general, and subject to correction for particular tribes in the light of the treaties and statutes affecting such tribe wherever such treaties or statutes contain peculiar provisions restricting or enlarging the general authority of an Indian tribe.

In analyzing the meaning of the phrase in question, I note that the general confirmation of powers already recognized is found in conjunction with specific grants of the following powers: "To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments." Furthermore, when a constitution has been adopted by a majority of the adults of an Indian tribe or tribes residing on the same reservation, the Secretary of the Interior is directed to "advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress."

I note, also, as relevant to the question of construction, that one of the stated purposes of the act in question is "to grant certain rights of home rule to Indians."

I assume, finally, that any ambiguity in the phrase which I am asked to interpret ought to be resolved in accordance with—

* * * the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians. *Alaska Pacific Fisheries v. United States* (248 U. S. 78, 89).

And see, to the same effect, *Seufert Bros. Co. v. United States* (249 U. S. 194); *Choate v. Trapp* (224 U. S. 665); *Jones v. Meehan* (175 U. S. 1).

Bearing these considerations in mind, I have no doubt that the phrase "powers vested in any Indian tribe or tribal council by existing law" does not refer merely to those powers which have been specifically granted by the express language of treaties or statutes, but refers rather to the whole body of tribal powers which courts and Congress alike have recognized as properly wielded by Indian tribes, whether by virtue of specific statutory grants of power or by virtue of the original sovereignty of the tribe insofar as such sovereignty has not been curtailed by restrictive legislation or surrendered by treaties. Had the intent of Congress been to limit the powers of

an Indian tribe to those previously granted by special legislation, it would naturally have referred to "existing laws" rather than "existing law" as the source of such powers. The term "law" is a broader term than the term "laws" and includes, as well as "laws", the materials of judicial decisions, treaties, constitutional provisions and practices, and other sources controlling the decisions of courts. Furthermore, it was clearly not the purpose of Congress to narrow the body of tribal powers which have heretofore been recognized by the courts. It would therefore be contrary to the manifest intent of the act to interpret this phrase in a narrow sense as referring only to express statutory grants of specific powers.

Perhaps the most basic principle of all Indian law, supported by a host of decisions hereinafter analyzed, is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.* Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty, and therefore properly falls within the statutory category, "powers vested in any Indian tribe or tribal council by existing law."

The acts of Congress which appear to limit the powers of an Indian tribe are not to be unduly extended by doubtful inference. What was said in the case of *In re Mayfield* (141 U. S. 107) is still pertinent:

The policy of Congress has evidently been to vest in the inhabitants of the Indian country such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization. We are bound to recognize and respect such policy and to construe the acts of the legislative authority in consonance therewith. * * * (At pp. 115-116.)

THE DERIVATION AND SCOPE OF INDIAN TRIBAL POWERS

From the earliest years of the Republic the Indian tribes have been recognized as "distinct, independent, political communities" (*Worcester v. Georgia*, 6 Pet. 515, 559), and, as such, qualified to exercise powers of self-government, not by virtue of any delegation

of powers from the Federal Government but rather by reason of their original tribal sovereignty. Thus treaties and statutes of Congress have been looked to by the courts as limitations upon original tribal powers, or, at most, evidences of recognition of such powers, rather than as the direct source of tribal powers. This is but an application of the general principle that "It is only by positive enactments, even in the case of conquered and subdued nations, that their laws are changed by the conqueror" (*Wall v. Williamson*, 8 Ala. 48, 51, upholding tribal law of divorce).

In point of form it is immaterial whether the powers of an Indian tribe are expressed and exercised through customs handed down by word of mouth or through written constitutions and statutes. In either case the laws of the Indian tribe owe their force to the will of the members of the tribe.

The earliest complete expression of these principles is found in the case of *Worcester v. Georgia* (6 Pet. 515). In that case the State of Georgia, in its attempts to destroy the tribal government of the Cherokees, had imprisoned a white man living among the Cherokees with the consent of the tribal authorities. The Supreme Court of the United States held that his imprisonment was in violation of the Constitution, that the State had no right to infringe upon the Federal power to regulate intercourse with the Indians, and that the Indian tribes were, in effect, wards of the Federal Government entitled to exercise their own inherent rights of sovereignty so far as might be consistent with Federal law. The court declared, per Marshall, C. J.:

The Indian nations had always been considered as distinct, independent, political communities, * * * (at p. 559).

* * * and the settled doctrine of the law of nations is that a weaker power does not surrender its independence—its right to self-government—by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. "Tributary and feudatory states", says Vattel, "do not thereby cease to be sovereign and independent states, so long as self-government, and sovereign and independent authority, are left in the administration of the state." At the present day, more than one state may be considered as holding its right of self-government under the guaranty and protection of one or more allies.

The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the Government of the United States. The act of the state of Georgia, under which the plaintiff in error was prosecuted, is, consequently void, and the judgment a nullity.

* * * (At pp. 560-561.)

In the recent case of *Patterson v. Council of Seneca Nation* (245 N. Y. 433, 157 N. E. 734) the New York Court of Appeals gave careful consideration to the present status of the Seneca tribe and of its legislative and judicial organs of government. Reviewing the relevant Federal cases, the court reached the conclusion that the powers which the Seneca Council and the Seneca Peacemakers' Court sought to exercise were powers derived from the sovereignty of the Seneca Nation, and that no act of New York State could diminish this sovereignty, although proper legislation, enacted at the request of the Indians themselves, might supplement the provisions of the tribal constitution. After reviewing the relevant State legislation, the court declared:

* * * Thus did the Seneca Nation, far from abdicating its sovereign powers, set up a strong central government, distribute all governmental powers among three departments, empower a legislative body to be called the "Councillors of the Seneca Nation" to make necessary laws, create a president to execute them, and establish a Peacemakers' Court and a Surrogate's Court to interpret the laws of the nation and decide causes. Thus did the Legislature of the State of New York twice approve of the Constitution adopted and the government set up. It was not accurate to say, therefore, that the State of New York in the year 1849 "assumed governmental control" of the Indians. On the contrary, in that year and subsequently, by its approval of the Indian Constitution in its original and amended form, the State of New York acknowledged the Seneca Indians to be a separate nation, a self-governing people, having a central government with appropriate departments to make laws, to administer and to interpret them. * * *

The force of the Seneca constitution, the court found, derived not from the sovereignty of New York State, but from the original sovereignty of the Seneca Nation:

Various statutes passed by the New York Legislature in relation to the Indians are now embodied in the "Indian Law." Article 4 of that law is entitled "The Seneca Indians." It doubtless embodies the statutes passed pursuant to the request of the Seneca Nation contained in its constitution of 1848. This article purports to set up a government for the Seneca Nation, consisting of three departments, exactly as provided in the Indian Constitution. It must be held, however, that the Indian Nation itself created these departments and the system of government set up by its constitution, the force of which had been expressly acknowledged by the New York Legislature. It purported to set up a Peacemakers' Court. The source of jurisdiction of that court, however, was the Indian Constitution, not the Indian Law. Thus, in *Mulkins v. Snow, supra*, this court said:

"The Peacemakers' Court is not a mere statutory local court of inferior jurisdiction. It is an Indian court, which has been recognized and given strength and authority by statute. It does not owe its existence to the State statute and is only in a qualified sense a State court." * * *

The respondent argues that the jurisdiction of the Peacemakers' Court is limited by the Indian Law (section 46) to "matters, disputes, and controversies

between any Indians residing upon such reservation" which may arise upon "contracts or for wrongs." We answer that the Peacemakers' Court is the creation not of the State but of the Indian Constitution; that by such constitution, as amended in 1898, the Peacemakers' Courts are given "exclusive jurisdiction in all civil causes arising between individual Indians residing on said reservations, except those which the Surrogate's Courts have jurisdiction of", without reference to "contracts" or to "wrongs." The Indian Law does not deny comprehensive jurisdiction; it merely fails to use terms apparently bestowing it. The Indian Constitution does bestow it. * * *

Thus the doctrine first laid down by Chief Justice Marshall in the early years of the Republic was reaffirmed but a few years ago with undiminished vigor by the New York Court of Appeals.

The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: An Indian tribe possesses, in the first instance, all the powers of any sovereign State. Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe,¹ *e. g.*, its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, *i. e.*, its powers of local self-government. These powers are subject to be qualified by treaties and by express legislation of Congress, but save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.

A most striking affirmation of these principles is found in the case of *Talton v. Mayes* (163 U. S. 376). The question was presented in that case whether the Fifth Amendment of the Federal Constitution operated as a limitation upon the legislation of the Cherokee Nation. A law of the Cherokee Nation authorized a grand jury of five persons to institute criminal proceedings. A person indicted under this procedure and held for trial in the Cherokee courts sued out a writ of habeas corpus, alleging that the law in question violated the Fifth Amendment to the Constitution of the United States, since a grand jury of five was not a grand jury within the contemplation of the Fifth Amendment. The Supreme Court held that the Fifth Amendment applied only to the acts of the Federal Government; that the sovereign powers of the Cherokee Nation, although *recognized* by the Federal Government, were not *created* by the Federal Government; and that the judicial authority of the Cherokees was, therefore, not subject to the limitations imposed by the Bill of Rights:

¹ Certain external powers of sovereignty, such as the power to make treaties with the United States, have been recognized by the Federal Government. *And cf. Montoya v. United States* (180 U. S. 261); *Scott v. United States and Apache Indians* (33 Ct. Cl. 486); *Dobbs v. United States and Apache Indians* (33 Ct. Cl. 308). The treaty-making power of the Indian tribes was terminated by the act of March 3, 1871 (U. S. Code, title 25, sec. 71).

The question, therefore, is, does the Fifth Amendment to the Constitution apply to the local legislation of the Cherokee nation so as to require all prosecutions for offenses committed against the laws of that nation to be initiated by a grand jury organized in accordance with the provisions of that amendment. The solution of this question involves an inquiry as to the nature and origin of the power of local government exercised by the Cherokee nation and recognized to exist in it by the treaties and statutes above referred to. Since the case of *Barron v. Baltimore*, 7 Pet. 243, it has been settled that the Fifth Amendment to the Constitution of the United States is a limitation only upon the powers of the General Government, that is, that the amendment operates solely on the Constitution itself by qualifying the powers of the National Government which the Constitution called into being.

* * * * *

The case in this regard therefore depends upon whether the powers of local government exercised by the Cherokee Nation are Federal powers created by and springing from the Constitution of the United States, and hence controlled by the Fifth Amendment to that Constitution, or whether they are local powers not created by the Constitution, although subject to its general provisions and the paramount authority of Congress. The repeated adjudications of this court have long since answered the former question in the negative. In *Cherokee Nation v. Georgia*, 5 Pet. 1, which involved the right of the Cherokee Nation to maintain an original bill in this court as a foreign state, which was ruled adversely to that right, speaking through Mr. Chief Justice Marshall, this court said (p. 16) :

“Is the Cherokee Nation a foreign state in the sense in which that term is used in the Constitution?”

“The counsel for the plaintiffs have maintained the affirmative of this proposition with great earnestness and ability. So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our Government plainly recognize the Cherokee Nation as a state, and the courts are bound by those acts.”

It cannot be doubted, as said in *Worcester v. The State of Georgia*, 6 Pet. 515, 559, that prior to the formation of the Constitution treaties were made with the Cherokee tribes by which their autonomous existence was recognized. And in that case Chief Justice Marshall also said (p. 559) :

“The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights. * * * The very term ‘nation’, so generally applied to them, means a ‘people distinct from others.’ The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties.”

In reviewing the whole subject in *Kagama v. United States*, 118 U. S. 375, this court said (p. 381) :

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

True it is that in many adjudications of this court the fact has been fully recognized, that although possessed of these attributes of local self-government, when exercising their tribal functions, all such rights are subject to the supreme legislative authority of the United States. *Cherokee Nation v. Kansas Railway Co.*, 135 U. S. 641, where the cases are fully reviewed. But the existence of the right in Congress to regulate the manner in which the local powers of the Cherokee Nation shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States. It follows that as the powers of local self-government enjoyed by the Cherokee Nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which, as we have said, had for its sole object to control the powers conferred by the Constitution on the National Government. * * * (At pp. 382-384.)

And see, to the same effect, *Ex parte Tiger* (2 Ind. T. 41, 47 S. W. 304). It is recognized, of course, that those provisions of the Federal Constitution which are completely general in scope, such as the Thirteenth Amendment, apply to the members of Indian tribes as well as to all other inhabitants of the nation. *In re Sah Quah* (31 Fed. 327).

Added recognition of the sovereign character of an Indian tribe is found in the case of *Turner v. United States and Creek Nation* (51 Ct. Cls. 125, aff'd 248 U. S. 354). Rejecting a claim against the Creek Nation based upon the allegedly illegal acts of groups of Indians in destroying the fence of a cattle company, the Court of Claims declared:

* * * we must apply the rule of law applicable to established governments under similar conditions. It is a familiar rule that in the absence of a statute declaring a liability therefor neither the sovereign nor the governmental subdivisions, such as counties or municipalities, are responsible to the party injured in his person or estate by mob violence. * * * (At p. 153.)

An extreme application of the doctrine of tribal sovereignty is found in the case of *Ex parte Crow Dog* (109 U. S. 556), in which it was held that the murder of one Sioux Indian by another upon an Indian reservation was not within the criminal jurisdiction of any court of the United States, but that only the Indian tribe itself could punish the offense.

The contention that the United States courts had jurisdiction in a case of this sort was based upon the language of a treaty with the Sioux, rather than upon considerations applicable generally to the various Indian tribes. The most important of the treaty clauses upon which the claim of Federal jurisdiction was based provided:

And Congress shall, by appropriate legislation, secure to them an orderly government; they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life. (At p. 568.)

Commenting upon this clause, the Supreme Court declared:

It is equally clear, in our opinion, that these words can have no such effect as that claimed for them. The pledge to secure to these people, with whom the United States was contracting as a distinct political body, an orderly government, by appropriate legislation thereafter to be framed and enacted, necessarily implies, having regard to all the circumstances attending the transaction, that among the arts of civilized life, which it was the very purpose of all these arrangements to introduce and naturalize among them, was the highest and best of all, that of self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs. They were nevertheless to be subject to the laws of the United States, not in the sense of citizens, but, as they had always been, as wards subject to a guardian; not as individuals, constituted members of the political community of the United States, with a voice in the selection of representatives and the framing of the laws, but as a dependent community who were in a state of pupillage, advancing from the condition of a savage tribe to that of a people who, through the discipline of labor and by education, it was hoped might become a self-supporting and self-governed society. * * * (At pp. 568-569.)

In finally rejecting the argument for Federal jurisdiction the Supreme Court declared:

* * * It is a case where, against an express exception in the law itself, that law, by argument and inference only, is sought to be extended over aliens and strangers; over the members of a community separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others and not for them, which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. (At p. 571.)

The force of the decision in *Ex parte Crow Dog* was not weakened, although the scope of the decision was limited, by subsequent legislation which withdrew from the rule of tribal sovereignty a list of seven major crimes, only recently extended to ten.² Over these specified crimes jurisdiction has been vested in the Federal courts. Over all other crimes, including such serious crimes as kidnaping, attempted murder, receiving stolen goods, and forgery, jurisdiction resides not in the courts of Nation or State but only in the Indian tribe itself.

We shall defer the question of the exact scope of tribal jurisdiction for more detailed consideration at a later point. We are concerned

²U. S. Code, title 18, sec. 548, analyzed *infra*, under heading "The Powers of an Indian Tribe in the Administration of Justice."

for the present only in analyzing the basic doctrine of tribal sovereignty. To this doctrine the case of *Ex parte Crow Dog* contributes not only an intimation of the vast and important content of criminal jurisdiction inherent in tribal sovereignty, but also an example of the consistent manner in which the United States Supreme Court has opposed the efforts of lower courts and administrative officials to infringe upon tribal sovereignty and to assume tribal prerogatives without statutory justification. The legal powers of an Indian tribe, measured by the decisions of the highest courts, are far more extensive than the powers which most Indian tribes have been actually permitted by omnipresent officials to exercise in their own right.

The doctrine of tribal sovereignty is well summarized in the following passage in the case of *In Re Sah Quah* (31 Fed. 327):

From the organization of the government to the present time, the various Indian tribes of the United States have been treated as free and independent within their respective territories, governed by their tribal laws and customs, in all matters pertaining to their internal affairs, such as contracts and the manner of their enforcement, marriage, descents, and the punishment for crimes committed against each other. They have been excused from all allegiance to the municipal laws of the whites as precedents or otherwise in relation to tribal affairs, subject, however, to such restraints as were from time to time deemed necessary for their own protection, and for the protection of the whites adjacent to them. *Cherokee Nat. v. Georgia*, 5 Pet. 1, 16, 17; *Jackson v. Goodell*, 20 Johns. 193. (At. p. 329.)

And in the case of *Anderson v. Mathews* (174 Cal. 537, 163 Pac. 902), it was said:

* * * The Indian tribes recognized by the federal government are not subject to the laws of the state in which they are situated. They are under the control and protection of the United States, but they retain the right of local self-government, and they regulate and control their own local affairs and rights of persons and property, except as Congress has otherwise specially provided by law. * * * (At 163 Pac. 905.)

See, also, to the same effect, Story's Commentaries, Sec. 1099; 3 Kent's Commentaries (14th ed.) 383-386.

The acknowledgment of tribal sovereignty or autonomy by the courts of the United States has not been a matter of lip service to a venerable but outmoded theory. The doctrine has been followed through the most recent cases, and from time to time carried to new implications. Moreover, it has been administered by the courts in a spirit of whole-hearted sympathy and respect. The painstaking analysis by the Supreme Court of tribal laws and constitutional provisions in the *Cherokee Intermarriage Cases* (203 U. S. 706) is typical, and exhibits a degree of respect proper to the laws of a sovereign state. If verbal recognition is needed, there is the glowing tribute which Judge Nott pays to this same Cherokee Constitution in the case of *Journeycake v. Cherokee Nation and United States* (28 Ct. Cls. 281, 317-318):

The constitution of the Cherokees was a wonderful adaptation to the circumstances and conditions of the time, and to a civilization that was yet to come. It was framed and adopted by a people some of whom were still in the savage state, and the better portion of whom had just entered upon that stage of civilization which is characterized by industrial pursuits; and it was framed during a period of extraordinary turmoil and civil discord, when the greater part of the Cherokee people had just been driven by military force from their mountains and valleys in Georgia, and been brought by enforced immigration into the country of the Western Cherokees; when a condition of anarchy and civil war reigned in the territory—a condition which was to continue until the two branches of the nation should be united under the treaty of 1846 (27 C. Cls. R., 1); yet for more than half a century it has met the requirements of a race steadily advancing in prosperity and education and enlightenment so well that it has needed, so far as they are concerned, no material alteration or amendment, and deserves to be classed among the few great works of intelligent statesmanship which outlive their own time and continue through succeeding generations to assure the rights and guide the destinies of men. And it is not the least of the successes of the constitution of the Cherokees that the judiciary of another nation are able, with entire confidence in the clearness and wisdom of its provisions, to administer it for the protection of Cherokee citizens and the maintenance of their personal and political rights. (At pp. 317-318.)

The sympathy of the courts towards the independent efforts of Indian tribes to administer the institutions of self-government has led to the doctrine that Indian laws and statutes are to be interpreted not in accordance with the technical rules of the common law, but in the light of the traditions and circumstances of the Indian people. An attempt in the case of *Ex parte Tiger* (47 S. W. 304, 2 Ind. T. 41) to construe the language of the Creek constitution in a technical sense was met by the appropriate judicial retort:

If the Creek Nation derived its system of jurisprudence through the common law, there would be much plausibility in this reasoning. But they are strangers to the common law.⁴ They derive their jurisprudence from an entirely different source, and they are as unfamiliar with common-law terms and definitions as they are with Sanskrit or Hebrew. With them, "to indict" is to file a written accusation charging a person with a crime.

So, too, in the case of *McCurtain v. Grady* (1 Ind. T. 107, 38 S. W. 65) the court had occasion to note that:

The Choctaw constitution was not drawn by geologists or for geologists, or in the interests of science, or with scientific accuracy. It was framed by plain people, who have agreed among themselves what meaning should be attached to it, and the courts should give effect to that interpretation which its framers intended it should have.

The realm of tribal autonomy which has been so carefully respected by the courts, has been implicitly confirmed by Congress in a host of statutes providing that various administrative acts of the President or the Interior Department shall be done only with the consent of the Indian tribe or its chiefs or council.

⁴ See *Waldron v. United States*, 143 Fed. 413; *Hanson v. Johnson*, 246 Pac. 868 (Okla.).

Thus, U. S. Code, title 25, section 63, provides that the President may "consolidate one or more tribes, and abolish such agencies as are thereby rendered unnecessary", but that such action may be undertaken only "with the consent of the tribes to be affected thereby, expressed in the usual manner."

Section 111 of the same title provides that payments of moneys and distribution of goods for the benefit of any Indians or Indian tribes shall be made either to the heads of families and individuals directly entitled to such moneys or goods or else to the chiefs of the tribe, for the benefit of the tribe, or to persons appointed by the tribe for the purpose of receiving such moneys or goods. This section finally provides that such moneys or goods "by consent of the tribe" may be applied directly by the Secretary to purposes conducive to the happiness and prosperity of the tribe.

Section 115 of the same title provides:

The President may, at the request of any Indian tribe, to which an annuity is payable in money, cause the same to be paid in goods, purchased as provided in section 91.

Section 140 of the same title provides that specific appropriations for the benefit of Indian tribes may be diverted to other uses "with the consent of said tribes, expressed in the usual manner."

Other statutory provisions of general import, confirming or delegating specific powers to the Indian tribes or their officers, are:

U. S. Code, title 25, sections 48, 130, 132, 159, 162, 184, 218, 225, 229, 371, 397, 398, 402.

These latter provisions are discussed later under relevant headings.

The whole course of Congressional legislation with respect to the Indians has been based upon a recognition of tribal autonomy, qualified only where the need for other types of governmental control has become clearly manifest. As was said in a report of the Senate Judiciary Committee (prior to the enactment of U. S. Code, title 18, sec. 548): "Their right of self-government, and to administer justice among themselves, after their rude fashion, even to inflicting the death penalty, has never been questioned." (Sen. Rep. No. 268, 41st Congress, 3d session.)

It is a fact that State governments and administrative officials have frequently trespassed upon the realm of tribal autonomy, presuming to govern the Indian tribes through State law or departmental regulation or arbitrary administrative fiat, but these trespasses have not impaired the vested legal powers of local self-government which have been recognized again and again when these trespasses have been challenged by an Indian tribe. "Power and authority rightfully conferred do not necessarily cease to exist in consequence of long nonuser." (*United States ex rel. Standing Bear v. Crook*, 5 Dill. 453, 460.) The Wheeler-Howard Act, by affording

statutory recognition of these powers of local self-government and administrative assistance in developing adequate mechanisms for such government, may reasonably be expected to end the conditions that have in the past led the Interior Department and various State agencies to deal with matters that are properly within the legal competence of the Indian tribes themselves.

Neither the allotting of land in severalty nor the granting of citizenship has destroyed the tribal relationship upon which local autonomy rests. Only through the laws or treaties of the United States, or administrative acts authorized thereunder, can tribal existence be terminated. As was said in the case of *United States v. Boylan* (265 Fed. 165) with reference to certain New York Indians over whom State courts had attempted to exercise jurisdiction:

* * * Congress alone has the right to say when the guardianship over the Indians may cease. *U. S. v. Nice*, 241 U. S. 591, 36 Sup. Ct. 696, 60 L. Ed. 1192; *Tiger v. Western Inv. Co.*, 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738. Accordingly it has been held that it is for Congress to say when the tribal existence shall be deemed to have terminated, and Congress must so express its intent in relation thereto in clear terms. Until such legislation by Congress, even a grant of citizenship does not terminate the tribal status or relieve the Indian from the guardianship of the government. *U. S. v. Nice*, 241 U. S. 591, 36 Sup. Ct. 696, 60 L. Ed. 1192. * * * (At p. 171.)

The court concludes:

* * * The right of self-government has never been taken from them. * * *

At all times the rights which belong to self-government have been recognized as vested in these Indians. * * * (At p. 173.)

In the case of *Farrell v. United States* (110 Fed. 942), the effect of allotment in severalty and of the grant of citizenship was considered, and the court declared:

* * * The agreement to maintain the agent and the retention and exercise of the power to control the liquor traffic are not inconsistent, as we have seen, with the allotment of the lands in severalty, or with the grant to the allottees of the immunities and privileges of citizenship. Neither the act of 1887 nor any other act of congress or treaty with these Indians required those who selected allotments and received patents and the privileges and immunities of citizenship to sever their tribal relation; or to surrender any of their rights as members of their tribes, as a condition of the grant, so that after their allotments, as before, their tribal relation continued. And finally the legislative and executive departments of the government to which the subject matters of the relations of the Indians and their tribes to the United States, and the regulation of the commerce with them, has been specially intrusted, have uniformly held that congress retained, and have constantly exercised, the power to regulate intercourse with these Indians, and to prohibit the traffic in intoxicating liquors with them, since these patents issued, to the same extent as before their lands were allotted in severalty. It is the settled rule of the judicial department of the government, in ascertaining the relations of Indian tribes and their members to the nation, to follow the action of the legislative and executive departments to which the determination of these questions

has been especially intrusted. *U. S. v. Holliday*, 3 Wall. 407, 419, 18 L. Ed. 182; *U. S. v. Earl* (C. C.) 17 Fed. 75, 78. (At p. 951.)

And in the case of *United States v. Holliday* (3 Wall. 407) the Supreme Court declared:

In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same. (At p. 419.)

And see, to the same effect, *The Kansas Indians* (5 Wall. 737, 756); *Yakima Joe v. To-is-lap* (191 Fed. 516); *United States v. Flournoy Live-Stock, etc., Co.* (71 Fed. 576).

There are, of course, a number of instances in which tribal autonomy has been terminated by act of Congress or by treaty. See, for example, *Wiggan v. Conolly* (163 U. S. 56); *United States v. Elm* (2 Cin. Law Bull. 307, 25 Fed. Cas. No. 15,048); and *cf.* act of April 26, 1906 (34 Stat. 137). But to accomplish this, the provisions of treaty or statute must be positive and unambiguous. (*Morrow v. Blevins*, 23 Tenn. 223; *Jones v. Meehan*, 175 U. S. 1.)

Save in such instances, the internal sovereignty of the Indian tribes continues, unimpaired by the changes that have occurred in the manners and customs of Indian life, and, for the future, remains a most powerful vehicle for the movement of the Indian tribes towards a richer social existence.

THE POWER OF AN INDIAN TRIBE TO DEFINE ITS FORM OF GOVERNMENT

Since any group of men, in order to act as a group, must act through forms which give the action the character and authority of group action, an Indian tribe must, if it has any power at all, have the power to prescribe the forms through which its will may be registered. The first element of sovereignty, and the last which may survive successive statutory limitations of Indian tribal power, is the power of the tribe to determine and define its own form of government. Such power includes the right to define the powers and duties of its officials, the manner of their appointment or election, the manner of their removal, the rules they are to observe in their capacity as officials, and the forms and procedures which are to attest the authoritative character of acts done in the name of the tribe. These are matters which may be determined even in a modern civilized nation by unwritten custom as well as by written law. The controlling character of the Indian tribe's basic forms and procedures has been recognized by State and Federal courts, whether evidenced by written statute or by the testimony of tradition.

Thus, in the case of *Pueblo of Santa Rosa v. Fall* (273 U. S. 315) the Supreme Court recognized that by the traditional law of the

Pueblo the "Captain" of the Pueblo would have no authority to convey to attorneys the claims of the Pueblo or to authorize suit thereon, and that such acts without the approval of a general council would be null and void.

To the same effect, see 7 Op. Atty. Gen. 142 (1855).

In 5 Op. Atty. Gen. 79 (1849) the opinion is expressed that a release to be executed by the "Creek Indians" would be valid "provided, that the chiefs and headmen executing it are such chiefs and headmen and constitute the whole or a majority of the council of the Creek Nation."

In *Rawlins and Presbey v. United States* (23 Ct. Cls. 106) the court finds that a chief's authority to act in the name of the tribe has been established by the tacit assent of the tribe and by their acceptance of the benefits of his acts.

In the case of *Mount Pleasant v. Gansworth* (271 N. Y. Supp. 78) it is held that the Tuscarora tribal council has never been endowed with probate jurisdiction, that no other body has been set up by the tribe to exercise probate powers, and hence that State courts may step in to remedy the lack. Whether or not the final conclusion is justified, in the light of such cases as *Patterson v. Council of Seneca Nation* (245 N. Y. 443; 157 N. E. 734), the opinion of the court indicates at least that the limitations which a tribe may impose upon the jurisdiction of its own governmental bodies and officers will be respected.

Not only must officers presuming to act in the name of an Indian tribe show that their acts fall within their allotted function and authority, but likewise the procedural formalities which tradition or ordinance requires must be followed in executing an act within the acknowledged jurisdiction of the officer or set of officers.

In 19 Op. Atty. Gen. 179 (1888) it is held that a decree of divorce which has not been signed by a judge or clerk of court, as required by the laws of the Choctaw Nation, is invalid.

In re Darch (265 N. Y. Supp. 86) involves action of a special tribal council meeting to which only a few of the members of the council were invited. The action was declared invalid on the ground that the council's rules of procedure required due notice of a special meeting to be given to all the members of the council. Based on an analogy taken from corporation law, the rule was laid down that violation of this requirement rendered the acts of the council invalid.

In 25 Op. Atty. Gen. 308 (1904) it appeared that certain sums were to be paid to attorneys "only after the tribal authorities, thereunto duly and specifically authorized by the tribe, shall have signed a writing * * *" By resolution of the tribe the business committee had been authorized to sign the writing in question. The

signatures of the business committee, in the opinion of the Attorney General, met the statutory requirement:

The proceedings of the council were regular, and the motions were carried by a sufficient number of voters, though less than a majority of those present. See *State v. Vanodel* (131 Ind. 388); *Attorney General v. Shepard* (62 N. H. 383); and *Mount v. Parker* (32 N. J. Law, 341).

The doctrine of *de facto* officers has been applied to an Indian tribe, in accordance with the rule applied to other governmental agencies, so as to safeguard from collateral attack acts and documents signed by officers acting under color of authority, though subject, in proper proceedings, to removal from office. See *Nofire v. United States* (164 U. S. 657); *Seneca Nation v. John* (16 N. Y. Supp. 40).

Based upon the analogy of the constitutional law of the United States, the doctrine has been applied to Indian statutes and constitutional provisions that statutes deemed by the courts to be violative of constitutional limitations are to be regarded as void. See *Whitmore, Trustee, v. Cherokee Nation* (30 Ct. Cls. 138); *Delaware Indians v. Cherokee Nation* (38 Ct. Cls. 234); 19 Op. Atty. Gen. 229 (1889).

Statutes of Congress have recognized that the authority of an Indian tribe is customarily wielded by chiefs and headmen.⁵

Other congressional legislation has specifically recognized the propriety of paying salaries to tribal officers out of tribal funds.⁶

THE POWER OF AN INDIAN TRIBE TO DETERMINE ITS MEMBERSHIP.

The courts have consistently recognized that in the absence of express legislation by Congress to the contrary, an Indian tribe has complete authority to determine all questions of its own membership.⁷

⁵ U. S. Code, title 25, sec. 130.

"Withholding of moneys or goods on account of intoxicating liquors. No annuities, or moneys, or goods, shall be paid or distributed to Indians * * * until the chiefs and headmen of the tribe shall have pledged themselves to use all their influence and to make all proper exertions to prevent the introduction and sale of such liquor in their country."

U. S. Code, title 25, sec. 132:

"Mode of distribution of goods. Whenever goods and merchandise are delivered to the chiefs of a tribe, for the tribe, such goods and merchandise shall be turned over by the agent or superintendent of such tribe to the chiefs in bulk, and in the original package, as nearly as practicable, and in the presence of the headmen of the tribe, if practicable, to be distributed to the tribe by the chiefs in such manner as the chiefs may deem best, in the presence of the agent or superintendent. (R. S. Sec. 2090.)"

⁶ U. S. Code, title 25, sec. 162, after providing generally for the segregation, deposit and investment of tribal funds, contains the following qualification:

"And provided further, That any part of tribal funds required for support of schools or pay of tribal officers shall be excepted from segregation or deposit as herein authorized and the same shall be expended for the purposes aforesaid."

⁷ It must be noted that property rights attached to membership are largely in the control of the Secretary of the Interior rather than the tribe itself. See heading, *infra*, "Tribal Powers Over Property."

It may thus by usage or written law determine under what conditions persons of mixed blood shall be considered members of the tribe. It may provide for special formalities of recognition, and it may adopt such rules as seem suitable to it, to regulate the abandonment of membership, the adoption of non-Indians or Indians of other tribes, and the types of membership or citizenship which it may choose to recognize. The completeness of this power receives statutory recognition in U. S. Code, title 25, sec. 184, which provides that the children of a white man and an Indian woman by blood shall be considered members of the tribe if, and only if, "said Indian woman was * * * recognized by the tribe."⁸ The power of the Indian tribes in this field is limited only by the various statutes of Congress defining the membership of certain tribes for purposes of allotment or for other purposes, and by the statutory authority given to the Secretary of the Interior to promulgate a final tribal roll for the purpose of dividing and distributing the tribal funds.⁹

The power of an Indian tribe to determine questions of its own membership arises necessarily from the character of an Indian tribe as a distinct political entity. In the case of *Patterson v. Council of Seneca Nation* (245 N. Y. 433; 157 N. E. 734), the Court of Appeals of New York reviewed the many decisions of that court and of the Supreme Court of the United States recognizing the Indian tribe as a "distinct political society, separated from others, capable of managing its own affairs and governing itself" (per Marshall, C. J., in *Cherokee Nation v. Georgia*, 5 Pet. 1), and, in reaching the conclusion that mandamus would not lie to compel the plaintiff's enrollment by the defendant council, declared:

Unless these expressions, as well as similar expressions many times used by many courts in various jurisdictions, are mere words of flattery designed to soothe Indian sensibilities, unless the last vestige of separate national life has been withdrawn from the Indian tribes by encroaching state legislation, then,

⁸ "Rights of children born of marriages between white men and Indian women. All children born of a marriage solemnized prior to June 7, 1897, between a white man and an Indian woman by blood and not by adoption, where said Indian woman was on that date, or was at the time of her death, recognized by the tribe, shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, by blood, as any other member of the tribe, and no prior Act of Congress shall be construed as to debar such child of such right. (June 7, 1897, c. 3, sec. 1, 30 Stat. 90.)"

⁹ U. S. Code, title 25, sec. 163:

"Roll of membership of Indian tribes. The Secretary of the Interior is authorized, wherever in his discretion such action would be for the best interest of the Indians, to cause a final roll to be made of the membership of any Indian tribe; such rolls shall contain the ages and quantum of Indian blood, and when approved by the said Secretary are declared to constitute the legal membership of the respective tribes for the purpose of segregating the tribal funds as provided in the preceding section, and shall be conclusive both as to ages and quantum of Indian blood: *Provided*, That the foregoing shall not apply to the Five Civilized Tribes or to the Osage Tribe of Indians, or to the Chippewa Indians of Minnesota, or the Menominee Indians of Wisconsin. (June 30, 1919, c. 4, sec. 1, 41 Stat. 9.)"

surely, it must follow that the Seneca Nation of Indians has retained for itself that prerequisite to their self-preservation and integrity as a nation, the right to determine by whom its membership shall be constituted.

* * * * *

It must be the law, therefore, that, unless the Seneca Nation of Indians and the state of New York enjoy a relation inter se peculiar to themselves, the right to enrollment of the petitioner, with its attending property rights, depends upon the laws and usages of the Seneca Nation and is to be determined by that Nation for itself, without interference or dictation from the Supreme Court of the state.

After examining the constitutional position of the Seneca Nation and finding that tribal autonomy has not been impaired by any legislation of the State, the court concludes:

The conclusion is inescapable that the Seneca Tribe remains a separate nation; that its powers of self-government are retained with the sanction of the state; that the ancient customs and usages of the nation except in a few particulars, remain, unabolished, the law of the Indian land; that in its capacity of a sovereign nation the Seneca Nation is not subservient to the orders and directions of the courts of New York state; that, above all, the Seneca Nation retains for itself the power of determining who are Senecas, and in that respect is above interference and dictation.

In the case of *Waldron v. United States* (143 Fed. 413), it appeared that a woman of five-sixteenths Sioux Indian blood on her mother's side, her father being a white man, had been refused recognition as an Indian by the Interior Department although, by tribal custom, since the woman's mother had been recognized as an Indian, the woman herself was so recognized. The court held that the decision of the Interior Department was contrary to law, declaring:

In this proceeding the court has been informed as to the usages and customs of the different tribes of the Sioux Nation, and has found as a fact that the common law does not obtain among said tribes, as to determining the race to which the children of a white man, married to an Indian woman, belong; but that, according to the usages and customs of said tribes, the children of a white man married to an Indian woman take the race or nationality of the mother.

The same view is maintained in 19 Op. Atty. Gen. 115 (1888), in which it is said:

It was the Indians, and not the United States, that were interested in the distribution of what was periodically coming to them from the United States. It was proper then that they should determine for themselves, and finally, who were entitled to membership in the confederated tribe and to participate in the emoluments belonging to that relation.

The certificate of the chiefs and councillors referred to is possibly as high a grade of evidence as can be procured of the fact of the determination by the chiefs of the right of membership under the treaty of February 23, 1867, and seems to be such as is warranted by the usage and custom of the Government in its general dealings with these people and other similar tribes. (At page 116.)

See to the same effect:

In re William Banks (26 L. D. 71); *Black Tomahawk v. Waldron* (19 L. D. 811); 20 Op. Atty. Gen. 711 (1894); *Western Cherokee Indians v. United States* (27 Ct. Cls. 1, 54); *United States v. Heyfron* (two cases) (138 Fed. 964, 968).

In the Cherokee Intermarriage Cases (203 U. S. 76), the Supreme Court of the United States considered the claims of certain white men, married to Cherokee Indians, to participate in the common property of the Cherokee Nation. After carefully examining the constitutional articles and the statutes of the Cherokee Nation, the court reached the conclusion that the claims in question were invalid, since, although the claimants had been recognized as citizens for certain purposes, the Cherokee Nation had complete authority to qualify the rights of citizenship which it offered to its "naturalized" citizens, and had, in the exercise of this authority, provided for the revocation or qualification of citizenship rights so as to defeat the claims of the plaintiffs. The Supreme Court declared (per Fuller, C. J.):

The distinction between different classes of citizens was recognized by the Cherokees in the differences in their intermarriage law, as applicable to the whites and to the Indians of other tribes; by the provision in the intermarriage law that a white man intermarried with an Indian by blood acquires certain rights as a citizen, but no provision that if he marries a Cherokee citizen not of Indian blood he shall be regarded as a citizen at all; and by the provision that if, once having married an Indian by blood, he marries the second time a citizen not by blood, he loses all of his rights as a citizen. And the same distinction between citizens as such and citizens with property rights has also been recognized by Congress in enactments relating to other Indians than the Five Civilized Tribes. Act August 9, 1888, 25 Stat. 392, c. 818; act May 2, 1890, 26 Stat. 96; c. 182; act June 7, 1897, 30 Stat. 90, c. 3. (At page 88.)

* * * The laws and usages of the Cherokees, their earliest history, the fundamental principles of their national policy, their constitution and statutes, all show that citizenship rested on blood or marriage; that the man who would assert citizenship must establish marriage; that when marriage ceased (with a special reservation in favor of widows or widowers) citizenship ceased; that when an intermarried white married a person having no rights of Cherokee citizenship by blood it was conclusive evidence that the tie which bound him to the Cherokee people was severed and the very basis of his citizenship obliterated. (At page 95.)

See, to the same effect, 19 Op. Atty. Gen. 109 (1888).

An Indian tribe may classify various types of membership and qualify not only the property rights, but the voting rights of certain members. Thus in 19 Op. Atty. Gen. 389 (1888) the view is expressed that a tribe may by law restrict the rights of tribal suffrage, excluding white citizens from voting, although by treaty they are guaranteed rights of "membership."

Similarly, an Indian tribe may revoke rights of membership which it has granted. In *Roff v. Burney* (168 U. S. 218), the Supreme Court upheld the validity of an act of the Chickasaw legislature depriving a Chickasaw citizen of his citizenship, declaring:

The citizenship which the Chickasaw legislature could confer it could withdraw. The only restriction on the power of the Chickasaw Nation to legislate in respect to its internal affairs is that such legislation shall not conflict with the Constitution or laws of the United States, and we know of no provision of such Constitution or laws which would be set at naught by the action of a political community like this in withdrawing privileges of membership in the community once conferred. (At page 222.)

The right of an Indian tribe to make express rules governing the recognition of members, the adoption of new members, the procedure for abandonment of membership, and the procedure for readoption, is recognized in *Smith v. Bonifer* (154 Fed. 883; aff'd, 166 Fed. 846). In that case the plaintiffs' right to allotments depended upon their membership in a particular tribe. The court held that such membership was demonstrated by the fact of tribal recognition, declaring:

Indian members of one tribe can sever their relations as such, and may form affiliations with another or other tribes. And so they may, after their relation with a tribe has been severed, rejoin the tribe and be again recognized and treated as members thereof, and tribal rights and privileges attach according to the habits and customs of the tribe with which affiliation is presently cast. As to the manner of breaking off and recasting tribal affiliations we are meagerly informed. It was and is a thing, of course, dependent upon the peculiar usages and customs of each particular tribe, and therefore we may assume that no general rule obtains for its regulation.

Now, the first condition presented is that the mother of Philomme was a full-blood Walla Walla Indian. She was consequently a member of the tribe of that name. Was her status changed by marriage to Tawakown, an Iroquois Indian? This must depend upon the tribal usage and customs of the Walla Wallas and the Iroquois. It is said by Hon. William A. Little, Assistant Attorney General, in an opinion rendered the Department of the Interior in a matter involving this very controversy:

"That inheritance among these Indians is through the mother and not through the father, and that the true test in these cases is to ascertain whether parties claiming to be Indians and entitled to allotments have by their conduct expatriated themselves or changed their citizenship."

But we are told that:

"Among the Iroquoian tribes kinship is traced through the blood of the woman only. Kinship means membership in a family; and this in turn constitutes citizenship in the tribe, conferring certain social, political, and religious privileges, duties, and rights, which are denied to persons of alien blood." Handbook of American Indians, edited by Frederick Webb Hodge; Smithsonian Institute, Government Printing Office, 1907.

Marriage, therefore, with Tawakown would not of itself constitute an affiliation on the part of his wife with the Iroquois tribe, of which he was a member, and a renunciation of membership with her own tribe. (At page 886.)

Considering a second marriage of the plaintiff to a white person, the court went on to declare:

But notwithstanding the marriage of Philomme to Smith, and her long residence outside of the limits of the reservation, she was acknowledged by the chiefs of the confederated tribes to be a member of the Walla Walla tribe. From the testimony adduced herein, read in connection with that taken in the case of *Hy-yu-tse-mil-kin v. Smith*, *supra*, it appears that Mrs. Smith was advised by Homily and Show-a-way, chiefs, respectively, of the Walla Walla and Cayuse tribes, to come upon the reservation and make selections for allotments to herself and children, and that thereafter she was recognized by both these chiefs, and by Peo, the chief of the Umatillas, as being a member of the Walla Walla Tribe. It is true that she was not so recognized at first, but she was finally, and by a general council of the Indians held for the especial purpose of determining the matter. (At page 388.)

Where tribal laws have not expressly provided for some certificate of membership (see 19 Op. Atty. Gen. 115 (1888)), the courts, in cases not clearly controlled by recognized tribal custom, have looked to recognition by the tribal chiefs as a test of tribal membership. *Hy-yu-tse-mil-kin v. Smith* (194 U. S. 401, 411).

The weight given to tribal action in relation to tribal membership is shown by the case of *Nofire v. United States* (164 U. S. 657). In that case the jurisdiction of the Cherokee courts in a murder case, the defendants being Cherokee Indians, depended upon whether the deceased, a white man, had been duly adopted by the Cherokee Tribe. Finding evidence of such adoption in the official records of the tribe, the Supreme Court held that such adoption deprived the State court of jurisdiction over the murder and vested such jurisdiction in the tribal courts.

A similar decision was reached in the case of *Raymond v. Raymond* (83 Fed. 721), in which the jurisdiction of a tribal court over an adopted Cherokee was challenged. The court declared (per Sanborn, J.):

It is conceded that under the laws of that nation the appellee became a member of that tribe, by adoption, through her intermarriage with the appellant. It is settled by the decisions of the supreme court that her adoption into that nation ousted the federal court of jurisdiction over any suit between her and any member of that tribe, and vested the tribal courts with exclusive jurisdiction over every such action. *Alberty v. U. S.* 162 U. S. 499, 16 Sup. Ct. 864; *Nofire v. U. S.*, 164 U. S. 657, 658, 17 Sup. Ct. 212.

It is of course recognized throughout the cases, that tribal membership is a bilateral relation, depending for its existence not only upon the action of the tribe but also upon the action of the individual concerned. Any member of any Indian tribe is at full liberty to terminate his tribal relationship whenever he so chooses. In the famous case of *United States ex rel. Standing Bear v. Crook* (5 Dill. 453, 25 Fed. Cases No. 14,891), in which an Indian secured a writ of

habeas corpus directed against a general of the United States Army, to prevent his removal to Indian Territory, the court found that the petitioner, Standing Bear, had severed his relationship with his tribe and was, therefore, not subject to the provisions of any treaties or legislation concerned with the removal of the tribe to Indian Territory. The court declared (per Dundy, J.):

Standing Bear, the principal witness, states that out of five hundred and eighty-one Indians who went from the reservation in Dakota to the Indian Territory, one hundred and fifty-eight died within a year or so, and a great proportion of the others were sick and disabled, caused, in a great measure, no doubt, from change of climate; and to save himself and the survivors of his wasted family, and the feeble remnant of his little band of followers, he determined to leave the Indian Territory and return to his old home, where, to use his own language, "he might live and die in peace, and be buried with his fathers." He also states that he informed the agent of their final purpose to leave, never to return, and that he and his followers had finally, fully, and forever severed his and their connection with the Ponca Tribe of Indians, and had resolved to disband as a tribe, or band, of Indians, and to cut loose from the government, go to work, become self-sustaining, and adopt the habits and customs of a higher civilization. To accomplish what would seem to be a desirable and laudable purpose, all who were able so to do went to work to earn a living. The Omaha Indians, who speak the same language, and with whom many of the Poncas have long continued to intermarry, gave them employment and ground to cultivate, so as to make them self-sustaining. And it was when at the Omaha reservation, and when thus employed, that they were arrested by order of the government, for the purpose of being taken back to the Indian Territory. They claim to be unable to see the justice, or reason, or wisdom, or necessity, for removing them by force from their own native plains and blood relations to a far-off country, in which they can see little but new-made graves opening for their reception. The land from which they fled in fear has no attractions for them. The love of home and native land was strong enough in the minds of these people to induce them to brave every peril to return and live and die where they had been reared. The bones of the dead son of Standing Bear were not to repose in the land they hoped to be leaving forever, but were carefully preserved and protected, and formed a part of what was to them a melancholy procession homeward.

* * * What is here stated in this connection is mainly for the purpose of showing that the relators did all they could to separate themselves from their tribe and to sever their tribal relations, for the purpose of becoming self-sustaining and living without support from the government. This being so, it presents the question as to whether or not an Indian can withdraw from his tribe, sever his tribal relation therewith, and terminate his allegiance thereto, for the purpose of making an independent living and adopting our own civilization.

If Indian tribes are to be regarded and treated as separate but dependent nations, there can be no serious difficulty about the question. If they are not to be regarded and treated as separate, dependent nations, then no allegiance is owing from an individual Indian to his tribe, and he could, therefore, withdraw therefrom at any time. The question of expatriation has engaged the attention of our government from the time of its very foundation. Many heated discussions have been carried on between our own and foreign

governments on this great question, until diplomacy has triumphantly secured the right to every person found within our jurisdiction. This right has always been claimed and admitted by our government, and it is now no longer an open question. It can make but little difference, then, whether we accord to the Indian tribes a national character or not, as in either case I think the individual Indian possesses the clear and God-given right to withdraw from his tribe and forever live away from it, as though it had no further existence. If the right of expatriation was open to doubt in this country down to the year 1868, certainly since that time no sort of question as to the right can now exist. On the 27th of July of that year Congress passed an act, now appearing as section 1999 of the Revised Statutes, which declares that: "Whereas, the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and, whereas, in the recognition of this principle the government has freely received emigrants from all nations, and invested them with the rights of citizenship. * * * Therefore, any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the republic."

The tribal power recognized in all the foregoing cases is not overthrown by anything said in the case of *United States ex rel. West v. Hitchcock* (205 U. S. 80). In that case, an adopted member of the Wichita tribe was refused an allotment by the Secretary of the Interior because the Department had never approved his adoption. Since the Secretary, according to the Supreme Court, had unreviewable discretionary authority to grant or deny an allotment even to a member of the tribe by blood, it was unnecessary for the Supreme Court to decide whether refusal of the Interior Department to approve the relator's adoption was within the authority of the Department. The court, however, intimated that the general authority of the Interior Department under Rev. Stat. 463 (U. S. Code, title 25, sec. 2),¹⁰ was broad enough to justify a regulation requiring Department approval of adoptions, but hastened to add that since the relator would have no legal right of appeal even if his adoption without Department approval were valid, "it hardly is necessary to pass upon that point."

The power of an Indian tribe to determine its membership is subject to the qualification, however, that in the distribution of tribal funds and other property under the supervision and control of the Federal Government, the action of the tribe is subject to the supervisory authority of the Secretary of the Interior. See *United States ex rel. West v. Hitchcock*, 205 U. S. 80; *Mitchell v. United States*, 22

¹⁰ *Duties of Commissioner.*—The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations. (R. S. Sec. 463.)

Fed. 2d, 771; *United States v. Provoe*, 38 Fed. 2d, 799; reversed on other grounds, 283 U. S. 753. See also *Wilbur v. United States*, 281 U. S. 206. The original power to determine membership, including the regulation of membership by adoption, nevertheless remains with the tribe, and in view of the broad provisions of the Wheeler-Howard Act, it is my opinion that the Secretary of the Interior may in the future define and confine his power of supervision in accordance with the terms of the constitution adopted by the tribe itself and approved by him.

THE POWER OF AN INDIAN TRIBE TO REGULATE DOMESTIC RELATIONS

The Indian tribes have been accorded the widest possible latitude in regulating the domestic relations of their members. Indian custom marriage has been specifically recognized by Federal statute, so far as such recognition is necessary for purposes of inheritance.¹¹ Indian custom marriage and divorce have been generally recognized by State and Federal courts for all other purposes. Where Federal law or written laws of the tribe do not cover the subject, the customs and traditions of the tribe are accorded the force of law, but these customs and traditions may be changed by the statutes of the Indian tribes. In defining and punishing offenses against the marriage relationship, the Indian tribe has complete and exclusive authority in the absence of legislation by Congress upon the subject. No law of the State controls the domestic relations of Indians living in tribal relationship. The authority of an Indian tribal council to appoint guardians for incompetents and minors is specifically recognized by statute,¹² although this statute at the same time deprives such guardians of the power to administer Federal trust funds.

The completeness and exclusiveness of tribal authority over matters of domestic relationship is clearly set forth by Mr. Justice Van

¹¹ U. S. C., title 25, sec. 371, which provides:

“Descent of land.—For the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of section 348, whenever any male and female Indian shall have cohabited together as husband and wife according to the custom and manner of Indian life the issue of such cohabitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue of the Indians so living together * * *

¹² U. S. C., title 25, sec. 159, which provides:

“Moneys due incompetents or orphans.—The Secretary of the Interior is directed to cause settlements to be made with all persons appointed by the Indian councils to receive moneys due to incompetent or orphan Indians, and to require all moneys found due to such incompetent or orphan Indians to be returned to the Treasury; and all moneys so returned shall bear interest at the rate of 6 per centum per annum, until paid by order of the Secretary of the Interior to those entitled to the same. No money shall be paid to any person appointed by any Indian council to receive moneys due to incompetent or orphaned Indians, but the same shall remain in the Treasury of the United States until ordered to be paid by the Secretary to those entitled to receive the same, and shall bear 6 per centum interest until so paid.” (R. S. sec. 2108.)

Devanter in the opinion of the Supreme Court in *United States v. Quiver* (241 U. S. 602, at 603-605):

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 or property of another Indian to be dealt with, according to their tribal customs and laws. Thus the Indian Intercourse Acts of May 19, 1796, c. 30, 1 Stat. 469, and of March, 1802, c. 13, 2 Stat. 139, provided for the punishment of various offenses by white persons against Indians and by Indians against white persons, but left untouched those by Indians against each other; and the act of June 30, 1834, c. 161, Sec. 25, 4 Stat. 729, 733, while providing that "so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States shall be in force in the Indian country", qualified its action by saying, "the same shall not extend to crimes committed by one Indian against the person or property of another Indian." That provision with its qualification was later carried into the Revised Statutes as Secs. 2145 and 2146. This was the situation when this court, in *Ex parte Crow Dog*, 109 U. S. 556, held that the murder of an Indian by another Indian on an Indian reservation was not punishable under the laws of the United States and could be dealt with only according to the laws of the tribe. The first change came when, by the act of March 3, 1885, c. 341, Sec. 9, 23 Stat. 362, 385, now Sec. 328 of the Penal Code, Congress provided for the punishment of murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, arson, burglary, and larceny when committed by one Indian against the person or property of another Indian. In other respects the policy remained as before. After South Dakota became a State, Congress, acting upon a partial cession of jurisdiction by that State, c. 106, Laws 1901, provided by the act of February 2, 1903, c. 351, 32 Stat. 793, now Sec. 329 of the Penal Code, for the punishment of the particular offenses named in the act of 1885 when committed on the Indian reservations in that State, even though committed by others than Indians, but this is without bearing here, for it left the situation in respect of offenses by one Indian against the person or property of another Indian as it was after the act of 1885.

We have now referred to all the statutes. There is none dealing with bigamy, polygamy, incest, adultery, or fornication, which in terms refers to Indians, these matters always having been left to the tribal customs and laws and to such preventive and corrective measures as reasonably could be taken by the administrative officers.

Recognition of the validity of marriages and divorces consummated in accordance with tribal law or custom is found in the following cases:

Carney v. Chapman, 247 U. S. 102; *Boyer v. Dively*, 58 Mo. 510; *Johnson v. Dunlap*, 68 Okla. 216, 173 Pac. 359; *Cyr v. Walker*, 29 Okla. 281, 116 Pac. 931; *Hallowell v. Commons*, 210 Fed. 793; *Earl v. Godley*, 42 Minn. 361; *Ortley v. Ross*, 78 Neb. 339; *People ex rel. La Forte v. Rubin*, 98 N. Y. Supp. 787; *Butler v. Wilson*, 54 Okla. 229, 153 Pac. 823; *Proctor v. Foster*, 107 Okla. 95, 230 Pac. 753; *Davis v. Reeder*, 102 Okla. 106, 226 Pac. 880; *Pompey v. King*, 101 Okla. 253, 225 Pac. 175; *Buck v. Branson*, 34 Okla. 807, 127 Pac. 436;

Johnson v. Johnson, 30 Mo. 72; *Unussee v. McKinney*, 270 Pac. 1096 (Okla.); and *cf. Connolly v. Woolrich* (1867), 11 Lower Can. Jur. 197.

Legal recognition has not been withheld from marriages by Indian custom, even in those cases where Indian custom sanctioned polygamy. As was said in *Kobogum v. Jackson Iron Co.* (76 Mich. 498, 43 N. W. 602):

* * * The testimony now in this case shows what, as matter of history, we are probably bound to know judicially, that among these Indians polygamous marriages have always been recognized as valid, and have never been confounded with such promiscuous or informal temporary intercourse as is not reckoned as marriage. While most civilized nations in our day very wisely discard polygamy, and it is not probably lawful anywhere among English-speaking nations, yet it is a recognized and valid institution among many nations, and in no way universally unlawful. We must either hold that there can be no valid Indian marriage, or we must hold that all marriages are valid which by Indian 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. They did not occupy their territory by our grace and permission, but by a right beyond our control. They were placed by the Constitution of the United States beyond our jurisdiction, and we have no more right to control their domestic usages than those of Turkey or India. * * * We have here marriages had between members of an Indian tribe in tribal relations, and unquestionably good by the Indian rules. The parties were not subject in those relations to the laws of Michigan, and there was no other law interfering with the full jurisdiction of the tribe over personal relations. We cannot interfere with the validity of such marriages without subjecting them to rules of law which never bound them.

See, to the same effect, *State v. McKenney* (18 Nev. 182, 200).

The jurisdiction of a tribal court over divorce actions is recognized in *Raymond v. Raymond* (83 Fed. 721); 19 Ops. Atty. Gen. 109 (1888).

THE POWER OF AN INDIAN TRIBE TO GOVERN THE DESCENT AND DISTRIBUTION OF PROPERTY

It is well settled that an Indian tribe has the power to prescribe the manner of descent and distribution of the property of its members, in the absence of contrary legislation by Congress. Such power may be exercised through unwritten customs and usages, or through written laws of the tribe. This power extends to personal property as well as to real property. By virtue of this authority an Indian tribe may restrict the descent of property on the basis of Indian blood or tribal membership, and may provide for the escheat of property to the tribe where there are no recognized heirs. An Indian tribe may, if it so chooses, adopt as its own the laws of the State in which it is situated and may make such modifications in these laws as it deems suitable to its peculiar conditions.

The only general statutes of Congress which restrict the power of an Indian tribe to govern the descent and distribution of property of its members are section 5 of the General Allotment Act (U. S. Code, title 25, sec. 348),¹³ which provides that allotments of land shall descend "according to the laws of the State or Territory where such land is located", the act of June 25, 1910, c. 431, Sec. 1, 36 Stat. 855 (U. S. Code, Title 25, Sec. 372),¹⁴ which provides that the Secretary of the Interior shall have unreviewable discretion to determine the heirs of an Indian in ruling upon the inheritance of individual allotments issued under the authority of the General Allotment Law, and section 2 of the same act (U. S. Code, title 25, sec. 373),¹⁵ which gives the Secretary of the Interior final power to approve and disapprove Indian wills devising restricted property.

These statutes abolish the former tribal power over the descent and distribution of property, with respect to allotments of land made under the General Allotment Act, and rendered tribal rules of testamentary disposition subject to the authority of the Secretary of the Interior. They do not, however, affect intestate succession to personal property or interests in land other than allotments (*e. g.*, possessory interests in land to which title is retained by the tribe). With respect to all property other than allotments of land made under the General Allotment Act, the inheritance laws and customs of the Indian tribe are still of supreme authority.¹⁶

The authority of an Indian tribe in the matter of inheritance is clearly recognized by the United States Supreme Court in the case

¹³ " *Patents to be held in trust; descent and partition.*—Upon the approval of the allotments provided for in sections 331 to 334, inclusive, and 336 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: * * *"

¹⁴ " *Ascertainment of heirs of deceased allottees.*—When any Indian to whom an allotment of land has been made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. * * *"

¹⁵ " *Disposal by will of allotments held under trust.*—Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided, however,* That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: * * *"

¹⁶ The foregoing general analysis is inapplicable to the Five Civilized Tribes, Congress having expressly provided that State probate courts shall have jurisdiction over the estates of allotted Indians of the Five Civilized Tribes leaving restricted heirs. (Act of June 14, 1913, c. 101, sec. 1; 40 Stat. L. 606; U. S. Code, title 25, sec. 375.)

of *Jones v. Meehan* (175 U. S. 1), in which it was held that the eldest male child of a Chippewa Indian succeeded to his statutory allotment in accordance with tribal law. The court declared:

The Department of the Interior appears to have assumed that, upon the death of Moose Dung the elder, in 1872, the title in his land descended by law to his heirs general, and not to his eldest son only.

But the elder Chief Moose Dung being a member of an Indian tribe, whose tribal organization was still recognized by the Government of the United States, the right of inheritance in his land, at the time of his death, was controlled by the laws, usages, and customs of the tribe, and not by the law of the State of Minnesota, nor by any action of the Secretary of the Interior. (At page 29.)

In reaching this conclusion the Supreme Court relied upon the following cases:

United States v. Shanks (15 Minn. 369); *Dole v. Irish* (2 Barb. [N. Y.] 639); *Hastings v. Farmer* (4 N. Y. 293, 294); *The Kansas Indians* (5 Wall. 737); *Waupemanqua v. Aldrich* (28 Fed. 489); *Brown v. Steele* (23 Kan. 672); *Richardville v. Thorp* (28 Fed. 52).

In the case of *Jones v. Meehan*, *supra*, the tribal authority was exercised through immemorial usage. Other tribes, however, have exercised a similar authority through written laws.

In the case of *Gray v. Coffman* (3 Dill. 393, 10 Fed. Cases, No. 5,714), the court held that the validity of the will of a member of the Wyandot tribe depended upon its conformity with the written laws of the tribe. The court declared:

The Wyandot Indians, before their removal from Ohio, had adopted a written constitution and laws, and among others, laws relating to descent and wills. These are in the record and are shown to have been copied from the laws of Ohio and adopted by the Wyandot tribe, with certain modifications, to adapt them to their customs and usages. One of these modifications was that only living children should inherit, excluding the children of deceased children, or grandchildren. The Wyandot council, which is several times referred to in the treaty of 1855, was an executive and judicial body and had power, under the laws and usages of the nation, to receive proof of wills, etc.; and this body continued to act, at least to some extent, after the treaty of 1855.

* * * under the circumstances, the court must give effect to the well-established laws, customs, and usages of the Wyandot tribe of Indians in respect to the disposition of property by descent and will.

In the case of *O'Brien v. Bugbee* (46 Kan. 1, 26 Pac. 428), it was held that a plaintiff in ejectment could not recover without positive proof that under tribal custom he was lawful heir to the property in question. In the absence of such proof, it was held that title to the land escheated to the tribe, and that the tribe might dispose of the land as it saw fit.

Tribal autonomy in the regulation of descent and distribution is recognized in the case of *Woodin v. Seeley* (141 Misc. 207; 252 N. Y.

Supp. 818). In this case, and in the case of *Patterson v. Council of Seneca Nation* (245 N. Y. 433; 157 N. E. 734), the supremacy of tribal law in matters of inheritance and membership rights is defended on the ground—

that when Congress does not act no law runs on an Indian reservation save the Indian tribal law and custom.

In the case of *Y-Ta-Tah-Wah v. Rebock* (105 Fed. 257), the plaintiff, a medicine man imprisoned by the Federal Indian agent and county sheriff for practicing medicine without a license, brought an action of false imprisonment against these officials, and died during the course of the proceedings. The court held that the action might be continued, not by an administrator of the decedent's estate appointed in accordance with State law, but by the heirs of the decedent by Indian custom. The court declared, per Shiras, J.:

If it were true that, upon the death of a tribal Indian, his property, real and personal, became subject to the laws of the state directing the mode of distribution of estates of decedents, it is apparent that irremediable confusion would be caused thereby in the affairs of the Indians * * * (At page 262.)

In a case involving the right of an illegitimate child to inherit property, the authority of the tribe to pass upon the status of illegitimates was recognized in the following terms:

The Creek Council, in the exercise of its lawful function of local self-government, saw fit to limit the legal rights of an illegitimate child to that of sharing in the estate of his putative father, and not to confer upon such child generally the status of a child born in lawful wedlock (*Oklahoma Land Company v. Thomas*, 34 Okla. 681, 127 Pac. 8.)

See, to the same effect, *Butler v. Wilson* (54 Okla. 229, 153 Pac. 823).

In the case of *Dole v. Irish* (2 Barb. 639) it was held that a surrogate of the State of New York has no power to grant letters of administration to control the disposition of personal property belonging to a deceased member of the Seneca tribe. The court declared:

I am of the opinion that the private property of the Seneca Indians is not within the jurisdiction of our laws respecting administration; and that the letters of administration granted by the surrogate to the plaintiff are void. I am also of the opinion that the distribution of Indian property according to their customs passes a good title, which our courts will not disturb; and therefore that the defendant has a good title to the horse in question and must have judgment on the special verdict. (At pages 642-643.)

In *George v. Pierce* (148 N. Y. Supp. 230), the distribution of real and personal property of the decedent through the Onondaga custom of the "dead feast" is recognized as controlling all rights of inheritance.

In the case of *Mackey v. Cowe* (18 How. 100), the Supreme Court held that letters of administration issued by a Cherokee court were

entitled to recognition in another jurisdiction, on the ground that the status of an Indian tribe was in fact similar to that of a Federal territory.

In the case of *Meeker v. Kaelin* (173 Fed. 216), the court recognized the validity of tribal custom in determining the descent of real and personal property and indicated that the tribal custom of the Puyallup band prescribed different rules of descent for real and for personal property.

THE TAXING POWER OF AN INDIAN TRIBE

Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe and over nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.

The case of *Buster v. Wright* (135 Fed. 947, app. dism., 203 U. S. 599), contains an excellent analysis of the taxing power of the Creek Nation:

Repeated decisions of the courts, numerous opinions of the Attorneys General, and the practice of years place beyond debate the propositions that prior to March 1, 1901, the Creek Nation had lawful authority to require the payment of this tax as a condition precedent to the exercise of the privilege of trading within its borders, and that the executive department of the government of the United States had plenary power to enforce its payment through the Secretary of the Interior and his subordinates, the Indian inspector, Indian agent, and Indian police. *Morris v. Hitchcock*, 194 U. S. 384, 392, 24 Sup. Ct. 712, 48 L. Ed. 1030; *Crabtree v. Madden*, 4 C. C. A. 408, 410, 413, 54 Fed. 426, 428, 431; *Maxey v. Wright*, 3 Ind. T. 243, 54 S. W. 807; *Maxey v. Wright*, 44 C. C. A. 683, 105 Fed. 1003; 18 Opinions of Attorneys General, 34, 36; 23 Opinions of Attorneys General, 214, 217, 219, 220, 528. * * *

* * * It may not be unwise, before entering upon the discussion of this proposition, to place clearly before our minds the character of the Creek Nation and the nature of the power which it is attempting to exercise.

The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it. Neither the authority nor the power of the United States to license its citizens to trade in the Creek Nation, with or without the consent of that tribe, is in issue in this case, because the complainants have no such licenses. The plenary power and lawful authority of the government of the United States by license, by treaty, or by act of Congress to take from the Creek Nation every vestige of its original or acquired governmental authority and power may be admitted, and for the purposes of this decision are here conceded.

The fact remains nevertheless that every original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by act of Congress or by the contracts of the Creek tribe itself.

Originally an independent tribe, the superior power of the republic early reduced this Indian people to a "domestic, dependent nation" (*Cherokee Nation v. State of Georgia*, 5 Pet. 1-20, 8 L. Ed. 25), yet left it a distinct political entity, clothed with ample authority to govern its inhabitants and to manage its domestic affairs through officers of its own selection, who under a Constitution modeled after that of the United States, exercised legislative, executive, and judicial functions within its territorial jurisdiction for more than half a century. The governmental jurisdiction of this nation was neither conditioned nor limited by the original title by occupancy to the lands within its territory. * * * Founded in its original national sovereignty, and secured by these treaties, the governmental authority of the Creek Nation, subject always to the superior power of the republic, remained practically unimpaired until the year 1889. Between the years 1888 and 1901 the United States by various acts of Congress deprived this tribe of all its judicial power, and curtailed its remaining authority until its powers of government have become the mere shadows of their former selves. Nevertheless its authority to fix the terms upon which noncitizens might conduct business within its territorial boundaries guaranteed by the treaties of 1832, 1856, and 1866, and sustained by repeated decisions of the courts and opinions of the Attorneys General of the United States, remained undisturbed.

* * * It is said that the sale of these lots and the incorporation of cities and towns upon the sites in which the lots are found authorized by act of Congress to collect taxes for municipal purposes segregated the town sites and the lots sold from the territory of the Creek Nation, and deprived it of governmental jurisdiction over this property and over its occupants. But the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it, or by the existence of municipalities therein endowed with power to collect taxes for city purposes, and to enact and enforce municipal ordinances. Neither the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners. (At pp. 949-952.)

A similar opinion was rendered by the Attorney General (23 Ops. Atty. Gen. 528) with respect to the right of the Cherokee Nation to impose an export tax on hay grown within the limits of the reservation. The opinion of the Attorney General suggested that tribal authority to impose such a tax would remain "even if the shipper was the absolute owner of the land on which the hay was raised." This suggestion was referred to and approved by the United States Supreme Court in *Morris v. Hitchcock* (194 U. S. 384, 392).

In the latter case, the Court of Appeals of the District of Columbia, considering the validity of a tax or fee imposed by the Chickasaw Nation upon the owners of all cattle grazed within the Chickasaw territory, analyzed the status and powers of the Chickasaw Nation in these terms:

A government of the kind necessarily has the power to maintain its existence and effectiveness through the exercise of the usual power of taxation upon all

property within its limits, save as may be restricted by its organic law. Any restriction in the organic law in respect of this ordinary power of taxation, and the property subject thereto, ought to appear by express provision or necessary implication. *Board Trustees v. Indiana*, 14 How. 268, 272; *Talbott v. Silver Bow Co.*, 139 U. S. 438, 448. Where the restriction upon this exercise of power by a recognized government, is claimed under the stipulations of a treaty with another, whether the former be dependent upon the latter or not, it would seem that its existence ought to appear beyond a reasonable doubt. We discover no such restriction in the clause of Article 7 of the Treaty of 1855, which excepts white persons from the recognition therein of the unrestricted right of self-government by the Chickasaw Nation, and its full jurisdiction over persons and property within its limits. The conditions of that exception may be fully met without going to the extreme of saying that it was also intended to prevent the exercise of the power to consent to the entry of noncitizens, or the taxation of property actually within the limits of that government and enjoying its benefits. (*Morris v. Hitchcock*, 21 App. D. C. 565, 593.)

In the case of *Mawey v. Wright* (3 Ind. T. 243, 54 S. W. 807, aff'd., 105 Fed. 1003), the right of an Indian tribe to levy a tax upon a nonmember of the tribe residing on its reservation was held to be an essential attribute of tribal sovereignty, which might be curtailed by express language of a treaty or statute, but otherwise remained intact. In that case the court declared:

* * * in the absence of express contradictory provisions by treaty, or by statute of the United States, the Nation (and not a citizen) is to declare who shall come within the boundaries of its occupancy, and under what conditions. (At page 36.)

See, to the same effect, 17 Ops. Atty. Gen. 134; 18 Ops. Atty. Gen. 34.

In view of the fact, however, that Congress has conferred upon the Commissioner of Indian Affairs exclusive jurisdiction to appoint traders on Indian reservations and to prescribe the terms and conditions governing their admission and operations (see secs. 261 and 262, title 25, U. S. Code), an Indian tribe is without power to levy a tax upon such licensed traders unless authorized by the Commissioner of Indian Affairs so to do.

THE POWER OF AN INDIAN TRIBE TO EXCLUDE NONMEMBERS FROM ITS JURISDICTION

The power of an Indian tribe to exclude nonmembers of the tribe from entering upon the reservation was first clearly formulated in an opinion of the Attorney General rendered in 1821 with respect to the lands of the Seneca Indians:

So long as a tribe exists and remains in possession of its lands, its title and possession are sovereign and exclusive; and there exists no authority to enter upon their lands, for any purpose whatever, without their consent. (1 Op. Atty. Gen. 465, 466.)

It was further said in the course of this opinion that even the United States Government could not enter the Seneca lands, for the purpose of building a road or for any other purpose, without the consent of the Indians.

Although the last implication of this doctrine, if originally valid, has been superseded by many statutes authorizing and directing officers and agents of the United States to enter upon Indian lands for various purposes, the basic principle that an Indian tribe may exclude private individuals from the territory within its jurisdiction, or prescribe the conditions upon which such entry will be permitted, has been followed in a long line of cases.

Two grounds for this power of exclusion are established by the decided cases: first, the Indian tribe may exercise, over all tribal property, the rights of a landowner; second, the tribe may, in the exercise of local self-government, regulate the relations between its members and other persons, so far as may be consistent with Congressional statutes governing trade and intercourse.

In *Rainbow v. Young* (161 Fed. 835) it was held that the Indian superintendent and Indian police had power to remove an attorney seeking to collect fees on a day when lease money was being paid to the Indians. In addition to the specific authority to remove undesirable persons granted by Revised Statutes, sec. 2149 (recently repealed by act of May 21, 1934, 48 Stat. 787), the court found that the power to remove nonresidents was incidental to the general powers of a landowner, which the United States was qualified to exercise with respect to Indian lands:

Besides, the reservation from which Mr. Sloan was removed is the property of the United States, is set apart and used as a tribal reservation and in respect of it the United States has the rights of an individual proprietor (citing cases) and can maintain its possession and deal with intruders in like manner as can an individual in respect of his property. (At p. 837.)

See, to the same effect, *United States v. Mullin* (71 Fed. 682); 20 Op. Atty. Gen. 245, holding that an injunction by a State court might properly be disobeyed; 14 Op. Atty. Gen. 451. And with respect to the general power of a government as a landowner to remove intruders see *Cainfield v. United States* (167 U. S. 518, 524).

As was said in the case of *Stephenson v. Little* (18 Mich. 433), in which it was held that the United States Government as a landowner might, through officials of the Land Office, seize and direct the sale of timber cut on public lands even though other timber had been mixed with that so cut:

It seems to me there can be no doubt that the Government has all the common-law rights of an individual in respect to depredations committed on its property, and that where there is no statute making it the duty of any particular

official to enforce those rights, it is *ex necessitate rei* made the duty of the Executive Department of the Government to enforce them. (At page 440.)

What is said here of the rights of the United States Government may be said with equal force of the rights of an Indian tribe. In an unallotted reservation, an Indian tribe occupies the position of a landowner in equity, if not in strict law. (*United States v. Sturgeon*, 6 Sawy. 29, 27 Fed. Cas. No. 16,413.)

The cases cited with respect to the power of an Indian tribe to tax nonmembers, as a condition of entry or residence within the jurisdiction of the tribe, confirm the foregoing conclusions, and indicate further that the power of an Indian tribe to exclude nonmembers is not limited to lands in tribal ownership.

Over tribal lands, the tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty. But over all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business, provided only such determination is consistent with applicable Federal laws and does not infringe any vested rights of persons now occupying reservation lands under lawful authority. *Morris v. Hitchcock* (194 U. S. 384) and other cases cited under heading "The Taxing Power of an Indian Tribe."

TRIBAL POWERS OVER PROPERTY

The powers of an Indian tribe with respect to property derive from two sources. In the first place, the tribe has all the rights and powers of a property owner with respect to tribal property. In the second place, the Indian tribe has, among its powers of sovereignty, the power to regulate the use and disposition of individual property among its members.

The powers of an Indian tribe over tribal property are no less absolute than the powers of any landowner, save as restricted by general acts of Congress restricting the alienation or leasing of tribal property,¹⁷ and particular acts of Congress designed to control the disposition of particular funds or lands.

¹⁷ U. S. Code, title 25, sec. 177, provides:

"Purchases or grants of lands from Indians.—No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. * * *

U. S. Code, title 25, sec. 85, provides:

"Contracts relating to tribal funds or property.—No contract made with any Indian, where such contract relates to the tribal funds or property in the hands of the United States, shall be valid, nor shall any payment for services rendered in relation thereto be

The powers of an Indian tribe with respect to tribal land are not limited by any rights of occupancy which the tribe itself may grant to its members. The proposition that occupancy of tribal land does not create any vested rights in the occupant as against the tribe is supported by a long line of court decisions:

Sizemore v. Brady, 235 U. S. 441; *Franklin v. Lynch*, 233 U. S. 269; *Gritts v. Fisher*, 224 U. S. 640; *Journeycake v. Cherokee Nation and United States*, 28 Ct. Cls. 281; *Sac and Fox Indians of Iowa v. Sac and Fox Indians of Oklahoma and the United States*, 45 Ct. Cls. 287, aff'd 220 U. S. 481; *Hayes v. Barringer*, 168 Fed. 221; *Dukes v. Goodall*, 5 Ind. T. 145, 82 S. W. 702; *In re Narragansett Indians*, 20 R. I. 715; *Terrance v. Gray*, 156 N. Y. Supp. 916; *Reservation Gas Co. v. Snyder*, 88 Misc. 209; 150 N. Y. Supp. 216; *Application of Parker*, 237 N. Y. Supp. 135; *McCurtain v. Grady*, 1 Ind. T. 107, 38 S. W. 65; *Whitmire, trustee, v. Cherokee Nation*, 30 Ct. Cls. 138; *Myers v. Mathis*, 2 Ind. T. 3, 46 S. W. 178.

In the case of *Sizemore v. Brady*, *supra*, the Supreme Court declared—

lands and funds belonged to the tribe as a community, and not to the members severally or as tenants in common. (At p. 446.)

Similarly, in *Franklin v. Lynch*, *supra*, the Supreme Court declared:

As the tribe could not sell, neither could the individual members, for they had neither an undivided interest in the tribal land nor vendible interest in any particular tract. (At p. 271.)

In the case of *Journeycake v. Cherokee Nation and the United States*, *supra*, the Court of Claims carefully analyzed the laws and constitutional provisions of the Cherokee Nation and found that property within the jurisdiction of the Nation was of two kinds: communal property, in which each individual had exclusive rights of occupancy in particular tracts, rights not subject to transfer or disposition except according to prescribed rules; and national property, held by the tribe itself. With respect to the former type of property, the court declared:

The distinctive characteristic of communal property is that every member of the community is an owner of it as such. He does not take as heir, or pur-

made unless the consent of the United States has previously been given. (June 30, 1913, c. 4, sec. 18, 38 Stat. 97.)"

Statutes restricting tribal powers to lease tribal lands are cited at pages 53-54, *infra*.

The foregoing restrictions are partially modified by the Wheeler-Howard Act (48 Stat. 984), secs. 4, 6, 17.

It is recognized that property held by the United States in trust for an Indian tribe is, like other trust property, subject to terms of the trust with respect to the use and disposition of corpus and income. Thus it is provided that tribal funds held by the United States in trust for Indian tribes may be expended only in accordance with annual statutory appropriations, except for certain designated purposes as to which annual statutory appropriation is not required. See act of May 18, 1916, c. 125, sec. 27, 39 Stat. L. 159.

chaser, or grantee; if he dies his right of property does not descend; if he removes from the community it expires; if he wishes to dispose of it he has nothing which he can convey; and yet he has a right of property in the land as perfect as that of any other person; and his children after him will enjoy all that he enjoyed, not as heirs but as communal owners.

Analyzing the status of tribal lands not subject to individual occupancy, the court declared:

With this power of regulation and control of the public domain and the *jus disponendi* lodged in the government of the Nation, it is plain that the communal element has been reduced to a minimum and exists only in the occupied lands. And it is manifest that with the growth of civilization, with all of its intricacies and manifold requirements, the communal management of the public domain would have been utterly insufficient and, if it had continued, would have been a barrier to the advancement of civilization itself.

With these powers of absolute ownership lodged in the Cherokee government, the power to alienate, the power to lease, the power to grant rights of occupancy, the power to restrict rights of occupancy, and with the exercise of those powers running back to the very year of the adoption of the constitution, and receiving from that time to the present the unquestioning acquiescence of the former communal owners, the Cherokee people, it is apparent that the "public domain" of the Cherokee Nation is analogous to the "public lands" of the United States or the "demesne lands of the Crown", and that it is held absolutely by the Cherokee government, as all public property is held, a trust for governmental purposes and to promote the general welfare.

Similarly, in the case of *Hayes v. Barringer*, *supra*, the court declared, in considering the status of Choctaw and Chickasaw tribal lands:

* * * At that time these were the lands of the Choctaw and Chickasaw Nations, held by them, as they held all their lands, in trust for the individual members of their tribes, in the sense in which the public property of representative governments is held in trust for its people. But these were public lands, and, while the enrolled members of these tribes undoubtedly had a vested equitable right to their just shares of them against strangers and fellow members of their tribes, they had no separate or individual right to or equity in any of these lands which they could maintain against the legislation of the United States or of the Indian Nations. *Stephens v. Cherokee Nation*, 174 U. S. 445, 488, 19 Sup. Ct. 722, 43 L. Ed. 1041; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 23 Sup. Ct. 115, 47 L. Ed. 183; *Lone Wolf v. Hitchcock*, 187 U. S. 553, 23 Sup. Ct. 216; 47 L. Ed. 299; *Wallace v. Adams*, 143 Fed. 716, 74 C. C. A. 540; *Ligon v. Johnston* (C. C. A.), 164 Fed. 670.

So, too, in *United States v. Lucero* (1 N. M. 422), title to lands within a pueblo is recognized to lie in the pueblo itself, rather than in the individual members thereof.

The extent of any individual's interest in tribal property is subject to such limitations as the tribe may see fit to impose.

Thus, in *Reservation Gas Co. v. Snyder*, *supra*, it was held that an Indian tribe might dispose of minerals on tribal lands which had been assigned to individual Indians for private occupancy, since the

individual occupants had never been granted any specific mineral rights by the tribe.

In *Terrance v. Gray, supra*, it was held that no act of the occupant of assigned tribal land could terminate the control duly exercised by the chiefs of the tribe over the use and disposition of the land.

In *Application of Parker, supra*, it was held that the Tonawanda Nation of Seneca Indians had the right to dispose of minerals on the tribal allotments of its members and that the individual allottee had no valid claim for damages.

In the case of *McCurtain v. Grady, supra*, a provision of the Choctaw constitution conferring upon the discoverer of coal the right to mine all coal within a mile radius of the point of discovery was upheld as a valid exercise of tribal power.

In *Whitmire, trustee, v. Cherokee Nation, supra*, the Court of Claims held that the general property of the Cherokee Nation, under the provisions of the Cherokee constitution, might be used for public purposes, but could not be diverted to per capita payments to a favored class.

The chief limitation upon tribal control of membership rights in tribal property is that found in acts of Congress guaranteeing to those who sever tribal relations to take up homesteads on the public domain,¹⁸ and to children of white men and Indian women, under certain circumstances,¹⁹ a continuing share in the tribal property. Except for these general limitations and other specific statutory limitations found in enrollment acts and other special acts of Congress, the proper authorities of an Indian tribe have full authority to regulate the use and disposition of tribal property by the members of the tribe.

The authority of a tribal council to lease tribal lands is specifically confirmed by U. S. Code, title 25, sections 397, 398, and 402.²⁰

¹⁸ U. S. Code, title 43, sec. 189, provides that an Indian severing tribal relations to take up a homestead upon the public domain "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." For a discussion of this and related statutes, see *Oakes v. United States* (172 Fed. 305).

¹⁹ U. S. Code, title 25, sec. 184:

"Rights of children born of marriages between white men and Indian women.—All children born of a marriage solemnized prior to June 7, 1897, between a white man and an Indian woman by blood and not by adoption, where said Indian woman was on that date, or was at the time of her death, recognized by the tribe, shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, by blood, as any other member of the tribe, and no prior Act of Congress shall be construed as to debar such child of such right. (June 7, 1897, c. 3, sec. 1, 30 Stat. 90.)"

²⁰ U. S. Code, title 25, sec. 397:

"Leases of Lands for grazing or mining.—Where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the council speaking for such Indians, for a period not to exceed five years for grazing, or ten years for mining purposes in such quantities and upon such

Although the exercise of such authority is made subject to the approval of the Secretary of the Interior, it has been said that:

From the language of this statute it appears reasonably certain that it was the legislative purpose to confer primary authority upon the Indians, and that the determination of the council should be conclusive upon the government, at least in the absence of any evidence of fraud or undue influence. (*White Bear v. Barth*, 61 Mont. 322, 203 Pac. 517.)

U. S. Code, title 25, section 179, which imposes a penalty upon persons driving stock to range upon the lands of an Indian tribe, has been construed as recognizing the right of the tribe to permit the use of its lands for grazing purposes, for a consideration.

See *United States v. Hunter*, 4 Mackey (D. C.) 531; *Kirby v. United States*, 273 Fed. 391, aff'd., 260 U. S. 423.

Similarly, U. S. Code, title 25, section 180, imposing a penalty upon persons settling on Indian lands, has been judicially interpreted as implying that an Indian tribe has power to permit such settlement upon such terms as it may prescribe. The cases on this subject have been analyzed under the heading "The Power of an Indian Tribe to Exclude Nonmembers From Its Jurisdiction."

The authority of an Indian tribe in matters of property is not restricted to those lands or funds over which it exercises the rights of ownership. The sovereign powers of the tribe extend over the property as well as the person of its members.

Thus, in *Crabtree v. Madden* (54 Fed. 426), it is recognized that questions of the validity of contracts among members of the tribe are to be determined according to the laws of the tribe.

See, to the same effect:

In re Sah Quah, 31 Fed. 327; *Jones v. Laney*, 2 Tex. 342.

In the latter case the question arose whether a deed of manumission freeing a Negro slave, executed by a Chickasaw Indian within the territory of the Chickasaw Nation, was valid. The lower court had charged the jury "that their (Chickasaw) laws and customs and usages, within the limits defined to them, governed all property belonging to anyone domesticated and living with them." Approv-

terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior. (Feb. 28, 1891, c. 383, Sec. 3, 26 Stat. 795.)"

U. S. Code, title 25, sec. 398:

"Leases of unallotted lands for oil and gas mining purposes.—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 preceding section 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."

U. S. Code, title 25, sec. 402:

"Leases of surplus lands.—The surplus lands of any tribe may be leased for farming purposes by the council of such tribe under the same rules and regulations and for the same term of years as is now allowed in the case of leases for grazing purposes. (Aug. 15, 1894, c. 290, Sec. 1, 28 Stat. 305.)"

ing this charge, upon the basis of which the jury had found the deed to be valid, the appellate court declared:

Their laws and customs, regulating property, contracts, and the relations between husband and wife, have been respected, when drawn into controversy, in the courts of the State and of the United States. (At p. 348.)

In the case of *Delaware Indians v. Cherokee Nation* (38 Ct. Cls. 234, decree mod. 193 U. S. 127), it is said:

The law of real property is to be found in the law of the situs. The law of real property in the Cherokee country, therefore, is to be found in the constitution and laws of the Cherokee Nation.

In the case of *Myers v. Mathis, supra*, the validity of a Chickasaw statute of limitations, whereby an individual Indian suffered a loss of his improvements by reason of his absence for a fixed period, was upheld.

In the case of *James H. Hamilton v. United States* (42 Ct. Cls. 232), it appeared that land, buildings, and personal property owned by the claimant, a licensed trader, within the Chickasaw reservation, had been confiscated by an act of the Chickasaw legislature. The plaintiff brought suit to recover damages on the theory that such confiscation constituted an "Indian depredation." The Court of Claims dismissed the suit, declaring:

The claimant by applying for and accepting a license to trade with the Chickasaw Indians, and subsequently acquiring property within the limits of their reservation, subjected the same to the jurisdiction of their laws. (At. p. 287.)

The authority of an Indian tribe to impose license fees upon persons engaged in trade with its members within the boundaries of the reservation is confirmed in *Zevely v. Weimer* (5 Ind. T. 646, 82 S. W. 941), as well as in the various cases cited under the heading "The Taxing Power of an Indian Tribe."

The power of an Indian tribe to regulate the inheritance of individual property owned by members of the tribe has been analyzed under a separate heading.

It clearly appears, from the foregoing cases, that the powers of an Indian tribe are not limited to such powers as it may exercise in its capacity as a landowner. In its capacity as a sovereign, and in the exercise of local self-government, it may exercise powers similar to those exercised by any State or nation in regulating the use and disposition of private property, save insofar as it is restricted by specific statutes of Congress.

The laws and customs of the tribe, in matters of contract and property generally (as well as on questions of membership, domestic relations, inheritance, taxation, and residence), may be lawfully administered in the tribunals of the tribe, and such laws and customs

will be recognized by courts of State or Nation in cases coming before these courts.²¹

THE POWERS OF AN INDIAN TRIBE IN THE ADMINISTRATION OF JUSTICE

The powers of an Indian tribe in the administration of justice derive from the substantive powers of self-government which are legally recognized to fall within the domain of tribal sovereignty. If an Indian tribe has power to regulate the marriage relationships of its members, it necessarily has power to adjudicate, through tribunals established by itself, controversies involving such relationships. So, too, with other fields of local government in which our analysis has shown that tribal authority endures. In all these fields the judicial powers of the tribe are coextensive with its legislative or executive powers.

Washburn v. Parker (7 Fed. Sup. 120); *Raymond v. Raymond* (83 Fed. 721); 19 Op. Atty. Gen. 109 (1888); 7 Op. Atty. Gen. 174 (1855).

The decisions of Indian tribal courts, rendered within their jurisdiction and according to the forms of law or custom recognized by the tribe, are entitled to full faith and credit in the courts of the several States.

As was said in the case of *Standley v. Roberts* (59 Fed. 836, app. dism., 17 Sup. Ct. 999, memo. dec.):

* * * the judgments of the courts of these nations, in cases within their jurisdiction, stand on the same footing with those of the courts of the territories of the Union and are entitled to the same faith and credit. (At page 845.)

And in the case of *Raymond v. Raymond*, *supra*, the court declared:

The Cherokee Nation * * * is a distinct political society, capable of managing its own affairs and governing itself. It may enact its own laws, though they may not be in conflict with the constitution of the United States. It may maintain its own judicial tribunals, and their judgments and decrees upon the rights of the persons and property of members of the Cherokee Nation as against each other are entitled to all the faith and credit accorded to the judgments and decrees of territorial courts. (At page 722.)

See, also, *Nofire v. United States* (164 U. S. 657); *Mehlin v. Ice* (56 Fed. 12).

The question of the judicial powers of an Indian tribe is particularly significant in the field of law and order. For in the fields of civil controversy the rules and decisions of the tribe and its officers

²¹ See: Cuthbert Pound, "Nationals Without a Nation", 22 Columbia Law Rev. 97, 101-102 (1922); W. G. Rice, Jr., "The Position of the American Indian in the Law of the United States", 16 Jour. Comp. Leg. (3d Series), part 1, p. 78 (1934).

have a force that State courts and Federal courts will respect. But in accordance with the well-settled principle that one sovereign will not enforce the criminal laws of another sovereign, State courts and Federal courts alike must decline to enforce penal provisions of tribal law. Responsibility for the maintenance of law and order is therefore squarely upon the Indian tribe, unless this field of jurisdiction has been taken over by the States or the Federal government.

It is illuminating to deal with the question of tribal criminal jurisdiction as we have dealt with other questions of tribal authority, by asking, first, what the original sovereign powers of the tribes were, and then, how far and in what respects these powers have been limited.

So long as the complete and independent sovereignty of an Indian tribe was recognized, its criminal jurisdiction, no less than its civil jurisdiction, was that of any sovereign power. It might punish its subjects for offenses against each other or against aliens and for public offenses against the peace and dignity of the tribe. Similarly, it might punish aliens within its jurisdiction according to its own laws and customs.²² Such jurisdiction continues to this day, save as it has been expressly limited by the acts of a superior government.

It is clear that the original criminal jurisdiction of the Indian tribes has never been transferred to the States. Sporadic attempts of the States to exercise jurisdiction over offenses between Indians, or between Indians and whites, committed on an Indian reservation, have been held invalid usurpation of authority.

The principle that a State has no criminal jurisdiction over offenses involving Indians committed on an Indian reservation is too well established to require argument, attested as it is by a line of cases that reaches back to the earliest years of the Republic. See *Worcester v. Georgia*, 6 Pet. 515; *United States v. Kagama*, 118 U. S. 375; *United States v. Thomas*, 151 U. S. 577; *Toy v. Hopkins*, 212 U. S. 542; *United States v. Celestine*, 215 U. S. 278; *Donnelly v. United States*, 228 U. S. 245; *United States v. Pelican*, 232 U. S. 442; *United States v. Ramsey*, 271 U. S. 467; *United States v. King*, 81 Fed. 625; *In re Lincoln*, 129 Fed. 297; *United States v. Hamilton*, 223 Fed. 685; *Yohyowan v. Luce*, 291 Fed. 425; *State v. Campbell*, 53 Minn. 354, 55 N. W. 553; *State v. Big Sheep*, 75 Mont. 219, 243 Pac. 1067; *Ex parte Cross*, 20 Nebr. 417; *People ex rel. Cusick v. Daly*, 212 N. Y. 183, 105 N. E. 1048; *State v. Cloud*, 228 N. W. 611 (Minn.); *State v. Rufus*, 237 N. W. 671 (Wis.).

²² This power is expressly recognized, for instance, in the Treaty of July 2, 1791, with the Cherokees (7 Stat. 40) providing: "If any citizen of the United States, or other person not being an Indian, shall settle on any of the Cherokee lands, such person shall forfeit the protection of the United States, and the Cherokees may punish him or not as they please." (Sec. 8.)

A State, of course, has jurisdiction over the conduct of an Indian off the reservation.²³ A State also has jurisdiction over some, but not all, acts of non-Indians within a reservation.²⁴ But the relations between whites and Indians in "Indian country" and the conduct of Indians themselves in Indian country are not subject to the laws or the courts of the several States.

The denial of State jurisdiction, then, is dictated by principles of constitutional law.

On the other hand, the constitutional authority of the Federal Government to prescribe laws and to administer justice upon the Indian reservation is plenary. The question remains how far Congress has exercised its constitutional powers.

The basic provisions of Federal law with regard to Indian offenses are found in sections 217 and 218 of U. S. Code, title 25:

Sec. 217. *General laws as to punishment extended to Indian country.*—Except as to crimes the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country. (R. S. Sec. 2145.)

Sec. 218. *Exceptions as to extension of general laws.*—The preceding section shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively. (R. S. Sec. 2146; Feb. 18, 1875, c. 80, Sec. 1, 18 Stat. 318.)

These provisions recognize that, with respect to crimes committed by one Indian against the person or property of another Indian, the jurisdiction of the Indian tribe is plenary. These provisions further recognize that, in addition to this general jurisdiction over offenses between Indians, an Indian tribe may possess, by virtue of treaty stipulations, other fields of exclusive jurisdiction (necessarily including jurisdiction over cases involving non-Indians). "The local law of the tribe" is further recognized to the extent that the punishment of an Indian under such law must be deemed a bar to further prosecution, under any applicable Federal laws, even though the offense be one against a non-Indian.

Such was the law when the case of *Ex parte Crow Dog* (109 U. S. 556), which has been discussed in an earlier connection, arose. The United States Supreme Court there held that Federal courts had no jurisdiction to prosecute an Indian for the murder of another Indian

²³ See *Pablo v. People* (23 Colo. 134) (upholding State jurisdiction over murder of Indian by Indian outside of reservation).

²⁴ See *United States v. McBratney* (104 U. S. 621) (declining Federal jurisdiction over murder of non-Indian by non-Indian on reservation).

committed on an Indian reservation, such jurisdiction never having been withdrawn from the original sovereignty of the Indian tribe.

Shortly before the decision in this case an opinion had been rendered by the Attorney General in another Indian murder case holding that where an Indian of one tribe had murdered an Indian of another tribe on the reservation of a third tribe, even though it was not shown that any of the tribes concerned had any machinery for the administration of justice, the Federal courts had no right to try the accused. The opinion concluded:

If no demand for Foster's surrender shall be made by one or other of the tribes, founded fairly upon a violation of some law of one or other of them having jurisdiction of the offense in question according to general principles, and by forms substantially conformable to natural justice, it seems that nothing remains except to discharge him. (17 Ops. Atty. Gen. 566, 570.)

A similar decision had been reached in State courts. See *State v. McKenney* (18 Nev. 182).

The right of an Indian tribe to inflict the death penalty had been recognized by Congress, in the report cited above, at page 20.

Following the *Crow Dog* decision Congress passed the act of March 3, 1885, sec. 9 (23 Stats. L. 385), which, with an amendment, became sec. 328 of the U. S. Criminal Code of 1910 and now sec. 548 of title 18 of the U. S. Code. This section provides for the prosecution in the Federal courts of Indians committing, within Indian reservations, any of the ten (formerly seven, then eight) specifically mentioned offenses (whether against Indians or against non-Indians), viz: murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny.²⁵

Although this statute does not expressly terminate tribal jurisdiction over the enumerated crimes, and might, if the question were an original one, be interpreted as conferring only a concurrent jurisdiction upon the Federal courts, it has been construed for many years as

²⁵ "548. (*Criminal Code, section 328.*) *Indians committing certain crime; acts on reservations; rape on Indian woman.*—All Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny on and within any Indian reservation under the jurisdiction of the United States Government, including rights-of-way running through the reservation, shall be subject to the same laws, tried in the same courts, and in the same manner, and be subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States: *Provided*, That any Indian who commits the crime of rape upon any female Indian within the limits of any Indian reservation shall be imprisoned at the discretion of the court: *Provided further*, That as herein used the offense rape shall be defined in accordance with the laws of the State in which the offense was committed.

The foregoing shall extend to prosecutions of Indians in South Dakota under section 549 of this title. (As amended June 28, 1932, c. 284, 47 Stat. 337.)"

removing all jurisdiction over the enumerated crimes from the Indian tribal authorities.

Thus, in the case of *United States v. Whaley* (37 Fed. 145), which arose soon after the passage of the statute in question, it had appeared fitting to the tribal council of the Tule River Reservation that a medicine man who was believed to have poisoned some twenty-one deceased patients should be executed, and he was so executed. The four tribal executioners were found guilty of manslaughter, in the Federal court, on the theory that the act of March 3, 1885, had terminated tribal jurisdiction over murder cases. Whether tribal authorities may still inflict the death penalty for offenses other than the enumerated ten major crimes is a matter of some doubt.

The lacunae in this brief criminal code of ten commandments are serious, and indicate the importance of tribal jurisdiction in the field of law and order.

"Assault" cases that do not involve a "dangerous weapon" or where "intent to kill" cannot be proven, cannot be prosecuted in the Federal court, no matter how brutal the attack may be, or how near death the victim is placed, if death does not actually ensue; men brutally beating their wives and children are, therefore, exempt from prosecution in the Federal courts, and, as above shown, the State courts do not have jurisdiction. Even assault with intent to commit rape or great bodily injury is not punishable under any Federal statute.²⁶

Aside from rape and incest the various offenses involving the relation of the sexes (*e. g.*, adultery, seduction, bigamy, and solicitation), as well as those involving the responsibility of a man for the support of his wife and children, are not within the cases that can be prosecuted in Federal courts.²⁷

Other offenses which may be mentioned, to which no State or Federal laws now have application, and over which no State or Federal court now has any jurisdiction, are: kidnapping, receiving stolen goods, poisoning (if the victim does not die), obtaining money under false pretenses, embezzlement, blackmail, libel, forgery, fraud, trespass, mayhem, bribery, killing of another's live stock, setting fire to prairie or timber, use of false weights and measures, carrying concealed weapons, gambling, disorderly conduct, malicious mischief, pollution of water supplies, and other offenses against public health.²⁸

²⁶ *United States v. King* (81 Fed. 625).

²⁷ See *United States v. Quiver* (241 U. S. 602), discussed above under heading, "The Power of an Indian Tribe to Regulate Domestic Relations."

²⁸ *Of* statements of Assistant Commissioner Meritt, before House Committee on Indian Affairs, 69th Congress, on H. R. 7826. Hearings ("Reservation Courts of Indian Offenses"), p. 91.

It is not clear whether the foregoing offenses, which are not punishable in the Federal courts when committed by one Indian against another, are likewise exempt from punishment when committed by a non-Indian against an Indian, or by an Indian against a non-Indian, if the offense occurs within the boundaries of Indian country.

In these circumstances the wrongdoer is clearly not subject to State law. He is, however, subject to the provisions of the United States Criminal Code which deal with a meager list of "offenses within admiralty, maritime, and territorial jurisdiction of the United States."²⁹ The offenses specifically dealt with in this Federal criminal code do not include any of the offenses above enumerated except simple assault, various sex offenses, receiving stolen goods, and attempts at murder. There is, however, in the United States Criminal Code a provision (U. S. Code, title 18, sec. 468) which makes acts committed upon land within the exclusive jurisdiction of the United States subject to Federal prosecution whenever made criminal by State law. It may be argued that this provision applies to offenses committed by an Indian against a non-Indian or by a non-Indian against an Indian, but no decision so holding has been found.³⁰

On the foregoing analysis the limitations of Federal jurisdiction in the Indian country are apparent. The only offenses punishable in the Federal courts when committed within an Indian reservation are: the ten major crimes specially designated in U. S. Code, title 18, section 548; the special "reservation offenses" included in U. S. Code, title 25 (chiefly involving the sale of liquor); the ordinary Federal crimes applicable throughout the United States (such as counterfeiting, smuggling,³¹ and offenses relative to the mails), and, with respect to offenses committed by an Indian against a non-Indian or by a non-Indian against an Indian, the special "territorial" offenses for which punishment is provided in chapters 11 and 13 of U. S. Code, title 18.

The difficulties of this situation have prompted agitation for the extension of Federal or State laws over the Indian country, which

²⁹ See *Donnelly v. United States* (228 U. S. 243) (murder of Indian by non-Indian upon reservation held within exclusive Federal jurisdiction).

³⁰ *United States v. Barnaby* (51 Fed. 20) held that this section had no application to crimes committed by one Indian against another. The court declared:

"This attempt to adopt territorial and state laws may be classed as indolent legislation, not well adapted to producing order upon Indian reservations, or in those places under the exclusive jurisdiction of the general government, and allowing men guilty of crimes, demanding in all civilized governments punishment, as in this case, to escape their just deserts. The motion in arrest of judgment is sustained, and the defendant discharged from custody."

³¹ See *Bailey v. United States* (47 Fed. 2d, 702), confirming conviction of tribal Indian for offense of smuggling.

has continued for at least five decades, without success.³² The propriety of the object sought is not here in question, but the agitation itself is evidence of the large area of human conduct which must be left in anarchy if it be held that tribal authority to deal with such conduct has disappeared.

Fortunately, such tribal authority has been repeatedly recognized by the courts, and although it has not been actually exercised always and in all tribes, it remains a proper legal basis for the tribal administration of justice wherever an Indian tribe desires to make use of its legal powers.

The recognition of tribal jurisdiction over the offenses of tribal Indians accorded by the Supreme Court in *Ex parte Crow Dog*, *supra*, and *United States v. Quiver*, *supra*, indicates that the criminal jurisdiction of the Indian tribes has not been curtailed by the failure of certain tribes to exercise such jurisdiction, or by the inefficiency of its attempted exercise, or by any historical changes that have come about in the habits and customs of the Indian tribes. Only specific legislation terminating or transferring such jurisdiction can limit the force of tribal law.

A recent writer,³³ after carefully analyzing the relation between Federal and tribal law, concludes:

This gives to many Indian tribes a large measure of continuing autonomy, for the federal statutes are only a fragment of law, principally providing some educational, hygienic, and economic assistance, regulating land ownership, and punishing certain crimes committed by or upon Indians on a reservation. Where these statutes do not reach, Indian custom is the only law. As a matter of convenience, the regular courts (white men's courts) tacitly assume that the general law of the community is the law in civil cases between Indians, but these court will apply Indian custom where it is proved. (At p. 90.)

A careful analysis of the relation between a local tribal government and the United States is found in 7 Ops. Atty. Gen. 174 (1855), in which it is held that a court of the Choctaw Nation has complete jurisdiction over a civil controversy between a Choctaw Indian and

³² See Harsha, "Law for the Indians", 134 North American Review 272;

James Bradley Thayer, "A People Without Law", 68 Atlantic Monthly 540, 676 (1891);

Austin Abbott, "Indians and the Law", 2 Harv. Law Rev. 167 (1888);

William B. Hornblower, "The Legal Status of the Indians", 14 Rep. Am. Bar Ass'n 261 (1891);

Resolution of American Bar Association, August, 1891, in 15 Rep. Am. Bar Ass'n 422 (1892);

Cuthbert Pound, "Nationals Without a Nation", 22 Columbia Law Rev. 97 (1922);

Meriam and Associates, "The Problem of Indian Administration" (1928), chapter 13;

Ray A. Brown, "The Indian Problem and the Law", 39 Yale L. J. 307 (1930);

Report of Brown, Mark, Cloud, and Meriam on "Law and Order on Indian Reservations of the Northwest", Hearings Subcommittee of the Senate Committee on Indian Affairs, part 26, page 14,137 *et seq.* (1932).

³³ W. G. Rice, Jr., "The Position of the American Indian in the Law of the United States", 16 Jour. Comp. Leg. (3d series), part 1, page 78 (1934).

an adopted white man, involving rights to property within the Choctaw Nation:

On the other hand, it is argued by the United States Agent that the courts of the Choctaws can have no jurisdiction of any case in which a citizen of the United States is a party * * *.

In the first place, it is certain that the Agent errs in assuming the legal impossibility of a citizen of the United States becoming subject, in civil matters, or criminal either, to the jurisdiction of the Choctaws. It is true that no citizen of the United States can, while he remains within the United States, escape their constitutional jurisdiction, either by adoption into a tribe of Indians, or any other way. But the error in all this consists in the idea that any man, citizen or not citizen, becomes divested of his allegiance to the United States, or throws off their jurisdiction or government, in the fact of becoming subject to any local jurisdiction whatever. This idea misconceives entirely the whole theory of the Federal Government, which theory is that all the inhabitants of the country are, in regard to certain limited matters, subject to the federal jurisdiction, and in all others to the local jurisdiction, whether political or municipal. The citizen of Mississippi is also a citizen of the United States; and he owes allegiance to, and is subject to the laws of, both governments. So also an Indian, whether he be Choctaw or Chickasaw, and while subject to the local jurisdiction of the councils and courts of the Nation, yet is not in any possible relation or sense divested of his allegiance and obligations to the Government and laws of the United States.

In effect, then, an Indian tribe bears a relation to the Government of the United States similar to that which a territory bears to such Government, and similar again to that relationship which a municipality bears to a State. An Indian tribe may exercise a complete jurisdiction over its members and within the limits of the reservation,⁸⁴ subordinate only to the expressed limitations of Federal law.

Recognition of tribal authority in the administration of justice is found in the statutes of Congress, as well as in the decisions of the Federal courts.

U. S. Code, title 25, section 229, provides that redress for a civil injury committed by an Indian shall be sought in the first instance from the "Nation or tribe to which such Indian shall belong." This provision for collective responsibility evidently assumes that the Indian tribe or nation has its own resources for exercising disciplinary power over individual wrongdoers within the community.

We have already referred to U. S. Code, title 25, section 218, with its express assurance that persons "punished by the law of the tribe" shall not be tried again before the Federal courts.

⁸⁴ The jurisdiction of the Indian tribe ceases at the border of the reservation (see 18 Op. Atty. Gen. 440, holding that the authority of the Indian police is limited to the territory of the reservation), and Congress has never authorized appropriate extradition procedure whereby an Indian tribe may secure jurisdiction over fugitives from its justice. See *Ex parte Morgan* (20 Fed. 298).

What is even more important than these statutory recognitions of tribal criminal authority is the persistent silence of Congress on the general problem of Indian criminal jurisdiction. There is nothing to justify an alternative to the conclusion that the Indian tribes retain sovereignty and jurisdiction over a vast area of ordinary offenses over which the Federal Government has never presumed to legislate and over which the State governments have not the authority to legislate.

The attempts of the Interior Department to administer a rough-and-ready sort of justice through Courts of Indian Offenses, or directly through superintendents, cannot be held to have impaired tribal authority in the field of law and order. These agencies have been characterized, in the only reported case squarely upholding their legality, as "mere educational and disciplinary instrumentalities by which the Government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian." (*United States v. Clapox*, 35 Fed. 575; and cf. *Ex parte Bi-a-lil-le*, 12 Ariz. 150, 100 Pac. 450; *United States v. Van Wert*, 195 Fed. 974.) Perhaps a more satisfactory defense of their legality is the doctrine put forward by a recent writer that the Courts of Indian Offenses "derive their authority from the tribe, rather than from Washington."³⁵

Whichever of these explanations be offered for the existence of the Courts of Indian Offenses, their establishment cannot be held to have destroyed or limited the powers vested by existing law in the Indian tribes over the province of law and order and the administration of civil and criminal justice.

THE POWER OF AN INDIAN TRIBE TO SUPERVISE GOVERNMENT EMPLOYEES

Although the power to supervise regular Government employees is certainly not an inherent power of Indian tribal sovereignty, it is a power which is specifically granted to the Indian tribes by statute, subject to the discretion of the Secretary of the Interior. U. S. Code, title 25, section 48, provides:

Right of tribes to direct employment of persons engaged for them. Where any of the tribes are, in the opinion of the Secretary of the Interior, competent to direct the employment of their blacksmiths, mechanics, teachers, farmers, or other persons engaged for them, the direction of such persons may be given to the proper authority of the tribe. (R. S. sec. 2072.)

Under the terms of this statute it is clearly within the discretionary authority of the Secretary of the Interior to grant to the proper

³⁵ W. G. Rice, Jr., "The Position of the American Indian in the Law of the United States", 16 Jour. Comp. Leg. (3d Ser.), Part 1, pp. 78, 93 (1934).

authorities of an Indian tribe all powers of supervision and control over local employees which may now be exercised by the Secretary, *e. g.*, the power to specify the duties, within a general range set by the nature of the employment, which the employee is to perform, the power to prescribe standards for appointment, promotion, and continuance in office, the power to compel reports, from time to time, of work accomplished or begun.

It will be noted that the statute in question is not restricted to the cases in which a Federal employee is paid out of tribal funds. Senators are responsible to their constituents regardless of the source of their salaries, and heretofore most Indian Service employees have been responsible only to the Federal Government, though their salaries might be paid from the funds of the tribe.

In directing the employment of Indian Service employees, an Indian tribe may impose upon such employees the duty of enforcing the laws and ordinances of the tribe, and the authority of Federal employees so acting has been repeatedly confirmed by the courts. See *Morris v. Hitchcock* (194 U. S. 384); *Buster v. Wright* (135 Fed. 947, app. dismissed 203 U. S. 599); *Mawey v. Wright* (3 Ind. T. 243, 54 S. W. 807, *aff'd* 105 Fed. 1003); *Zevely v. Weimer* (5 Ind. T. 646, 82 S. W. 941); 23 Ops. Atty. Gen. 528.

The section in question has not, apparently, been extensively used by the Interior Department, and that Department, under a previous administration, has recommended its repeal. Congress has not seen fit, however, to repeal the statute, and the recommendation of a previous Secretary of the Interior has no particular weight in construing the meaning of the statute.

CONCLUSIONS

I conclude that under Section 16 of the Wheeler-Howard Act (48 Stat. 984) the "powers vested in any Indian tribe or tribal council by existing law", are those powers of local self-government which have never been terminated by law or waived by treaty, and that chief among these powers are the following:

1. The power to adopt a form of government, to create various offices and to prescribe the duties thereof, to provide for the manner of election and removal of tribal officers, to prescribe the procedure of the tribal council and subordinate committees or councils, to provide for the salaries or expenses of tribal officers and other expenses of public business, and, in general, to prescribe the forms through which the will of the tribe is to be executed.

2. To define the conditions of membership within the tribe, to prescribe rules for adoption, to classify the members of the tribe, and to grant or withhold the right of suffrage in all matters save those

as to which voting qualifications are specifically defined by the Wheeler-Howard Act (that is, the referendum on the act, and votes on acceptance, modification, or revocation of constitution, bylaws, or charter), and to make all other necessary rules and regulations governing the membership of the tribe so far as may be consistent with existing acts of Congress governing the enrollment and property rights of members.

3. To regulate the domestic relations of its members by prescribing rules and regulations concerning marriage, divorce, legitimacy, adoption, the care of dependents, and the punishment of offenses against the marriage relationship, to appoint guardians for minors and mental incompetents, and to issue marriage licenses and decrees of divorce, adopting such State laws as seem advisable or establishing separate tribal laws.

4. To prescribe rules of inheritance with respect to all personal property and all interests in real property other than regular allotments of land.

5. To levy dues, fees, or taxes upon the members of the tribe and upon nonmembers residing or doing any business of any sort within the reservation, so far as may be consistent with the power of the Commissioner of Indian Affairs over licensed traders.

6. To remove or to exclude from the limits of the reservation nonmembers of the tribe, excepting authorized Government officials and other persons now occupying reservation lands under lawful authority, and to prescribe appropriate rules and regulations governing such removal and exclusion, and governing the conditions under which nonmembers of the tribe may come upon tribal land or have dealings with tribal members, providing such acts are consistent with Federal laws governing trade with the Indian tribes.

7. To regulate the use and disposition of all property within the jurisdiction of the tribe and to make public expenditures for the benefit of the tribe out of tribal funds where legal title to such funds lies in the tribe.

8. To administer justice with respect to all disputes and offenses of or among the members of the tribe, other than the ten major crimes reserved to the Federal courts.

9. To prescribe the duties and to regulate the conduct of Federal employees; but only insofar as such powers of supervision may be expressly delegated by the Interior Department.

It must be noted that these conclusions are advanced on the basis of general legislation and judicial decisions of general import and are subject to modification with respect to particular tribes in the light of particular powers granted, or particular restrictions imposed, by special treaties or by special legislation. With this qualification the conclusions advanced are intended to apply to all Indian tribes

recognized now or hereafter by the legislative or the executive branch of the Federal Government.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

**SUSPENSION OF ANNUAL PAYMENTS OF RENTAL UNDER COAL,
OIL, AND GAS LEASES—ACT OF FEBRUARY 9, 1933, AMENDING
ACT OF FEBRUARY 25, 1920**

REGULATIONS

[Circular No. 1341, amending Circular No. 1294]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 14, 1934.

REGISTERS, UNITED STATES LAND OFFICES;
OIL AND GAS SUPERVISORS, GEOLOGICAL SURVEY:

The instructions approved March 3, 1933 (General Land Office Circular No. 1294, 54 I. D. 181), are hereby amended to read as follows:

By the act of February 9, 1933 (47 Stat. 798), the leasing act of February 25, 1920 (41 Stat. 437), is further amended by adding thereto the following section:

“Sec. 39. In the event the Secretary of the Interior, in the interest of conservation, shall direct or shall assent to the suspension of operations and production of coal, oil, and/or gas under any lease granted under the terms of this Act, any payment of acreage rental prescribed by such lease likewise shall be suspended during such period of suspension of operations and production; and the term of such lease shall be extended by adding any such suspension period thereto: *Provided*, That nothing in this Act shall be construed as affecting existing leases within the borders of the naval petroleum reserves and naval oil-shale reserves.”

The provisions of the act apply to oil and gas and coal leases where, in the interest of conservation, suspensions of operations and production have been or may be directed or assented to by the Secretary of the Interior whether the form of suspension is by order of the Secretary of the Interior, by reason of a restricted drilling clause inserted in the lease, or by the granting of such relief upon application by the lessee.

No payment of rentals under oil or gas leases so suspended is required to be made during the periods of suspension of operations and production, beginning with the first day of the lease-month¹ following the date of filing in the office of the oil and gas supervisor of written application for drilling relief or for drilling and producing relief, or after the date of the act when suspension was then in effect, and ending with the first day of the lease-month in which relief is terminated at the direction of the Secretary of the Interior or by notice from the oil and gas supervisor. In any case where rental has been paid in advance for the period or part of the period of the suspension, the amount applicable to such period subsequent to the date of the approval of these regulations will be credited on the next rental or royalty payment chargeable under the lease. If rental has not been paid in advance by reason of prior suspension of payments therefor, rental for the remainder of the lease-year will be due and payable within 60 days after the effective date of the termination of drilling and/or producing relief.

The drilling and producing requirements of oil and gas leases are separate and distinct requirements, and relief from either or both requirements may be granted after receipt of appropriate application. Relief from the drilling requirements of a lease which has no wells capable of producing oil or gas grants concurrent relief from the producing requirements of that lease. Suspension of payment of acreage rental will be effective in case there is approved drilling and producing relief or approved drilling relief with no wells on the lease capable of producing.

The term of any oil and gas lease shall be extended by adding thereto any period of suspension of operations and production, subsequent to February 9, 1933, assented to or directed by the Secretary of the Interior in the interest of conservation.

Since the suspension of operations and production under a lease extends the term of the lease and suspends payment of rental, the granting of such suspension is a change in the provisions of the lease, and an applicant for such suspension will be required to furnish the assent of the surety on the lease bond to the suspension; and if the privilege of paying compensatory royalty in lieu of conforming to drilling or producing requirements is also desired, the consent of the surety thereto must be filed.

¹ The term "lease-month" as herein used means any one of the successive calendar periods of 28 to 31 days beginning with the effective date of a lease; e.g., for a lease dated the 7th of a calendar month, the lease-month extends from the 7th of any calendar month to and including the 6th of the next succeeding calendar month. A lease-month that ends commonly with the 29th, 30th, or 31st of a calendar-month is construed to end with the last day of any calendar month which does not contain its regular termination date.

Relief from payment of rentals under suspended leases will not be affected by the payment of the lessee of compensatory royalty in lieu of drilling and production.

When oil and gas supervisors grant temporary relief or terminate relief from the drilling and/or producing requirements of a lease, notice of granting or terminating relief from payment of acreage rental will be made to the lessee by the Supervisor, and copies of such notices will be furnished to the General Land Office.

While the act does not relieve lessees from payment of rentals accrued prior to its date on leases theretofore suspended, such lessees who are now in default in the payment of past rentals accrued during suspension of operations and production under their leases will be allowed to defer payment of the amounts due until termination of the suspension periods or until otherwise directed by the Secretary.

A suspended preference right to lease the secondary or (b) acreage of the permit will no longer be granted to applicants for lease under section 14 of the Leasing Law. Those who have accepted such rights in lieu of leases with the restricted drilling provision authorized by the regulations will be given notice and allowed 60 days from receipt thereof to execute and file leases, such leases to contain the restricted drilling provision. Any such lease, if issued, will not require payment of annual rental thereon until drilling and producing under the lease are authorized. In case, after notice, the holder of such preference right to lease fails to complete the lease, no further right to lease the land will be recognized, and the permit will be cancelled.

The provisions of the act apply to coal leases when suspension of the requirements of section (2-i) of the leases is made in the interest of conservation. However, a coal lessee will not be excused from payment of annual rental if the required production under the lease is modified to a lesser amount than provided in the lease, or modified to require no production where the application for such modification is made subsequent to the expiration of the year for which the relief is requested.

These regulations shall be effective on and after the date of approval hereof.

ANTOINETTE FUNK,
Acting Commissioner, General Land Office.

W. C. MENDENHALL,
Director, Geological Survey.

Approved, November 14, 1934:

T. A. WALTERS,
First Assistant Secretary.

WITHDRAWAL OF PUBLIC LANDS IN CONNECTION WITH TAYLOR GRAZING ACT

Opinion, November 22, 1934

TAYLOR GRAZING ACT—EFFECT ON WITHDRAWALS UNDER ACT OF JUNE 25, 1910— CONCURRENT AUTHORITY.

No provision of the Taylor Grazing Act can be construed to repeal, supersede, or abridge any part of the withdrawal act of June 25, 1910, which act authorized the President to make temporary withdrawals of public lands for classification and other public purposes; and the Taylor Act does not purport to revoke that authority or any part of the earlier act, but, on the contrary, merely provides that under certain conditions a withdrawal shall be in effect without necessity for resort to the authority granted the President by said earlier act.

WITHDRAWAL OF PUBLIC LANDS—ACT OF JUNE 25, 1910—EFFECT OF LONG-CONTINUED ADMINISTRATIVE PRACTICE.

Since the passage of the withdrawal act of June 25, 1910, the Chief Executive and the Department of the Interior have consistently regarded the power granted therein as existing concurrently with all other authority providing for or regulating the use and disposition of public lands, and such long-continued administrative practice, acquiesced in by Congress, has the force of law.

TAYLOR GRAZING ACT—PRIOR WITHDRAWAL OF LANDS FOR CLASSIFICATION— AUTHORITY OF PRESIDENT—ACREAGE WITHDRAWN.

Since, by authority of section 1 of the withdrawal act of June 25, 1910, the President has the power of making temporary withdrawals for the purpose of classifying public lands, and since a classification is obviously necessary and proper to effectuate the purposes of the Taylor Grazing Act: *Held*, That the President may temporarily withdraw vacant and unappropriated public domain for that purpose, regardless of the aggregate acreage involved in the withdrawal.

MARGOLD, *Solicitor*:

You have requested me to advise you whether the remaining vacant, unappropriated, and unreserved public lands in a number of States may be withdrawn from entry or settlement for the purpose of classifying such lands for their proper and orderly use in order to effectuate the objectives of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269).

It is my opinion that section 1 of the withdrawal act of June 25, 1910 (36 Stat. 847), confers upon the President power to effect such withdrawal. That section provides—

That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including the District of Alaska, and reserve the same for water-power sites, irrigation, *classification of lands, or other public purposes to be specified in the orders of withdrawals*, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress. (*Italics supplied.*)

Under authority of this section, and upon the recommendation of the Secretary of the Interior, the President has heretofore made numerous withdrawals of public lands for classification. Classifications made pursuant to such withdrawals have been for a wide range of purposes and involved a grouping of lands by classes, depending upon various physical characteristics, the determination of which has been necessary to the administration of statutory enactments.

A question arises as to whether the Taylor Grazing Act abridges or abrogates the President's power of withdrawal under the Act of June 25, 1910.

It is an elementary principle of law that a statute will not repeal a prior one on the same subject unless the two are irreconcilable or unless there is an express or implied intent in the latter statute to repeal the former. Effect will be given to both statutes wherever possible (*United States v. Healy*, 160 U. S. 136, at 147). No provision of the Taylor Grazing Act can be construed to repeal or supersede any part of the withdrawal act. The latter act authorized the President of the United States to make temporary withdrawals of the public domain for classification and other public purposes. The Taylor Grazing Act does not purport to revoke that authority or any part thereof, but, on the contrary, merely provides that in a certain instance a withdrawal shall be in effect without necessity for resort to the authority granted the President by the earlier act.

This conclusion is supported by reference to the action of the President in withdrawing under the Act of 1910 all public land which might conceivably contain water-power sites needed for projects under the Federal Water Power Act of June 10, 1920 (41 Stat. 1063). This action was taken notwithstanding an express provision in Section 24 of the Water Power Act reserving land by operation of law upon the filing of an application to develop the power site. Closely analogous to this section of the Water Power Act is the provision of the Taylor Grazing Act that publication of notice of a proposed grazing district operates to withdraw the land from entry or settlement.

The President has heretofore exercised his general power of withdrawal as a means of aiding in the administration of other statutes which provide for disposition of parts of the public domain. After the passage of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437), more than nine million acres were withdrawn for the purpose of classification of potash lands, and approximately eight million acres were withdrawn for the purpose of classification of oil shale lands. Withdrawals for the purpose of classifying coal lands and for other purposes have also been made as a method of aiding in the administration of particular statutes concerning the disposition of the public domain. In other words, ever since the passage

of the withdrawal act, the Department of the Interior and the Chief Executive have consistently regarded the power granted therein as existing concurrently with all other authority providing for or regulating the use and disposition of public lands. Such long-continued administrative practice, acquiesced in by the Congress, has the force of law. *Alaska S. S. Co. v. United States* (290 U. S. 256, 262).

Examination of the provisions of the Taylor Grazing Act indicates clearly that a classification of public lands will be required for its proper administration. Four different methods of use and disposition of land are contemplated thereunder. In section 1, the Secretary of the Interior is authorized "to establish grazing districts * * * from any part of the public domain of the United States (exclusive of Alaska) * * * which, in his opinion, are chiefly valuable for grazing and raising forage crops." Under the provisions of section 8, "when public interests will be benefited thereby", lands owned by the United States may be exchanged with the States or private persons. By section 14, the Secretary of the Interior is given the power to sell isolated and disconnected tracts not exceeding 760 acres "which, in his judgment, it would be proper to expose for sale * * *." Section 13 confers upon him the power to lease lands "situated in such isolated or disconnected tracts of 640 acres or more as not to justify their inclusion in any grazing district * * *." From these provisions it is clear that the Secretary of the Interior will be unable to administer the Taylor Act without a classification of the lands coming within its purview, based on physical character, proper use, size, location, etc.

It is immaterial, in my opinion, that the Taylor Grazing Act limits the amount of public lands which may be placed in grazing districts to an aggregate area of 80 million acres. For one thing, the limitation does not extend to the other three methods of disposition under the act. For another, it would be clearly impossible to determine, in the absence of careful examination and detailed classification, which 80 million acres of the remaining unappropriated and unreserved public lands are chiefly valuable for grazing and raising forage crops.

Finally, it should be noted that the Department's brief experience in the administration of the Taylor Act has already demonstrated that the objects which Congress sought to achieve thereby will be defeated in many instances unless the public lands of a State can be placed in *statu quo* until the Secretary of the Interior has had an opportunity to determine their proper use and disposition.

Since the President has the power of making temporary withdrawals for the purpose of classifying public lands, and since a classification is obviously necessary and proper to effectuate the pur-

poses of the Taylor Grazing Act, it is my opinion that the President may temporarily withdraw vacant and unappropriated public domain for that purpose regardless of the aggregate acreage involved in the withdrawal.

Approved, November 22, 1934:

HAROLD L. ICKES,

Secretary of the Interior.

BEN S. MILLER

Decided November 22, 1934

COLOR OF TITLE AND PREFERENCE RIGHT—ACT OF DECEMBER 22, 1928.

In the administration of the public lands, the rule has been long settled that land held in good faith under claim of title was not subject to appropriation by others under the public-land laws while so occupied and claimed, and the Supreme Court has held that a claimant in this situation who has been misinformed or has misunderstood his rights and paid a valuable consideration for the land, may, in the discretion of the Department, have title withheld in the United States until, "within the limits of existing law or special Act of Congress", he may obtain title to the land which he holds under color of title.

WITHDRAWAL OF PUBLIC LANDS—COLOR OF TITLE RIGHT—"VALID EXISTING CLAIMS" CONSTRUED.

The exception of "valid existing claims" occurring in a withdrawal of public lands contemplates something less than a vested right, and in this view lands claimed, possessed, and improved under color of title long before and at the time of a withdrawal fall within the exception of "valid existing claims" and are not affected by the withdrawal.

ACT OF DECEMBER 22, 1928—SCOPE AND CONSTRUCTION.

The act of December 22, 1928, being a remedial act, a strict and literal construction of its provisions not in harmony with its spirit and purpose should be avoided. Accordingly, the removal of loose stone to render land more arable, the clearing of brush to render it tillable, the diversion of water from swampy land to render it reclaimable, and similar acts effecting improvement, may properly be held a compliance with the act's requirement that "valuable improvements have been placed on such land."

WALTERS, *First Assistant Secretary:*

Ben S. Miller has appealed from a decision of the Commissioner of the General Land Office dated September 23, 1932, which held his application to purchase lot 8, sec. 1, T. 20 N., R. 13 W., 4th P. M., Wisconsin, containing 33.58 acres, under the color of title act of December 22, 1928 (45 Stat. 1069), for rejection for lack of evidence "that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation" as the act requires, and for the further reason that applicant had not exhibited receipts from the tax collector showing taxes had been paid for the period of ownership claimed.

At the time appeal was transmitted to the Department, the application was in conflict with pending Swamp Land Selection G. L. O. 03891 of the State of Wisconsin. The selection of the State was rejected September 12, 1934, and the case closed. Thereafter B. H. Schlostein, attorney for applicant, was given opportunity to file brief and argument in support of his application, which he failed to do within the time allowed.

The tract applied for forms part of an island in the upper Mississippi River and is identified as lot 8 by the official plat of survey filed March 4, 1932. The application was filed July 16, 1932. As more fully set forth by the Commissioner, the island of which lot 8 forms a part had the status of public land April 25, 1925. It was included in an Executive withdrawal on August 7, 1925, made under the act of June 25, 1910 (36 Stat. 847), as amended August 24, 1912 (37 Stat. 497), and reserved for administration by the Department of Agriculture under the act to establish a refuge for wildlife and fish reserve, enacted June 7, 1924 (43 Stat. 650). The withdrawal of August 7, 1925, excepted valid existing claims from its operation. The areas in section 1 aforesaid are not included in the withdrawal of October 2, 1926, for the Upper Mississippi River Wildlife and Fish Reserve.

The applicant alleges in support of his application that he—

purchased an undivided three-quarter interest in said land from the heirs of his mother, Carolina Miller, by warranty deed under date of November 25, 1921, as shown in Entry No. 53 in the abstract of title attached hereto; that he inherited the remaining one-quarter interest from his mother Carolina Miller, who in turn had purchased said land from one Michael Damm and his wife Anna, by warranty deed under date of December 8, 1905, as shown by Entry No. 44 in the abstract of title attached hereto; that during the entire time since said applicant purchased said land and during the time that his mother owned it before him, he has used it and improved it with the purpose of improving the amount and the quality of the timber thereon; that in order to accomplish this he has spent a great amount of time and labor in cutting out and removing all underbrush on said lands; that he has cut out and removed all dead wood and has trimmed all the trees so as to insure a more vigorous and hearty growth; that he has removed trees and brush only for the purpose of thinning out the remaining trees and producing a better quality and grade of timber; that applicant has at times purchased wood for his own use from outside parties in order to conserve the wood for timber on said land and allow it to develop; that as a result of the time and labor spent by applicant in so doing, the land is at present covered with a large amount of timber of very good grade and quality.

Further allegations are made of open, uninterrupted, and exclusive possession by the applicant and his predecessors in title since 1905, and that the taxes have been paid at all times to date, except for 1927 and 1928, during which time agents of the Government had possession claiming the land as a part of the Upper Mississippi Wild-

life and Game Refuge. The allegations of title are supported by an abstract, which appears to show that title is derived from a patent from the State issued in 1857, and which includes a certificate of the county clerk of Buffalo County, Wisconsin, stating that his tax books show that there are no taxes due and unpaid, except for 1927 and 1928.

The act of December 22, 1928 (45 Stat. 1069), was subsequent to the withdrawal of April 25, 1925, and prior to that act there was no provision of law authorizing the patenting of public land generally to those holding possession thereof under claim and color of title, accompanied by tangible evidence of improvement or cultivation. The rule, however, long before then had been settled that land held in good faith under claim of title was not subject to appropriation by others under the public-land laws while so occupied and claimed, and the Supreme Court has held that a claimant in this situation who has been misinformed or has misunderstood his rights and paid valuable consideration therefor, may, in the discretion of the Department, have the title withheld in the United States until "within the limits of existing law or special Act of Congress" he may obtain title to the land which he holds under color of title. See *Williams v. United States* (138 U. S. 514, 524); *Northern Pacific Railway Co. v. McComas* (250 U. S. 387, 393). And the Department has considered such claimants as having a preferred right to initiate and perfect title to the land. *A. R. Bowdre et al.* (50 L. D. 486, 489). It has also been held that the exception of "valid existing claims" occurring in a withdrawal means something less than a vested right. *Stockley v. United States* (260 U. S. 532, 544). It is believed that lands claimed, possessed, and improved under color of title long before and at the time of the withdrawal of April 25, 1925, fall within the exception of "valid existing claims" and are not affected by the withdrawal. In so holding, it would not seem that any public interest would be injuriously affected, inasmuch as the land was not included in the later withdrawal for a wildlife and fish refuge.

The Commissioner took the view that—

The improvement of the timber already on the land, or labor and capital expended in its improvement, cannot be considered as placing valuable improvements upon the land or as cultivation of the same within the meaning of the act above mentioned.

It is thought that the Commissioner places a too strict and literal construction upon a remedial act, and one not in harmony with its spirit and purpose. Evidently land can be improved and its value enhanced by taking things off of it which impair its value and interfere with its use as well as by placing things upon it to improve it. Under the rule that the Commissioner sets up, it would seem that

the removal of loose stone to render land more arable, the clearing of brush to render it tillable, the diversion of water from swampy land to render it reclaimable, the removal of unsightly or obnoxious structures would not be placing improvements on the land within the meaning of the act. The clearing of underbrush, dead trees, the trimming and thinning of trees is well recognized as good and necessary forest practice to promote the growth of timber and to lessen the hazards of fire. It is believed that the applicant has shown that he and his grantors have placed improvements on the land during the required period within the meaning of the act.

The production of receipted tax bills showing payment thereof by the applicant or his predecessors in interest would constitute corroborative evidence of the fact alleged and supported by the abstract that it is the applicant who claims the land under color of title, but such evidence would seem to be merely cumulative where no doubts arise as to his claim and no one appears to dispute it. If there are adverse claimants, they have their opportunity to assert their claim during the period of publication. The payment of taxes is not a condition precedent to the exercise of the right to purchase. Such taxes are void, being levied on land the equitable title to which remained in the United States. *A. R. Bowdre, supra.*

In accordance with these views, the Commissioner's decision is
Reversed.

OFFERINGS OF LAND AT PUBLIC SALE—SEC. 2455, REVISED STATUTES, AS AMENDED

[Circular No. 684]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 23, 1934.

REGISTERS, UNITED STATES LAND OFFICES:

The sale of isolated tracts of unreserved public land and tracts not isolated, but which are mountainous or too rough for cultivation, is authorized by section 2455 of the Revised Statutes (section 1171, title 43, United States Code), as amended by the acts of June 27, 1906 (34 Stat. 517), March 28, 1912 (37 Stat. 77), March 9, 1928 (45 Stat. 253), and June 28, 1934 (Public, No. 482).

The present instructions constitute a revision of those of February 9, 1934.

Section 14 of the Act of June 28, 1934 (48 Stat. 1274), amended section 2455, Revised Statutes, as amended, to read as follows:

SEC. 2455. Notwithstanding the provisions of section 2357 of the Revised Statutes (U. S. C., title 43, sec. 678) and of the act of August 30, 1890 (26 Stat.

391), it shall be lawful for the Secretary of the Interior to order into market and sell at public auction, at the land office of the district in which the land is situated, for not less than the appraised value, any isolated or disconnected tract or parcel of the public domain not exceeding seven hundred and sixty acres which, in his judgment, it would be proper to expose for sale after at least thirty days' notice by the land office of the district in which such land may be situated: *Provided*, That for a period of not less than thirty days after the highest bid has been received, any owner or owners of contiguous land shall have a preference right to buy the offered lands at such highest bid price; and where two or more persons apply to exercise such preference right the Secretary of the Interior is authorized to make an equitable division of the land among such applicants, but in no case shall the adjacent land owner or owners be required to pay more than three times the appraised value: *Provided further*, That any legal subdivisions of the public land, not exceeding one hundred and sixty acres, the greater part of which is mountainous or too rough for cultivation, may, in the discretion of the said Secretary, be ordered into the market and sold pursuant to this section upon the application of any person who owns land or holds a valid entry of lands adjoining such tract, regardless of the fact that such tract may not be isolated or disconnected within the meaning of this section: *Provided further*, That this section shall not defeat any valid right which has already attached under any pending entry or location. The word "person" in this section shall be deemed to include corporations, partnerships, and associations.

GENERAL REGULATIONS

1. Applications to have isolated tracts ordered into market must be filed, in duplicate, with the register of the land office for the district wherein the lands are situated, except in the States of Alabama, Arkansas, Florida, Kansas, Louisiana, Illinois, Indiana, Iowa, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Ohio, Oklahoma, and Wisconsin. These States have no district land office, and applications for land therein should be forwarded to the Commissioner of the General Land Office, Washington, D. C.

2. Applicants must show by their affidavits, corroborated by at least two witnesses, that the land contains no salines, coal, or other minerals; the amount, kind, and value of timber or stone thereon, if any; whether the land is occupied, and, if so, the nature of the occupancy; for what purpose the land is chiefly valuable; why it is desired that same be sold; that applicant desires to purchase the land for his own individual use; and that he is a citizen of the United States or has declared his intention to become such. Also a duly corroborated affidavit showing that no hot or medicinal or other spring or water hole exists, if it be a fact, upon any legal subdivision of the land applied for; or if there be any spring or water hole, the affidavit should state the exact location and size thereof, together with an estimate of the quantity of water in gallons which it is capable of producing daily.

3. The affidavits of applicants to have isolated tracts ordered into market and of their corroborating witnesses may be executed before any officer having a seal and authorized to administer oaths in the county or land district in which the tracts described in the applications are situated. Affidavits relating to lands in those States having no district land office may be executed anywhere within the State.

4. The officer before whom such affidavits are executed will cause each applicant and his witnesses to fully answer the questions contained in the accompanying form and, after the answers to the questions therein contained have been reduced to writing, to sign and swear to same before him.

5. The register will, on receipt of applications, note same upon the tract books of his office, and if the applications are not properly executed or not corroborated, he will reject the same, subject to the right of appeal. Applications found to be properly executed and corroborated will be disposed of as follows:

(a) If the applicant does not show himself qualified, or if the tract appears not to be subject to disposition, the register will reject the application, subject to the usual right of appeal; if part of the tract is appropriated, he will reject the application as to that part, and, in the absence of an appeal, after the usual notice, he will eliminate the description thereof from the application and take further action as though it had never been included therein. Where an appeal is filed, the Commissioner of the General Land Office, if he decides to order into market a part, or all, of the lands, will call upon the register and the special agent in charge for the reports as hereinafter provided for concerning the value of the land. Adverse action by the Commissioner will be subject to appeal to the Secretary of the Interior.

(b) If the status of the lands is such that a sale might properly be ordered, the register, after noting the application on his records, will promptly forward the original to the special agent in charge for report as to the value of the land and any objection he may wish to interpose to the sale, and the register will make proper notations on his schedule of serial numbers in the event the application is not returned in time to be forwarded with the current returns. The duplicate will be forwarded to the director in charge of grazing for report as to whether the lands are appropriate for inclusion in a grazing district as authorized by the act of June 28, 1934. Upon receipt of the application from the special agent in charge, with his report thereon, and report from the director in charge of grazing, the register will attach his report as to the status of the land, the value of the land applied for, if he has any knowledge concerning the same, and any objection to the sale known to him, and forward the papers to the General Land Office with the current returns.

6. The filing of an application under the section in conformity with these regulations will segregate the lands applied for from other disposition under the public land laws, subject to any prior valid right which had attached under any pending entry or location.

7. Upon receipt of letter authorizing the sale, the register will prepare a notice for publication describing the land, and fixing a date for the sale, which date must be far enough in advance to afford ample time for publication of the notice and for the affidavit of the publisher to be filed in the district land office prior to the date of the sale. The notice will be sent to the applicant with instructions that he must publish the same at his expense in the designated newspaper. Payment for publication must be made by applicant directly to the publisher, and in case the money for publication is transmitted to the register he must issue receipt therefor and immediately return the money to the applicant by his official check, with instructions to arrange for the publication of the notice as hereinbefore provided.

If evidence of publication is not filed at or before the time set for the offering, the register will close the case on his records, and will report the default to the General Land Office, which will, without letter, close the case on its records.

8. Notice must be published for 30 days preceding the date set for the sale, and a sufficient time should elapse between the date of last publication and the date of sale to enable the affidavit of the publisher to be filed in the district land office. The notice must be published in the designated newspaper. If this be a daily paper, the notice should be published in the Wednesday issue for 5 consecutive weeks; if weekly, in 5 consecutive issues, and if semi-weekly, in either issue for 5 consecutive weeks. The register will cause a similar notice to be posted in his office, such notice to remain posted during the entire period of publication. The applicant must file in the local office, prior to the date fixed for the sale, evidence that publication has been had for the required period, which evidence may consist of the affidavit of the publisher, accompanied by a copy of the notice published.

9. At the time and place fixed for the sale the register will read the notice of sale and allow all qualified persons an opportunity to bid. Bids may be made through an agent personally present at the sale, as well as by the bidder in person. The register conducting the sale will keep a record showing the names of the bidders and the amount bid by each. Such record will be transmitted to this office with the other papers in the case.

10. When all persons present shall have ceased bidding the register will, in the usual manner, declare the bidding closed, announcing the name of the highest bidder and the amount of his bid; the

highest bid will be noted on the records and the offerer thereof (or his principal) will be declared the highest bidder, provided he immediately pays to the register the amount of the bid. In the absence of such payment the register will at once proceed with the sale, excluding the bid made by the highest bidder and starting with the highest bid not withdrawn.

11. Within 10 days after he has been declared the purchaser he must furnish evidence that he is a citizen of the United States or has declared his intention to become such; also a nonmineral affidavit or (in States where that is sufficient) a nonsaline affidavit.

12. Where the offering results in a sale, the register will issue cash papers as in ordinary cash entries, noting thereon the date of the letter authorizing the offering, and report the same in his current returns. With the papers must also be forwarded the affidavit of the publisher showing publication and the register's certificate as to posting of the notice for publication.

13. There is no limitation as to the minimum price to be fixed by appraisal and in view thereof the appraisal must be based upon field examination. No lands will be sold at less than the price fixed by the appraisal and such minimum price will be set by the letter ordering the sale, based upon the report of the special agent in charge. Should any of the lands offered be not sold, the same will not be regarded as subject to private entry unless located in the State of Missouri (act of March 2, 1889, 25 Stat. 854), but may again be offered for sale in the manner herein provided. The price fixed by the appraisal will be effective for three years from the date of the report of the special agent in charge.

UNDER THE BODY OF THE SECTION

14. No tract exceeding approximately 760 acres in area will be ordered into the market. An application may include several contiguous tracts provided their aggregate area does not exceed 760 acres. Each tract will be offered separately and certificates will be issued under different numbers unless they are bought by the same person.

15. No tract of land will be ordered into the market unless, at the time application is filed, said tract is vacant, unreserved, and surrounded by lands which have been entered.

16. Where lands have been authorized to be sold under the body of the section and the highest bidder has been named, if the amount of his bid is paid immediately to the register, he will then declare the bidding closed subject to the preference right of purchase by owners of contiguous land. The amount tendered will be held in the unearned account of the register, and the register will notify the

bidder that if within thirty days from the date of his bid no owner or owners of contiguous lands shall apply to purchase the lands at such highest bid price, but at not more than three times the appraised price if such highest bid be more than three times such appraised price, he will be declared the purchaser.

17. If on date of offering no bids are received, you will close the case on your records and report to the General Land Office.

REGULATIONS UNDER FIRST PROVISIO TO SECTION 14

18. The first proviso to section 14 confers a preference right for a period of thirty days after the highest bid has been received, upon any owner or owners of contiguous lands to purchase the lands offered for sale under the body of the section at the highest bid price or at three times the appraised price if three times such appraised price is less than the highest bid price. With assertion of a preference right, each claimant must accompany his application with payment of the purchase price of the land. Where there is a conflict between two or more persons claiming such preference right of purchase, you will notify them that they will be allowed thirty days from receipt of notice within which to agree among themselves upon a division of the tracts in conflict by subdivisions, and that an equitable division will be made by this office in the absence of an agreement. In such cases, unless an amicable adjustment is made, you will forward the applications of all preference-right claimants to this office with report and recommendation for consideration, making on your schedules the necessary notations as to the method of transmittal. This office will thereupon make an equitable division of the different subdivisions among the applicants so as to equalize as nearly as possible the tracts the applicants should be allowed to purchase. An appeal will be allowed from the action of this office. Where there is but one subdivision adjoining lands of two or more applicants exercising the preference right of purchase, the subdivision will be awarded to that qualified person who first files application therefor with an assertion of such right within the thirty-day preference-right period.

19. The preference right granted by the first proviso of said act is limited to owners of contiguous lands. Applications for such preference right must be supported by proof of the applicant's ownership of the whole title of the contiguous lands; that is, he must show by affidavit that he has the title in fee. If a preference right is asserted, or if conflicting preference rights are asserted, and there is an amicable agreement between the parties, and all other necessary evidence and money have been tendered by the respective parties, the register

will make the award, at the same time returning the amount on deposit to the credit of the highest bidder with notice that the land has been sold to the preference-right claimant. In no event can the land be sold until the end of the thirty days preference-right period.

(a) If, at the end of the thirty days preference-right period, no assertion of preference right is made, the sale will be declared closed and the highest bidder declared the purchaser.

REGULATIONS UNDER SECOND PROVISO TO SECTION 14

20. The second proviso to section 14 authorizes the sale of legal subdivisions not exceeding one quarter section, the greater part of which is mountainous or too rough for cultivation, upon the application of any person who owns or holds a valid entry of lands adjoining such tract and regardless of the fact that such tract may not be actually isolated by the entry or other disposition of surrounding lands. Applications will be disposed of by you in accordance with the "General Regulations." Applications may be made upon the form provided (4-008b) properly modified as necessitated by the terms of the proviso. In addition the applicant or applicants must furnish proof in his or their affidavit of his or their ownership of the whole title to adjoining land, or that he holds a valid entry embracing adjoining land, in connection with which entry he has met the requirements of the law; also detailed evidence as to the character of the land applied for, the extent to which it is cultivable, and the conditions which render the greater portion unfit for cultivation; also a description of any and all lands theretofore applied for under the second proviso or purchased under Section 2455 or the amendments thereto. This evidence must consist of an affidavit by the claimant, corroborated by the affidavits of not less than two disinterested persons having actual knowledge of the facts.

No person will be allowed more than one application under this proviso, 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 this proviso be permitted to secure the offering under said second 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 this proviso will not disqualify the purchaser as an applicant for the offering of tracts actually isolated, nor will the purchase of isolated tracts disqualify the purchaser from becoming an applicant for offering under the second proviso.

In acting on applications for offering under the second proviso, regard will be had to the character of each subdivision applied for, as reported by the special agent in charge and the director in charge of grazing, and offering of an entire tract will not be had upon the ground that the greater part is of the character contemplated thereby, if taken as a whole.

21. In the notices for publication and posting, where sale is authorized under this proviso, you will add after the description of the land, "This tract is ordered into the market on a showing that the greater portion thereof is mountainous or too rough for cultivation."

22. Where lands have been authorized sold under this proviso and the highest bidder named, if the amount of his bid is paid immediately to the register he will then declare such bidder the purchaser of the tract.

23. If on the date of offering no bids are received, the case should immediately be closed on your records and report made to the General Land Office.

ISOLATED TRACTS OF COAL LAND

24. The act of Congress approved April 30, 1912 (37 Stat. 105), provides:

That * * * unreserved public lands of the United States, exclusive of Alaska, which have been withdrawn or classified as coal lands, or are valuable for coal, shall * * * be subject * * * to disposition * * * under the laws providing for the sale of isolated or disconnected tracts of public lands, but there shall be a reservation to the United States of the coal in all such lands so * * * sold, and of the right to prospect for, mine, and remove the same in accordance with the provisions of the act of June 22, 1910, and such lands shall be subject to all the conditions and limitations of said act.

An application to have coal land offered at public sale must bear on its face the notation:

Application made in accordance with and subject to the provisions and reservations of the act of June 22, 1910 (36 Stat. 583).

Where such an application does not bear this notation you will afford applicant an opportunity to consent thereto and will reject the application if this requirement be not complied with.

In the printed and posted notice of sale will appear the statement:

This land will be sold in accordance with, and subject to, the provisions and reservations of the act of June 22, 1910 (36 Stat. 583).

The purchaser's consent to the reservation of the coal in the land to the United States will not be required, but the cash certificate and patent will contain respectively the provisions specified in paragraph 7 (b) of the circular of September 8, 1910.

TRACTS CONTAINING PHOSPHATE, ETC.

25. The act of Congress approved July 17, 1914 (38 Stat. 509), provides:

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

The act of Congress approved March 4, 1933 (47 Stat. 1570), provides:

That lands withdrawn, classified, or reported as valuable for sodium and/or sulphur and subject to prospecting, leasing, or development under the General Leasing Act of February 25, 1920, or acts amendatory thereof or supplementary thereto, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available in the form and manner and subject to the reservations, provisions, limitations, and conditions of the act of Congress approved July 17, 1914 (38 Stat. L. 509; U. S. C., title 30, sec. 123); * * *.

The sulphur lands are limited to the States of Louisiana and New Mexico pursuant to the act of July 16, 1932 (47 Stat. 761).

An application for offering of the lands referred to in said act must bear on its face the notation:

Application made in accordance with and subject to the provisions and reservations of the act of July 17, 1914 (38 Stat. 509).

If an application for such mineral land does not bear that notation, you will afford the applicant opportunity to consent thereto, and if he fails to do so, you will reject the application.

In the printed and posted notice of sale will appear the statement:

This land will be sold in accordance with and subject to the provisions and reservations of the act of July 17, 1914 (38 Stat. 509).

If the land should be sodium and/or sulphur, in character, the statement should also contain a reference to the act or acts appropriate thereto.

The purchaser's consent to the reservation of the minerals in the land to the United States will not be required, but the cash certificate and patent will contain, respectively, the provisions specified in paragraph 6 of the circular of March 20, 1915 (44 L. D. 32, 34) modified to refer to either or both of the acts of July 16, 1932, and March 4, 1933, when appropriate.

26. All applications for the sale of public lands under these regulations must be rejected where it appears at the time of filing that the land applied for is within the limits of a producing oil or gas

field, or included in an oil or gas or other mineral lease, in accordance with Circular No. 1303 of June 13, 1933 (54 I. D. 227).

In connection with all applications under these regulations for public lands embraced in an application for prospecting permit or lease, or in a prospecting permit granted, for any mineral subject to lease, you will proceed in accordance with instructions contained in Circular No. 1021 of July 21, 1925 (51 L. D. 167), as amended by Circular No. 1031 of September 17, 1925 (51 L. D. 202). If all requirements shall have been satisfactorily complied with, you will proceed thereon in accordance with these regulations.

In the printed and posted notice will appear the statement that the land will be sold in accordance with, and subject to, the provisions and reservations of the particular act which reserves to the United States the mineral contents in the land, and subject to the right of the prior claimant for the mineral contents in the land.

THIRD PROVISIO TO SECTION 14

27. No application under section 14 will defeat a valid right which attached prior to the filing thereof under any pending entry or location.

28. Wherever the word "applicant" or "purchaser" appears in the foregoing regulations, it may mean an individual, a partnership, an association, or a corporation.

ANTOINETTE FUNK,
Acting Commissioner.

Approved, November 23, 1934:

T. A. WALTERS,
First Assistant Secretary.

GEORGE W. BOLIEU

Decided November 28, 1934

WITHDRAWAL—TIME OF TAKING EFFECT—EXCEPTION—EVIDENCE.

Under the general rule of law, a statute is in force and operation during the entire day of its approval, subject to the exception that any person having a substantial right that may be affected thereby may prove that a claim filed on that day was actually initiated before the exact time of approval of the act.

WITHDRAWAL—ORDER OF THE PRESIDENT—FORCE AND EFFECT.

An order of withdrawal executed by the President under authority granted by Congress has the force and effect of law, and the rules of presumption as applied to statutes have like application to Executive orders and regulations. Accordingly, in the absence of definite proof as to the exact time when an order of withdrawal of public land was signed by the President,

it must be held that such order operated upon the status of the land affected during the entire day of the date of its issuance.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *Ralph T. Richards* (52 L. D. 336) cited and applied.

WALTERS, *First Assistant Secretary*:

On September 8, 1933, George W. Bolieu filed stock-raising homestead application, Las Cruces 048379, for the N $\frac{1}{2}$ N $\frac{1}{2}$ Sec. 29, N $\frac{1}{2}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 28, SE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 30, W $\frac{1}{2}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 33, T. 19 S., R. 8 W., N. M. P. M., New Mexico. It was allowed as an entry on October 9, 1933.

On April 20, 1934, the State of New Mexico protested the allowance of the entry, calling attention to the fact that by Executive Order No. 6276 the lands involved had been withdrawn on September 8, 1933, for the purpose of aiding the State in making exchange selections as provided by the act of June 20, 1910, as amended by the act of June 15, 1926 (44 Stat. 747). Whereupon, the Commissioner of the General Land Office, by decision of April 24, 1934, held the entry for cancelation.

Bolieu has appealed, contending that his application was sent to the Las Cruces office by mail and was received on September 8, 1933, at 9 o'clock, while the Executive order was in all probability signed later in the day.

The question is therefore presented as to the exact time of taking effect of the order of withdrawal, and whether the land was subject to selection at the time the application was received in the local land office.

In the case of *Ralph T. Richards* (52 L. D. 336), the Department held:

Under the general rule applicable to such a case, the act was in force and operation during the entire day, subject to the privilege of any person having a substantial right that may be affected by the general rule to prove if he can that his location was made before the exact time the act was approved on that day. Citing *United States v. Stoddard et al.* (89 Fed. 699).

Departmental regulations (47 L. D. 437, 472) governing the administration of the act of February 25, 1920, provide:

Under the general rule of law applicable to such cases, the act of February 25, 1920, was in force and operation during the entire day, subject, however, to the privilege of any person having a substantial right which would be affected by the application of the general rule to prove, if he can, the exact time of approval.

An order of withdrawal executed by the President under authority granted by Congress has the force and effect of law. Therefore, the rule of presumption as applied to statutes would have the same application to Executive orders and regulations.

Inquiry has been made at the White House in an effort to ascertain the exact time of signature of the order of withdrawal, but no record of the hour in which the President signs Executive orders is kept. In this connection, it may be pointed out that the difference in standard time between Washington, D. C., and Las Cruces, would have given the President until eleven o'clock to affix his signature, which is two hours prior to the time Bolieu's application was received.

In view of the foregoing, and in the absence of definite proof as to the exact time when the order was signed, it must be held that the order of withdrawal operated upon the status of the land affected during the entire day of the date of its issuance.

Therefore, the entry must be canceled unless the entryman, in view of his alleged equities, can prevail upon the State to withdraw its protest. He alleges that he settled upon the land in good faith on January 12, 1934, and has maintained a residence there ever since; that he has planted fruit trees; fenced two acres of garden ground, and has made other improvements.

Upon the present record the Commissioner's decision must be and is hereby

Affirmed.

THOMAS M. DOLAN

Decided November 28, 1934

HOMESTEAD APPLICATION—CONTEST—CANCELATION FEE.

The requirement in section 2 of the act of May 14, 1880, that the successful contestant of an entry must pay the cancellation fee of \$1 as a condition to making entry of the land so contested is not abrogated by reason of the fact that he does not exercise the preference right of entry granted by the act within the allowed period of 30 days from notice, but applies to make entry after such period has terminated.

WALTERS, First Assistant Secretary:

On January 18, 1934, Thomas M. Dolan filed a stock-raising homestead application for lots 1 and 2, N $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 29, T. 20 N., R. 6 E., M. D. M., California. He alleged:

That there are two mining locations conflicting with this land, but whenever application for patent is made for them I shall relinquish that part of them in conflict with this entry application; the names of the locations are Buck Horn and the Saint Francis.

The register suspended the application for the payment of a cancellation fee of \$1 in connection with contest No. 2280, and the applicant appealed, stating that he had filed a contest against a former homestead entry for the land and that said entry was canceled as a result of his contest; that he did not apply for the land for many

months after receiving notice of cancelation; and that as he had not exercised his preference right he could not be required to pay any cancelation fee.

By decision of July 25, 1934, the Commissioner of the General Land Office held the application for rejection, subject to the right of the applicant to comply with certain requirements within 30 days from notice, to wit, pay the cancelation fee of \$1 and furnish a specified showing as to the mineral character of the lands covered by the Buck Horn and Saint Francis mining claims.

The applicant appealed, specifying alleged error only as to the requirement that the cancelation fee be paid. He made no reference to the requirement of evidence with respect to the conflicting mining claims, but requested that his application be allowed.

The records show that this applicant contested a former homestead entry for this land and secured its cancelation; that on March 16, 1932, he received notice of the cancelation of the contested entry and of his preference right resulting therefrom, which notice was sent by registered mail from the local land office.

Section 2 of the Act of May 14, 1880 (21 Stat. 140), provided as follows:

In all cases where any person has contested, paid the land-office fees, and procured the cancellation of any preemption, homestead, or timber-culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands: *Provided*, That said register shall be entitled to a fee of one dollar for the giving of such notice, to be paid by the contestant and not to be reported.

It was held under that act that such cancelation fees belonged to the register as his own private property and that the title thereto was never in the United States. See 44 Ct. Cls. 604; Comp. Dec., vol. 17, p. 270.

This condition was changed by the Act of March 4, 1911, 36 Stat. 1351, section 2 of which reads as follows:

That hereafter all money or fees received or collected by registers of United States land offices for issuing notices of cancellation of entries shall be reported and accounted for by such registers in the same manner as other fees or moneys received or collected.

By this act such fees are moneys accruing to the United States, and are to be accounted for as such.

Rule 100 of the Rules of Practice governing contests (51 L. D. 563) provides:

When preference right of entry is awarded under section 2 of the act of May 14, 1880 (21 Stat. 140), the register will, after service of notice of such right upon contestant and the expiration of the 30 days allowed for exercise thereof, transmit to the Commissioner of the General Land Office by special letter the evidence of service for filing with the canceled entry record. A fee

of \$1 for giving such notice must be tendered to the register of the district land office before any application for the land will be approved.

The fee was clearly earned in this case and is owing to the United States by the applicant. The debt is not satisfied by the failure of the contestant to file application within the preference right period. He lost nothing by such delay, no intervening application having been filed. Thus, he reaps the benefit resulting from his contest, and he must pay the cost incident thereto. The fee was earned by the giving of the notice, and it is immaterial that the period of preference right accorded thereby expired before the application was filed. There is no merit in the argument that this applicant is in the same position as any other applicant who might have applied for the land after the expiration of the preference right period without paying the said fee. The answer is that no one else was charged with the obligation, while this applicant was so charged. The remedy to enforce collection is to require payment before entry is allowed.

The decision appealed from is accordingly

Affirmed.

HEARINGS UNDER TAYLOR GRAZING ACT

Opinion, November 30, 1934

TAYLOR GRAZING ACT, SEC. 1—HEARINGS.

Complete discretion is left with the Secretary of the Interior, by the Act of June 28, 1934, as to the number of hearings which shall be held in any State preliminary to the establishment of grazing districts therein, except that one such hearing must be had.

TAYLOR GRAZING ACT—CREATION OF DISTRICTS—WITHDRAWAL—SCOPE OF AUTHORITY OF SECRETARY.

The Act of June 28, 1934, assumes a reasonable exercise by the Secretary of the discretionary power lodged in him in connection with the creation of grazing districts, and accordingly only areas reasonably contemplated for administration as grazing districts may be included within proposed districts and by the publication of notice withdrawn from entry or settlement pending their final disposition.

TAYLOR GRAZING ACT—HEARING—NUMBER AND SIZE OF DISTRICTS.

Grazing districts of any size or number, found desirable in the light of information developed at the general hearing had, may thereafter be created without further hearing.

TAYLOR GRAZING ACT—LIMITATION OF AREA PERMITTED FOR GRAZING DISTRICTS—INAPPLICABILITY TO WITHDRAWALS.

The provision in section 1 of the Act of June 28, 1934, limiting to 80 million acres the aggregate area of vacant, unappropriated, and unreserved lands which may be placed in grazing districts under said act does not apply to the area which may be withdrawn by virtue of notice.

MARGOLD, Solicitor:

At the request of the Grazing Administrator, you [the Secretary of the Interior] have asked my opinion on four related questions

involving the interpretation of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269):

1. Section 1 of the act requires a hearing before the creation of grazing districts. Would one hearing for each State be sufficient under the statute, or is a separate hearing required before the creation of each district?

2. The same section provides that publication of notice of such hearing shall have the effect of withdrawing all the public lands within the exterior boundary of proposed grazing districts from all forms of entry or settlement. Can all the public lands in a State be included within one proposed grazing district, and by the publication of such notice withdrawn pending their final disposition according to the best interests of the parties concerned?

3. Can grazing districts of any size or number finally be created after such hearing and notice without any further hearing or notice?

4. Section 1 also limits the aggregate area of vacant, unappropriated, and unreserved lands which can be placed in grazing districts to 80 million acres. Does this limitation apply, also, to the area of such lands withdrawn pursuant to notice?

I am of the opinion that the first and third questions asked must be answered in the affirmative, and the second and fourth in the negative.

I

ONE HEARING FOR EACH STATE IS SUFFICIENT UNDER THE STATUTE

The first sentence of section 1 of the act expressly leaves the creation of grazing districts to your discretion.

* * * the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts. * * *

The only limitation upon this discretionary power here pertinent is imposed by the provision, toward the end of section 1, that:

Before grazing districts are created *in any State* as herein provided, a hearing shall be held *in the State*, after public notice thereof shall have been given, at such location convenient for the attendance of State officials, and the settlers, residents, and livestock owners of the vicinity, as may be determined by the Secretary of the Interior. No such district shall be established until the expiration of ninety days after such notice shall have been given, nor until twenty days after such hearing shall be held: *Provided, however*, That the publication of such notice shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry or settlement. * * * (Italics added.)

The act, therefore, requires that before grazing districts are established in a State a hearing shall be held. The purpose and scope of the hearing are not described. Since, however, the hearing is required to precede the creation of grazing districts, it must have

been intended for the purpose of considering primarily the advisability of creating them. A fair consideration of this problem involves more than an examination of mere local evidence. It demands a hearing at which the utilization of broad areas of public lands may be fully discussed.

Congress did not intend that all unreserved public lands in their nature suitable for administration as grazing districts should be set apart as such. By limiting the aggregate area of grazing districts to 80 million acres, the act raised a problem of comparison. By providing for the exchange of public, private, and State lands (section 8), for cooperation with other Executive Departments (section 12), and for negotiation regarding public lands reserved for other purposes (section 1), it presented also problems of a general nature. In view of the purpose of the hearings, therefore, it is clear that Congress intended them to have a general as well as a purely local scope.

Congress therefore enacted, using accurate and grammatical language, that one hearing could cover several districts. Its use of singulars and plurals is consistent and significant. Throughout the quotation, the term "grazing districts" in the plural is in contrast with "hearing" and "notice" in the singular. Had Congress intended a hearing for each district it would have said: "Before districts are created, hearings shall be held", or "Before a district is created a hearing shall be held." Even such language, moreover, might be considered ambiguous. The use of plural "districts", on the other hand, in conjunction with a singular "hearing" can mean only that one hearing may include several districts.

Nor is the use of "district" in the singular, in the second sentence of the quotation, inconsistent with this interpretation. Since several districts may be included in one hearing, Congress provided that no district, that is to say, no one of these districts, should be created until after the lapse of a certain period. The same phrase, "such district", in the singular was employed in the first sentence of the section, and its antecedent there, as here, was an intentional plural.

Congress, however, did place one limitation on the scope of the hearings. Because of the State land exchange provisions, each State is interested in the creation of districts within its boundaries. The act, therefore, provides that a hearing should be held in every State before districts are established therein.

In addition to requiring a hearing, the act directs that it shall be held "at such location convenient for the attendance of State officials, and the settlers, residents, and livestock owners of the vicinity, as may be determined by the Secretary of the Interior." The word "vicinity", as used here, carries no implication contrary to the definite and literal interpretation developed above. "Vicinity" is a relative

term. Its antecedent here is "grazing districts", for it is permissible to speak of the vicinity of several districts as well as of one. Certainly it does not refer to "grazing district" in the singular, for that phrase does not occur in the same sentence.

Congress undoubtedly had in mind a situation similar to that of Colorado, which in this respect is typical of most western States. In Colorado practically all of the suitable grazing lands are located in a limited area on the western slope of the Continental Divide. Districts would be established there rather than on the eastern slope. Congress, therefore, intended that the hearing be held at some location convenient for livestock owners on the western slope. In Nevada, on the other hand, the greater part of the State is public land, and grazing districts might include public domain situated in any part of the State. Under modern conditions of travel, furthermore, any central location would be within a day's drive, and as convenient as another.

The act, however, does not require that the hearing be held in the vicinity of these grazing districts, or even at a location convenient only for livestock owners of the vicinity. It requires a location convenient also for State officials.

It is to be noted that another type of hearing is provided for by section 9 of the act:

The Secretary of the Interior shall provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer in charge in a manner similar to the procedure in the land department.

Section 9 hearings may be contrasted with those required under section 1. Section 9 hearings are similar to those held by registers of district land offices. They provide persons aggrieved by decisions of administrative officials with an opportunity to present their cases individually. Such hearings are necessarily held after the creation of grazing districts, and are individual in purpose and local in scope. Section 1 hearings, on the other hand, precede the creation of districts, and are designed for the consideration of general problems which may well be of state-wide concern.

II

ONLY THOSE AREAS REASONABLY CONTEMPLATED FOR POSSIBLE ADMINISTRATION AS GRAZING DISTRICTS CAN BE INCLUDED WITHIN PROPOSED GRAZING DISTRICTS AND WITHDRAWN FROM ALL FORMS OF ENTRY OR SETTLEMENT BY PUBLICATION OF NOTICE.

Section 1 not only requires that a hearing shall precede the establishment of districts in a State, but also that public notice precede the hearing. It provides, moreover, that "the publication of such

notice shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry or settlement." Thus the act contemplates the proposal of districts and their automatic withdrawal by publication of notice. Consequently, although the hearing may be so broad in its scope as to cover lands which will be exchanged, leased, or sold, the automatic withdrawal provision is restricted to lands within proposed districts.

Since the act says nothing more concerning the proposing of districts, it is reasonable to assume that such tentative designation falls within your general discretionary power, elaborated in section 2. The exercise of that discretionary power, however, must be a reasonable one; the proposing of districts should conform to a *bona fide* intention to consider seriously their actual creation, in greater or less degree, along the lines of the proposal.

Section 1 enumerates certain lands which cannot be included within grazing districts. Certainly areas made up of such lands could not be proposed as districts simply for the covert purpose of effectuating a withdrawal. The same section of the act limits grazing districts to lands which are in your opinion "chiefly valuable for grazing and raising forage crops." It would not, so it seems to me, be a reasonable exercise of discretion to propose for a district desert lands devoid of vegetation, which afford no possibility of water development. Similarly, to include within a proposed district lands affirmatively known to be suited only for exchange, sale or lease, would be merely a colorable pretext for withdrawing such lands from entry.

Aside from the limitation of reasonableness, however, your discretion in the proposal of districts is unrestricted. The grazing value of many lands is either conjectural or unknown. The relative advisability of administering areas as grazing districts or disposing of them under one of the other alternatives of the act is often in doubt. For the purpose of hearings and investigations it would certainly be reasonable to include within proposed districts these lands whose suitability for ultimate inclusion in the districts cannot be immediately determined.

Within the limits of reasonableness, therefore, any lands which may possibly be deemed suitable for the purpose could be included within proposed grazing districts, and such lands would, upon publication of notice, be properly withdrawn from entry and settlement. But the arbitrary inclusion within a proposed district of all the public lands in an entire State would be unwarranted. Such action would constitute an unlawful attempt to accomplish a wholesale withdrawal by use of a provision not intended for such purpose. If it is necessary for the attainment of the objects of the act or for

classification preliminary thereto to withdraw larger areas than those which could properly be included within proposed grazing districts, the necessary withdrawal should be made in the manner provided by Congress, namely, by Executive order under section 1 of the act of June 25, 1910 (36 Stat. 847), as amended by the act of August 24, 1912 (37 Stat. 497).

III

GRAZING DISTRICTS OF ANY SIZE OR NUMBER, FOUND DESIRABLE IN THE LIGHT OF INFORMATION DEVELOPED AT THE GENERAL HEARING, CAN BE CREATED THEREAFTER WITHOUT FURTHER HEARING.

After hearing within the State has been conducted pursuant to the published notice, you may establish such grazing districts as are found to be desirable in the light of the information secured at the hearing. Since the act contemplates that all available facts will be developed at the general hearing, there is no need for further hearings concerning the creation of individual districts. Only one hearing at which all interested parties may present their views and their information is required, and that hearing has been had.

As has been heretofore pointed out, the proposed districts must include land reasonably contemplated for inclusion within actual districts. There is no necessity, however, that the districts finally created correspond either in area or boundaries with those proposed in the public notice. The very requirement of a hearing presupposes that it will disclose information which was not available at the time notice was published, and that that information will be acted upon in the creation of the individual districts.

IV

THE LIMITATION OF 80 MILLION ACRES DOES NOT APPLY TO THE AREA WHICH MAY BE WITHDRAWN BY VIRTUE OF NOTICE.

Section 1 of the act limits your authority to establish grazing districts to an aggregate area not exceeding 80 million acres of vacant, unappropriated, and unreserved lands. If the hearings required, however, are to have any effect, all the area proposed and withdrawn by virtue of notice will not be administered ultimately as grazing districts. Much of it may be restored to entry, and much of it may be leased, sold, or exchanged. The act contemplates, therefore, an adjustment of the areas withdrawn, and the elimination of much of the land covered by the notice. It necessarily implies, therefore, that the area withdrawn may exceed that of the districts actually created. Thus the limitation of 80 million acres was applied specifically only.

to the establishment of grazing districts, and no limitation was placed upon the area which could be withdrawn by publication of notice, other than the requirement that land included in the notice be thought reasonably adaptable for inclusion within a district, and that inclusion in the proposed district be made in good faith to effectuate the purposes of the act.

It may be noted in passing that the limitation applies specifically only to the "vacant, unappropriated, and unreserved lands" included within the districts, and does not restrict the area of reserved lands which may be included within the grazing districts as finally established.

Approved, November 30, 1934:

HAROLD L. ICKES,

Secretary of the Interior.

WESTERN SALT COMPANY v. HASEROT

Decided December 6, 1934

SODIUM—PROSPECTING PERMIT—LEASE—ACTS OF FEBRUARY 25, 1920, AND DECEMBER 11, 1928.

Salt water was pumped from Salton Sea into solar vats upon adjoining lands and there evaporated, leaving sodium chloride in commercial quantities. *Held*, that such lands could properly be embraced in a prospecting permit and a lease under sections 23 and 24 of the Leasing Act of February 25, 1920, as amended by the Act of December 11, 1928.

WALTERS, First Assistant Secretary:

On September 17, 1930, Clarence L. Haserot was granted a permit to prospect for sodium upon the E $\frac{1}{2}$ Sec. 12, T. 10 S., R. 12 E., lots 5 and 6, E $\frac{1}{2}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 30, all of Sec. 32, T. 9 S., R. 13 E., lots 3, 4, 11, 12, 13, 14, 15, E $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 6, all of Sec. 8, T. 10 S., R. 13 E., S. B. M., California. In his permit application he alleged:

These sections border on or adjacent to the Salton Sea, which contains water which is a natural brine that has a content of sodium chloride, sodium sulphate, and other sodium salts.

The waters, when evaporated by solar heat, will, in the opinion of the applicant, make sodium chloride in commercial quantities.

This permit expired and on September 19, 1932, Haserot filed an application for a second sodium permit to embrace lots 3, 4, 11, 12, 13, 14, 15, E $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 6, all of Sec. 8, T. 10 S., R. 13 E. He made the same allegations as for the first permit and further alleged:

"Up to date the applicant has expended approximately \$5,000 for the development of this project."

In connection with the application there was submitted a report reading in part as follows:

The whole area included in the permit lies on the shore of Salton Sea about 15 miles southwest of Niland, California. * * * The area is typical flat Imperial Valley clay lands. It slopes to the south-southwest at an average fall of three feet per thousand, making it ideal for the erection of dikes and ponds. The area being prospected is particularly ideal as it is practically undisturbed by drainage water from the hills lying to the north. Protection against this drainage is afforded by a large gravel bank which diverts the waters to the east and west. * * * The area has practically no vegetation of any kind as aridity and salinity of soil prevent the growth of any plants except a few salt bush.

Under the prospecting permit it is our intention to show that sodium chloride can be produced in commercial quantities by solar evaporation of the water of the Salton Sea. * * * The method of procedure in obtaining sodium chloride from this water is as follows:

Four ponds are prepared in which the water may be evaporated. Ponds one and two, called concentrators, are of approximately three acres area. Ponds three and four are of approximately one acre each, and are called gypsum ponds as it is in these ponds that the gypsum is separated from the balance of the salts in solution. Pond five is about three-quarters of an acre in area, and is the crystallizing pond in which the sodium chloride crystals are dropped and from which the bitter waters containing the other salts are drained into pond six, called the bitter pond. Water is pumped into ponds one and two. In these ponds it is allowed to evaporate until the concentration of salt in pond two reaches 60% saturated, or about 12% solids. At this time it is moved to ponds three and four. Pond two is then refilled from pond one, and pond one is refilled with sea water. * * *

Work was commenced early in October 1930, * * * One-half mile of road was cleared and graded in order to make the area more accessible. The next three months were spent in digging approximately 800 feet of ditch in which the sea water would be made available for the upper pond.

A permit was granted as applied for, on January 17, 1933. On March 31, 1934, the permittee filed application for a lease to cover all the permit land except the E $\frac{1}{2}$ Sec. 8. He alleged that during the 1933 evaporating season approximately 400 tons of sodium chloride were produced over a 10-acre area, or 40 tons an acre, and that approximately \$9,000 had been invested in materials and labor.

On May 28, 1934, the Western Salt Company, a California corporation, of San Diego, California, by its secretary, filed a protest against issuance of a lease to Haserot on the grounds that when Haserot filed his permit application he knew that the lands applied for did not contain sodium salts in commercial quantities; that he expected to obtain sodium salts from the Salton Sea; that the act of February 25, 1920 (41 Stat. 437), as amended by the act of December 11, 1928 (45 Stat. 1019), did not authorize nor contemplate the granting of a lease under the facts and circumstances disclosed in the lease application, which should therefore be rejected; that the permit to prospect the land in question could only be granted to the high-water mark of the Salton Sea, even if an accurate survey disclosed that said land abutted the waters of said sea; that the protestant was

engaged in the salt business in California; and that the protest was filed in order to protect its interests.

On August 4, 1934, the Geological Survey reported that its records showed that sodium had been discovered in commercial quantities and that the permit land was properly subject to segregation in a sodium lease.

By decision of September 11, 1934, the Commissioner of the General Land Office dismissed the protest, stating that no legal ground for denying the lease application was alleged. He further stated:

The right to a lease has been established and cannot be denied because the production from the leased lands may increase the supply beyond market demands, or because some control of the water level is desirable. The lands embraced in said lease application are not meandered along the waters of the Salton Sea, so that apparently no question of riparian rights is involved; however, there is no legal ground for denying to one holding the land the privilege of taking the waters of the sea on the land and abstracting the sodium therefrom. The amount of water used for this purpose will not affect the level of the sea.

The protestant has appealed, contending that a lease cannot lawfully be issued to the permittee.

Section 23 of the act of February 25, 1920, *supra*, is in part as follows:

That the Secretary of the Interior is hereby authorized and directed, under such rules and regulations as he may prescribe, to grant to any qualified applicant a prospecting permit which shall give the exclusive right to prospect for chlorides, sulphates, carbonates, borates, silicates, or nitrates of sodium dissolved in and soluble in water, and accumulated by concentration, in lands belonging to the United States.

Sections 23 and 24 of the act of 1920, as modified by the act of December 11, 1928, *supra*, provide:

SEC. 23. That the Secretary of the Interior is hereby authorized, under such rules and regulations as he may prescribe, to grant to any qualified applicant a prospecting permit which shall give the exclusive right to prospect for chlorides, sulphates, carbonates, borates, silicates, or nitrates of sodium, in lands belonging to the United States * * *.

SEC. 24. That upon showing to the satisfaction of the Secretary of the Interior that valuable deposits of one of the substances enumerated in section 23 hereof have been discovered by the permittee within the area covered by his permit and that such land is chiefly valuable therefor, the permittee shall be entitled to a lease for any or all of the land embraced in the prospecting permit * * *.

In the case of The Utah-Salduro Company, Salt Lake City 024899, patent was issued for more than 30,000 acres of lands embraced in placer mining claims in the Great Salt Lake Desert, Utah, alleged to contain valuable deposits of potassium, magnesium, and sodium. In that case it was alleged:

That after careful investigation, which included, among other things, the drilling of a large number of test holes, and the analysis of all brines encountered, it was determined that a brine supply could best be developed by cutting trenches through the crystal body and the underlying muds, in which the brine collected by infiltration. Accordingly an extensive trench system was planned and completed.

* * * * *

That the process originally adopted consisted essentially of evaporating, in large open solar vats constructed upon the surface of the salt, and within the area of the claims, the crude brine obtained from the trenches.

* * * * *

That the modified plan requires a larger area for the construction of solar vats than was necessary under the previously described, or original, plan.

It is thus shown that large areas were patented which were used as vats or ponds for the brine pumped from trenches, although the mining laws provide that the discovery of mineral shall be within the limits of the claim located. The necessities of the case required a workable construction of the law.

In the present case the situation is somewhat similar. A ditch or trench has been dug so that water of the Salton Sea, which is in fact brine, comes upon part of the permit land. The brine is pumped from the trench into ponds where, through evaporation, salts are deposited. The land itself naturally contains a little sodium, but the sodium chloride in commercial quantity is produced artificially, as stated.

The land involved and the brine of Salton Sea apparently have no value for any other purpose. The brine is pumped from part of the land involved to other parts thereof. Salt is deposited on the permit land and is taken from there for the market. In these circumstances a sodium prospecting permit was properly and lawfully granted under the Leasing Act of 1920, as amended by the Act of December 11, 1928. And as sodium chloride can be produced in commercial quantity and quality the permittee is now lawfully entitled to a lease.

Counsel for the protestant have requested an oral hearing. The protestant has no claim to, or interest in, the land involved or the brine. It has merely entered and petitioned that the Government eliminate a competitor. If an oral hearing were to be granted, the permittee should certainly be present or represented. He has not asked for any oral hearing and apparently has not been advised that request therefor has been made. It would be an unwarranted action to impose upon him the expense of appearing, personally or by attorney, at an oral hearing, which in itself does not seem necessary. The request is denied.

The decision appealed from is

Affirmed.

MILITARY BOUNTY-LAND WARRANTS**INSTRUCTIONS**

December 11, 1934.

MILITARY BOUNTY-LAND WARRANTS—CASH SUBSTITUTION—TITLE—WAIVER OF RIGHT TO MINERALS.

As a condition to obtaining title from the United States, a claimant to public land by virtue of cash substitution for a military bounty-land warrant, will be required to waive rights to mineral or minerals in the land sought, the United States not having been divested of its equitable title, should the Geological Survey report said land is known to be valuable, or has prospective value, for oil or gas or any other mineral named in the act of July 17, 1914, as amended.

WALTERS, First Assistant Secretary:

You [Commissioner of the General Land Office] have submitted for instructions a case, G. L. O. 05579, in which the facts are briefly as follows:

On November 16, 1860, Thomas S. Colier located a military bounty-land warrant on the SW $\frac{1}{4}$ SE $\frac{1}{4}$ and SE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 23, W $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 26, T. 9 N., R. 3 W., La. M., Louisiana. The records show that the location was suspended because the assignment of the warrant was in blank.

Subsequently the name of Francis Palms was inserted as the assignee of the warrant and he was allowed to locate said warrant on land in Michigan, which was patented to him.

It does not appear that Colier was notified that his location was defective. Recently claimants who show rights from the Colier location have tendered \$200, cash substitution in lieu of the warrant, and have requested that patent be issued in the name of the original locator.

The land comes within the purview of Order No. 349, of May 14, 1929, and you request instructions "as to whether in this and similar cases involving lands affected by said order a report should be secured from the Geological Survey as to the oil and gas character of the land as of the date when the substitute payment is made and whether consent to a reservation of the oil and gas deposits should be required if the land should be reported as valuable for such deposits on such date."

In the act of March 22, 1852 (10 Stat. 3), it is provided that military bounty land warrants are assignable "according to such form, and pursuant to such regulations as may be prescribed by the Commissioner of the General Land Office."

In Circular No. 615, dated May 3, 1855 (Lester's Land Laws, Regulations, and Decisions, 598), the Commissioner of the General Land Office instructed registers and receivers in part as follows:

Under those acts (Acts of 1847, 1850, and 1852), warrants have been returned to this Office, located—

* * * * *

9th. Upon assignments where the blank is not filled with the name of the assignee who locates.

* * * * *

You are strictly enjoined to refuse any location where either of the foregoing objections, or others of a like character, exist, requiring every applicant to have his warrant perfected in every respect, so that no subsequent action may be necessary for that purpose.

The location of Collier was never completed or perfected and neither he nor any successor in interest acquired title to the land involved, legal or equitable, up to the time the cash payment was made. In the case of *Price v. Dennis* (159 Ala. 625, 49 So. 248), the court said:

The records of the Land Office show that the location of this land in question, under that warrant, was suspended by the Commissioner of the General Land Office of the United States because of insufficiency of the transfer or assignment of the warrant; hence the equity was never perfected until the assignment was made good.

See also the case of *A. R. Bowdre et al.* (50 L. D. 486).

Under the regulations now in force (41 L. D. 34) nonmineral affidavits are required. It is also provided that cash may be substituted for a defective or unacceptable warrant. In the present case the mineral character cannot very well be denied because the present claimants have attempted to sell their rights to minerals in the land.

The color of title act of December 22, 1928 (45 Stat. 1069), provides for the reservation of coal and all other minerals to the United States.

Certain specified minerals, including oil and gas, in public lands of the United States, are subject to disposition only under the Act of February 25, 1920 (41 Stat. 437), as amended.

In the present case, as no equitable title has passed, and in similar cases, the Geological Survey will be called upon for report, and if the Survey shall report that the land involved is known to be valuable, or has prospective value, for oil or gas or any other mineral named in the Act of July 17, 1914 (38 Stat. 509), as amended, the claimants will be required to waive rights to such mineral or minerals. The procedure prescribed in paragraph 12c of the oil and gas regulations (47 L. D. 437, 445) will be followed.

T. A. WALTERS,
First Assistant Secretary.

APPLICATION OF ACREAGE LIMITATION OF TAYLOR GRAZING ACT TO LEASE, SALE, OR EXCHANGE OF LANDS SUBJECT TO SUCH ACT

Opinion, December 19, 1934

TAYLOR GRAZING ACT—ACREAGE LIMITATION—FIELD OF APPLICATION.

The provision in section 1 of the Act of June 28, 1934, limiting to 80 million acres the area of lands which may be placed in grazing districts, applies only to the acreage of vacant, unappropriated, and unreserved lands which may be included within grazing districts, and the area of public lands which may be leased, sold, or exchanged, is not limited by said act.

TAYLOR GRAZING ACT—STATUTORY CONSTRUCTION.

Since the provision in section 1 of the Act of June 28, 1934, limiting to 80 million acres the area of lands which may be placed in grazing districts, is mentioned in the act only in relation to the authority to create grazing districts, it cannot be implied as a limitation upon the other powers contained in the act.

MARGOLD, *Solicitor*:

In your [Director of Grazing, Salt Lake] letter of December 12, 1934, you requested my opinion as to whether the limitation of 80 million acres expressed in section 1 of the Taylor Grazing Act applies to the lease, sale, or exchange of public lands under that act, as well as to the creation of grazing districts.

It is my opinion that that restriction applies only to the acreage of vacant, unappropriated, and unreserved lands which may be included within grazing districts, and that the area of public lands which may be leased, sold, or exchanged is not limited by the act.

The Taylor Act authorizes, in general, four modes of disposition and regulation of public lands:

1. * * * the Secretary of the Interior is authorized in his discretion, by order to *establish grazing districts* or additions thereto and/or to modify the boundaries thereof, *not exceeding in the aggregate an area of eighty million acres of vacant, unappropriated, and unreserved lands* * * *. (Italics supplied.)
2. SEC. 8. * * * when public interests will be benefited thereby, he is authorized and directed to accept on behalf of the United States title to any privately owned lands within the exterior boundaries of said grazing district, and in exchange therefor to issue patent for not to exceed an equal value of surveyed grazing district land or of unreserved surveyed public land * * *. Upon application of any State to exchange lands within or without the boundary of a grazing district the Secretary of the Interior is authorized and directed, in the manner provided for the exchange of privately owned lands in this section, to proceed with such exchange at the earliest practicable date and to cooperate fully with the State to that end * * *.
3. SEC. 14. That section 2455 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 2455. Notwithstanding the provisions of Section 2357 of the Revised Statutes (U. S. C., title 43, sec. 678) and of the Act of August 30, 1890

(26 Stat. 391), it shall be lawful for the Secretary of the Interior to order into market and sell at public auction, at the land office of the district in which the land is situated, for not less than the appraised value, any isolated or disconnected tract or parcel of the public domain not exceeding seven hundred and sixty acres which, in his judgment, it would be proper to expose for sale * * *."

4. SEC. 15. The Secretary of the Interior is further authorized, in his discretion, where vacant, unappropriated, and unreserved lands of the public domain are situated in such isolated or disconnected tracts of six hundred and forty acres or more as not to justify their inclusion in any grazing district to be established pursuant to this Act, to lease any such lands to owners of lands contiguous thereto for grazing purposes, upon application therefor by any such owner, and upon such terms and conditions as the Secretary may prescribe.

It will be noted that all four methods are expressed in separate grants of authority. Each mode is particularly suitable for the disposition of certain typical lands to which the others may not so readily be applied. Each grant is subject to certain restrictions not expressed as to the others and not intended to relate to them. Thus, since the 80-million-acre provision is mentioned only in relation to the authority to create grazing districts, it cannot be implied as a limitation on the other powers.

The application of one of the simplest canons of statutory construction, namely, that "a limiting clause is to be restrained to the last antecedent, unless the subject matter requires a different construction". (*Cushing v. Worrick*, 9 Gray (Mass.) 382, and *Endlich on the Interpretation of Statutes*, Sec. 414), would seem to be decisive of the question. * * * (*Puget Sound Electric Ry. et al. v. Benson*, 253 Fed. 710-711.)

You report that the contention has been made that Congress intended the limitation to apply to all the methods of disposition and regulation that might be undertaken under the Taylor Act. If so, such intention was not expressed, and it cannot be inserted in the act under the guise of an interpretation.

Approved, Jan. 17, 1935:

OSCAR L. CHAPMAN,

Assistant Secretary.

LEGISLATIVE REPRESENTATIVES OF EXECUTIVE DEPARTMENTS— SECTION 201, TITLE 18, UNITED STATES CODE

Opinion, December 19, 1934

LEGISLATIVE REPRESENTATIVES—LEGALITY OF EMPLOYMENT.

One employed in an Executive Department of the Federal Government, with compensation derived from congressional appropriations, who is designated by the head of his Department to represent him in legislative mat-

ters, and who, in the course of such employment, calls upon a Member of Congress without invitation, seeking his support for proposed legislation, is not guilty of a violation of section 201 of title 18, United States Code.

CONSTRUCTION OF STATUTES—WEIGHT ATTACHED TO PRACTICE OF LONG STANDING.

Section 201 of title 18, United States Code, being a criminal statute, must be strictly construed; and a construction adopted and acted upon for 15 years without objection is entitled to great weight.

MARGOLD, *Solicitor*:

My opinion has been requested on the question whether a member of this Department whose services are paid for out of congressional appropriations and who is designated by you to represent him in legislative matters, is guilty of a violation of section 201 of title 18, United States Code, if he makes a call upon a Member of Congress without invitation and seeks that Member's support for proposed legislation.

The provision of law in question reads as follows:

Use of appropriations to pay for personal service to influence Member of Congress to favor or oppose legislation. No part of the money appropriated by any Act shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers and employees of the United States from communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business.

Any officer or employee of the United States who, after notice and hearing by the superior officer vested with the power of removing him, is found to have violated or attempted to violate this section, shall be removed by such superior officer from office or employment. Any officer or employee of the United States who violates or attempts to violate this section shall also be guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine of not more than \$500 or by imprisonment for not more than one year, or both.

This section has not yet been construed either by a court or in an Attorney General's opinion, and the only light which may be thrown on its construction must be derived from the debate in Congress at the time of adoption. The committee reports are silent on the matter.

The provision in question was originally section 6 of the Third Deficiency Appropriation Act of July 11, 1919 (41 Stat. 35, 68). When that act was considered in the House of Representatives, Congressman Good, in charge of the bill, made the following statement (58 Cong. Rec. 403):

Mr. Good. The bill also contains a provision which I am frank to say is subject to a point of order. It is new legislation, but it will prohibit a practice that has been indulged in so often without regard to what administration is in power—the practice of a bureau chief or the head of a department writing letters throughout the country, sending telegrams throughout the country for this organization, for this man, for that company to write his Congressman, to wire his Congressman, in behalf of this or that legislation. The gentleman from Kentucky, Mr. Sherley, former chairman of this committee during the closing days of the last Congress was greatly worried because he had on his desk thousands upon thousands of telegrams that had been started right here in Washington by some official wiring out for people to wire Congressman Sherley for this appropriation and for that. Now, they use the contingent fund for that purpose, and I have no doubt that the telegrams sent for that purpose cost the Government more than \$7,500. Now, it was never the intention of Congress to appropriate money for this purpose, and section 5 (now incorporated in the U. S. Code as title 18, section 201) of the bill will absolutely put a stop to that sort of thing.

Mr. SMITH of Idaho. Is it intended by section 5 to prevent the employees or officers of the Government from communicating directly with their representatives in Congress?

Mr. Good. No; that is expressly reserved.

Mr. SMITH. It says "through proper official channels."

Mr. Good. They have, of course, the right to communicate, just as before, with their members of Congress.

Mr. SMITH. The words "through official channels" should be eliminated if that was the intention.

Mr. Good. It was not the thought of the committee to hamper in any degree or limit or restrict those communications that pass from the members of Congress to the heads of the various Executive departments.

Notwithstanding the rather inconclusive character of this colloquy, it will be apparent that the Member in charge of the bill did not desire to curtail in any way the usual access of Departments to Members of Congress, but that the only evil sought to be remedied was the then promiscuous practice on the part of certain Bureau heads of stirring up private citizens to flood their Congressmen with solicitations. As indicated in Mr. Good's remarks, this practice reached such proportions as almost to disrupt the business of government.

While the language of the statute is extremely broad and might at first blush be construed to limit access to any Member of Congress except upon his invitation, none the less I am of opinion, having in mind the universal practice among Departments and the usual criterion that criminal statutes are to be strictly construed, that a member of a Department designated by the Secretary to represent him in legislative matters may approach individual Members of Congress and solicit their support for pending legislation in any proper manner, notwithstanding the provisions of Section 201. It seems to me that this conclusion, based as it is upon the premise that contact with a Member of Congress authorized by the head of a Department is a proper official channel, is in accord with the construction placed

on the statute in the fifteen years that have elapsed since its enactment. To hold otherwise would stigmatize as criminal a practice long indulged in by every Department of the Government without objection by Congress.

Approved, December 19, 1934:

OSCAR L. CHAPMAN,
Assistant Secretary.

GREEN v. ROCHELLE; VILLNAVE, INTERVENER.

Decided December 27, 1934

HOMESTEAD ENTRY—RELINQUISHMENT—CONTEST AFFIDAVIT—SUFFICIENCY.

One who simultaneously files a relinquishment of a contested homestead entry and his application for the land so relinquished cannot excuse his neglect in not questioning the sufficiency of the contest affidavit on the ground that he had no opportunity to inspect it or because a copy thereof was not served upon him, since the contest papers are either open for inspection at the local office, or, if transmitted to the General Land Office, certified copies may be procured.

CONTEST AFFIDAVIT—PREFERENCE RIGHT—RELINQUISHMENT—HEARING.

Where, following the filing of a sufficient contest affidavit, a third person files application for the land, accompanying his application with the relinquishment of the prior entryman, such third person is not restricted, in attacking the contest affidavit and requesting a hearing, to the grounds expressly mentioned in Circular 225 of April 3, 1913, but is at liberty, observing the procedure required by Circular 225, to attack the affidavit upon any ground whatsoever which would prove it false or invalid.

PRIOR DECISIONS DISTINGUISHED.

Cases of *Day v. Cutshall* (48 L. D. 365), and *Raber v. Smith, Leight, Intervener* (51 L. D. 46), cited and distinguished.

WALTERS, *First Assistant Secretary:*

April 9, 1930, Ogden J. Rochelle made stock-raising homestead entry, Cheyenne 051234. February 5, 1934, Harry C. Green filed contest affidavit against the entryman charging:

That said entryman has never established residence on said lands, has erected no improvements thereon, and has abandoned the land for three years last past.

Notice of contest issued on the same date, but had not been served on February 6, 1934, when Fred A. Villnave simultaneously filed a relinquishment of the entry and a stock-raising homestead application. February 14, 1934, Green's application based on a preference right as contestant was allowed and Villnave's application rejected, notice of which was served on Villnave, February 15, 1934.

Villnave appealed to the Commissioner of the General Land Office, in substance alleging: That no notice of contest was served on

Rochelle; that the contest docket showed only that contestant charged abandonment; that all papers had been transmitted to the General Land Office and consequently he had no opportunity to examine the contest affidavit to ascertain whether it was a "good and sufficient" contest affidavit and properly corroborated; that he was not notified of the presumptive preference right of Green; that he paid a valuable consideration for the relinquishment. He submitted in support of the appeal a corroborated affidavit made by the former entryman, Rochelle, denying he had abandoned the land and alleging that his absences from the homestead prior to January 1, 1933, were caused by drought conditions, making it necessary to leave the land to earn money to buy the necessities of life, and expressing the opinion that his entry by reason of the causes of absences stated was not subject to contest under the Act of March 2, 1932 (47 Stat. 59). Villnave requested that, in the event the record before the Commissioner was not deemed sufficient to cancel the entry of Green and allow his application, Green be required to file a copy of the contest affidavit on him in order that he might determine whether it was a good and sufficient and properly corroborated affidavit of contest under Rule 3 of Practice, and whether he should object thereto and apply for a hearing.

By decision of May 3, 1934, the Commissioner followed the rule in *Day v. Cutshall* (48 L. D. 365), which disposed of a case exhibiting an essentially similar state of facts as the case at bar, under paragraph 3 of Circular 225 (42 L. D. 71) and held:

Where the question arises after a relinquishment of a homestead entry is filed subsequent to initiation of the contest as to which of two applicants is entitled to enter the land, one basing his claim upon the contest, the other upon the filing of the relinquishment, the presumption will obtain that the contest induced the relinquishment, which can only be defeated on a showing that the contest charge was not true, or that the contestant is not a qualified applicant, or that the land is not subject to the application.

In view of the foregoing, Green's right is held superior to that of Villnave, unless Villnave should determine to proceed under Circular 225 (42 L. D. 71).

Accordingly, the register's decision rejecting Villnave's application was affirmed and Green's entry was allowed to stand.

Villnave has appealed, reiterating substantially his contentions made before the Commissioner.

Paragraph 3 of Circular 225, *supra*, unquestionably governs in the present case, and Villnave in asserting his claim must be governed by its provisions. In *Day v. Cutshall*, however, it was plainly intimated, and in *Raber v. Smith, Leight, Intervener* (51 L. D. 46) it was definitely decided, that the question of whether the affidavit of contest was "good and sufficient" was a matter for determination under paragraph 3, and it was there decided that the contest affi-

davit was insufficient and the land awarded to the applicant, who had filed a relinquishment and applied for the land between the date of filing the contest affidavit and the date of service of the notice of contest on the contestee.

In the present case, however, the affidavit of contest by Green seems to be a good and sufficient one. Villnave not only has not attacked the contest affidavit on any of the grounds expressly mentioned in paragraph 3, Circular 225, but has not alleged that it is any way defective. His contention that the contestant should serve him with a copy of the affidavit of contest is not supported by any rule of practice or procedure. His excuse for not questioning the sufficiency of such affidavit on the ground that he has had no opportunity to inspect it is without merit. Villnave, it seems, was negligent in not ascertaining before he filed his application whether a contest was not pending against the relinquished entry. *Smith v. Woodford* (41 L. D. 606). At the time of such application the contest affidavit was accessible to him in the local office. Even after the contest papers were transmitted to the General Land Office, certified copies thereof could have been and can now be obtained by Villnave in accordance with the instructions of August 4, 1915 (44 L. D. 235), and at the costs prescribed in Circular 504 (49 L. D. 274).

If, in fact, Rochelle did not abandon the land as charged, or there are circumstances surrounding the execution of the contest affidavit susceptible of proof showing that it is false or invalid, Villnave may still establish such facts if he follows the procedure prescribed in paragraph 3. As the case stands, there is no ground for requiring entryman Green to do anything or to disturb his entry on the supposition that the contest affidavit may not be technically perfect.

As herein modified, the Commissioner's decision is

Affirmed.

**CLARK I. WYMAN, ASSIGNEE OF EMILY G. HOLLIDAY, WIDOW
OF DAVID HOLLIDAY**

Decided December 27, 1934

JURISDICTION—RES JUDICATA.

A Department decision denying an application based on a construction of a statute is *res judicata* so far as the General Land Office is concerned, notwithstanding the construction of the statute is changed by a subsequent decision of the Department in another case.

SOLDIERS' ADDITIONAL RIGHT—RETURN OF PAPERS.

The Department of the Interior will not return papers filed in support of a claim of soldiers' additional right under section 2306, Revised Statutes, where the claim is found to be invalid, since such papers, if returned, could afford opportunity for fraudulent barter and sale and useless harassment of the Government.

SOLDIERS' ADDITIONAL RIGHT—HONORABLE DISCHARGE—SECS. 2304 AND 2307,
REVISED STATUTES.

An enlisted man, discharged upon condition that he reenlist to serve three years and who shortly after reenlistment deserted, was not "honorably discharged" within the meaning of section 2304 of the Revised Statutes, and no rights under section 2307 can be predicated upon his military service.

PRIOR DECISIONS ADHERED TO; OTHERS DISTINGUISHED.

Prior decisions involving the same persons and claimed rights (38 L. D. 164; 38 L. D. 269) adhered to. *Case of Frank C. Robie* (53 I. D. 649) distinguished.

WALTERS, *First Assistant Secretary*:

This is an appeal by the W. E. Moses Land Scrip and Realty Company from a decision of the Commissioner of the General Land Office dated October 28, 1932, which denied its application for the return of the papers evidencing the assignment by Emily G. Holliday, widow of David Holliday, of an alleged soldiers' additional right of entry, filed in support of the application of Clark I. Wyman, under section 2307, Revised Statutes.

On May 12, 1909, the Department affirmed the Commissioner in rejecting Wyman's application. Motions for review were denied, August 24, 1909 (38 L. D. 164), and October 15, 1909 (38 L. D. 269).

The record showed that the application was based upon an original homestead entry made by Holliday, June 1868, for 80 acres, and his enlistment in the military service during the Civil War on October 30, 1861, from which he was given an honorable discharge December 24, 1863, "by reason of reenlistment as a veteran volunteer in the same organization to serve three years." The War Department records showed that Holliday was mustered in under his reenlistment December 25, 1863, and deserted February 13, 1864, and never returned to his company.

The Department held "that his discharge on December 24, 1863, for the purpose of reenlistment was not an honorable discharge separating him from the service, therefore he had not been honorably discharged within the meaning of the land laws" (38 L. D. 165); "that his discharge and immediate reenlistment merely lengthened his term without separating him from the service." (Decision of October 15, 1909.)

The application based on service as an honorably discharged soldier was denied.

It is an established rule of the Department to refuse to return the papers on file in support of a claim of soldiers' additional right to enter under sections 2306 and 2307, Revised Statutes, where it is

found that the claim is invalid. The return is refused for the reason that the assignment has no value and could be used as an instrument of fraudulent barter and sale and as a further useless harassment of the Government. *Frank Weller* (41 L. D. 506).

Based upon the Department's ruling of May 9, 1932, in the case of *Frank C. Robie* (53 L. D. 649), the appellant requested return of the papers in support of Wyman's application, contending that the Department had reversed its former practice by that decision and held that so long as a soldier had 90 days' service and an honorable discharge, it did not matter if he afterwards reenlisted and deserted.

In the decision assailed by the appeal, the Commissioner set forth the material facts and the Department's rulings in the Wyman case, reopening of which is now sought, and in the Robie case and that of *Fred B. Rogers* (47 L. D. 325), pointing out that while the Rogers case was overruled in the Robie decision, the Wyman case was not mentioned in that decision and still stands. He, therefore, held he had no authority to return the assignment papers in the Wyman case.

It has been long settled that a final decision of the Secretary is conclusive on subordinate officers of the Land Department and precludes further action by the General Land Office. *Lettrieux Albrio* (5 L. D. 613); *Phillips v. Central Pac. R. R. Co.* (6 L. D. 378); *J. H. Kopperud* (10 L. D. 93); *Pike's Peak Lode* (10 L. D. 200). The final decision of the Department denying Wyman's application is *res judicata* so far as the General Land Office is concerned, and even if it be conceded that the Robie case changed the construction of the words "honorably discharged" in section 2304, Revised Statutes, such change in the construction of the law conferred no power on the Commissioner to readjudicate the Wyman case and allow the return of the assignment papers because the construction of the statute upon which the denial was based had been changed by the Department. For the reason above stated the refusal of the Commissioner to return the assignment papers was right.

As to the authority of the Department, however, it has been held that if the *res* remains subject to its action, the Department is not necessarily prevented by the principles of *res judicata* or *stare decisis* from taking proper action. *Knight v. United States Land Association* (142 U. S. 161, 181); *Ernest B. Gates* (On Rehearing) (41 L. D. 384). As the question here is only as to the propriety of the return of the assignment papers for further use as a basis for the exercise of a soldiers' additional right of entry, and is a matter in which only the Government and the appellant are concerned, if it appeared that in refusing to recognize Holliday as an honorably discharged

soldier; there was a plain denial of a statutory right; the Department could rectify its error and vacate its former decisions. See *Wells v. Fisher* (47 L. D. 288, 295).

But if this appeal were treated as invoking such authority, no reason is perceived for disturbing the previous decisions in the case. The facts in the Robie case, as the decision of the Commissioner reveals, are clearly distinguishable from the case at bar. In the Robie case the sailor seeking credit for naval service toward residence on his homestead entry, made under section 2304, Revised Statutes, enrolled in the National Naval Volunteers on April 18, 1917, and was issued a "good discharge" under honorable conditions on October 19, 1917, while on board the U. S. S. *St. Louis*; and while still on board said vessel, on the following day, he enlisted in the Navy and was honorably discharged May 27, 1919. He again enlisted in the Navy 107 days later and was issued a dishonorable discharge July 28, 1920.

The Department held that Robie's last period of service was in no way connected with the first and accorded him credit for the time of service performed prior to his honorable discharge.

In the Rogers case the application under Sec. 2307 was based in part on an assignment of a homestead right by a soldier who enlisted in a New York Infantry regiment November 22, 1861, and who was discharged upon a certificate of disability October 9, 1862. He was again mustered into service for three years in a cavalry regiment October 10, 1863, and deserted March 18, 1865.

In the Robie and Rogers cases, the honorable discharges for the first services were final and not issued upon any conditions thereafter to be performed by the sailor and soldier, respectively, and effected their complete separation from the service. Their subsequent enlistments were entirely voluntary. In the present case, Holliday received an honorable discharge on condition that he would enlist and serve in the Army for three more years, a condition that he broke. Moreover, as stated in the decision of October 15, 1909:

The certificate issued by the War Department April 23, 1907, that Holliday "was discharged from the service of the United States on the 24 day of December, 1863, by reason of reenlistment as a veteran volunteer" was intended merely to furnish a certificate in lieu of a lost certificate of discharge given prior to the commission of the offense of desertion and was not intended to pass upon or indicate the military status of the soldier at the time of his separation from the service * * *.

For the reason above stated the Commissioner's decision is affirmed, and the case will remain closed.

Affirmed.

PROCEDURE ON GEOLOGICAL REPORTS UNFAVORABLE TO
NONMINERAL ENTRIES

INSTRUCTIONS

December 28, 1934.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

It has been determined that the Instructions of January 23, 1930, "Procedure on Geological Reports Unfavorable to Nonmineral Entries" (53 I. D. 41), conflict in some respects with well settled and familiar principles of law, and said instructions are therefore hereby revoked. In substitution thereof the following instructions are announced:

Where the Geological Survey reports that land embraced in a nonmineral entry or claim on which final proof has not been submitted or which has not been perfected is in an area in which valuable deposits of oil and gas may occur, because of the absence of reliable evidence that the land is affected by geological structure unfavorable to oil and gas accumulation, the entryman or claimant will be allowed 30 days from notice to furnish consent under the Act of July 17, 1914 (38 Stat. 509), 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 must be advised that if a hearing is ordered the burden of proof will be upon him, and also that if he shall fail to take one of the actions indicated, his entry or claim will be canceled.

In a case where acceptable final proof has been submitted, or a claim has been perfected, and the Geological Survey thereafter makes report, as in the above or similar form, such report will not be relied upon as basis for adverse proceedings against the entry or claim unless the Government is prepared to assume the burden of proving, *prima facie*, that the land was known to be of mineral character at the date of acceptable final proof or when the claim was completed, according to the established criteria for determining mineral from nonmineral lands, among which may be those recognized by the Supreme Court in the case of *United States v. Southern Pacific Company et al.* (251 U. S. 1). If the Government is thus prepared to assume such burden of proof, the General Land Office will institute adverse proceedings against the entry or claim, making a charge to that effect, giving the entryman or claimant the option of refuting the charge in accordance with regulations in force (Circular No. 460, 44 L. D. 572) or of consenting to the reservation of the oil and gas to the United States, and thereby avoiding the expense of litigation. The entryman or claimant will be advised that in the event hearing is had, the burden of proof will be upon the Govern-

ment; also, that if he shall fail to make answer or to exercise the option offered him within the time allowed, the entry or claim will be canceled without further notice.

T. A. WALTERS,
First Assistant Secretary.

JONES v. MALLOY

Decided January 24, 1935

CONTEST—AFFIDAVIT—PRACTICE.

Rule 2 of the Rules of Practice requires that an application to contest an entry must be under oath, and Rule 3 requires that the statements therein must be corroborated by at least one witness under oath.

CONTEST—AFFIDAVIT—FALSE CERTIFICATION.

A contest notice issued on a false certification that the contest application was subscribed and sworn to by contestant is invalid.

WALTERS, First Assistant Secretary:

Harry C. Jones has appealed from a decision of the Commissioner of the General Land Office dated June 12, 1934, which reversed the decision of the local register and held his contest against the original stock-raising homestead entry of Edna L. Malloy, Cheyenne 053952, for dismissal.

The entry was made March 25, 1932, for 640 acres in Secs. 4 and 5, T. 27 N., R. 73 W., 6th P. M. On June 21, 1933, Jones filed a contest affidavit alleging that entrywoman "never established residence on the land and has wholly abandoned the land for the last six months." The record fails to disclose when notice of this contest was served on entrywoman, but it would seem to have come to her notice between the time when the United States Commissioner, on July 14, acknowledged the receipt of the contest papers for service, and the time entrywoman executed a demurrer and answer to the allegations of contest on July 27, which was filed on the following day. On July 31, 1933, the register held the contest for dismissal for failure of the corroborating witness to set forth, in compliance with Rule 3 of Practice, the facts within his personal knowledge, which, if proven, would render the entry subject to cancellation. Thereupon, a second contest affidavit, purporting to be executed by Jones, and corroborated by Arnold L. Braae and Harry Isaac on August 14, 1933, was filed on August 16 in the local office. This affidavit was adjudged sufficient, and notice issued the same day, which was served on contestee August 19, 1933. Jones alleged that the entrywoman "failed to establish residence on the said lands and wholly abandoned the same for more than six months last past."

Hearing of the contest was held before the register on October 2, 1933. At the hearing the contestant admitted that he signed the second contest affidavit on August 14, 1933, while in camp on the range and not in the presence of the notary public who certified to his affidavit, and sent it to Douglas to be notaried.

It appears that the second contest application purports to be subscribed and sworn to by Harry C. Jones before Thelma Simonson, a notary public, under her signature and official seal on August 14, 1933. It further appears that the Thelma Simonson herein mentioned took and transcribed the testimony at the hearing but was not placed on the stand and interrogated as to the question whether the affidavit of contestant was subscribed and sworn to in her presence.

At the conclusion of contestant's case in chief, attorney for contestee moved to dismiss the contest on the following grounds:

1. That contestant admitted that he did not make oath to the contest affidavit, but signed it and sent it to town to have the notary affix her seal and signature.

2. That the same notary, who is an employee of attorney for contestant, was transported from Wheatland to Cheyenne to take the testimony in the case.

3. That the testimony offered by contestant was insufficient to prove abandonment or intent to abandon the entry by the entry-woman.

The register overruled the motion, whereupon contestant was recalled as a witness by his attorney and testified to the effect that after he had sent in the contest application he was advised by a companion that it would be necessary to swear to the same and within four to seven days thereafter he appeared before Notary Simonson and was shown the contest application and acknowledged his signature and made oath thereto before her. Contestee then offered her evidence in support of her entry. The correctness of the register's action in overruling the motion to dismiss is raised by contestee's reply brief on this appeal.

With respect to the second ground for dismissal, in the absence of any allegation that the evidence was improperly reported because of the relation of the reporter as an employee of the contestant's attorney, no merit is seen in this objection.

With respect to the third ground of dismissal, contestee, by proceeding to offer his evidence after the motion to dismiss was overruled, and not electing to stand on his motion, waived the benefits of the motion to dismiss on account of the insufficiency of the evidence. *Cummings v. Clark* (35 L. D. 373).

However, with respect to the first ground for dismissal, the record as previously herein noticed shows the notice of contest was issued on the contest application two days after its execution, and it is clear that no oath by contestant was made thereto before the notary who affixed her seal and signature to the statement to the contrary. The contest notice was issued on a false certification that the contest application was subscribed and sworn to by contestant. Rule 2 of Practice requires that such application shall be under oath. It has been held that the corroborating affidavit required under Rule 3 is jurisdictional, without which there is no foundation for the proceeding, *Nemnich v. Colyar* (47 L. D. 5); that a contest application that does not set forth the particulars required in Rules 2 and 3 is not a good and sufficient affidavit. *Roark v. Torkington, McCracken, Intervener* (51 L. D. 183).

This is not a case where the contest application shows on its face that it was not properly verified, which might in the absence of an adverse claim be amendable. It has been held that where a notary takes an affidavit of a party, the party should in any case be present before him, and it is serious misconduct to dispense with personal presence of such party. *Matter of Napolis* (129 App. Div. 469, 155 N. Y. Supp. 416). As a matter of public policy in the administration of claims to public land, the Department should not uphold the validity of an application based upon a false and misleading notarial certificate.

For the reasons stated, the contest affidavit was void and the contest proceeding must be dismissed.

The contest being invalid, it is unnecessary to consider whether or not allegations of contest were sustained by evidence.

The Commissioner's decision will be affirmed on the ground above stated.

Affirmed.

PRELIMINARY REGULATIONS GOVERNING FILING OF APPLICATIONS FOR LEASE UNDER THE TAYLOR GRAZING ACT

[Circular No. 1336]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 20, 1934.

REGISTERS, UNITED STATES LAND OFFICES:

Section 15 of the act of June 28, 1934 (48 Stat. 1269, 1275), provides that:

The Secretary of the Interior is further authorized in his discretion, where vacant, unappropriated, and unreserved lands of the public domain are situated

in such isolated or disconnected tracts of six hundred and forty acres or more as not to justify their inclusion in any grazing district to be established pursuant to this Act, to lease any such lands to owners of lands contiguous thereto for grazing purposes, upon application therefor by any such owner, and upon such terms and conditions as the Secretary may prescribe.

In order that those qualified may avail themselves of the provisions of this section without delay, the following preliminary regulations are issued:

1. Any person who is a citizen of the United States or who has declared his intention to become such citizen, or any group or association composed of such persons, or any corporation organized under the laws of the United States or of any State or Territory thereof authorized to conduct business in the State in which the lands involved are situated, and who is the owner of lands adjoining the lands for which lease is desired may file such application.

2. An application for lease should be filed in quadruplicate, under oath, in the United States District Land Office for the district in which such lands are situated, except that in the States in which there are no District Land Offices, the application should be forwarded direct to the Commissioner of the General Land Office, Washington, D. C. The original application only need be sworn to. No specific form of application will be required and no blanks will be furnished, but applications should contain the following information:

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

(b) A statement as to whether the applicant is a native-born or naturalized citizen of the United States, and if naturalized, evidence of such naturalization must be furnished.

(c) If the applicant is a corporation, a certified copy of the articles of incorporation must accompany the application, and if an association, a copy of the constitution and bylaws, and evidence of the citizenship of each member must be submitted.

(d) A description of the lands applied for must be furnished in terms of the legal subdivisions of the public land surveys, together with a statement as to whether the lands contain any springs or water holes, and whether the lands are occupied or used for any purpose and by whom.

(e) A description in terms of legal subdivisions of the public land surveys of the lands owned by the applicant upon which the application is based and the nature of the title thereto and when acquired.

(f) A statement as to the number and kind of stock to be grazed upon the lands, seasons of contemplated use, and the manner in which the applicant plans to graze the lands applied for in connection with his general operations.

(g) A statement as to what previous use, if any, the applicant has made of the lands applied for, and whether the lands have been used

by any one else, if so, by whom, for what purpose, and to what extent.

(h) Evidence that notice of the application has been served upon the owner or owners of all lands contiguous to those for which lease is sought must be furnished. In the absence of such evidence publication may be required.

3. Every applicant for lease must pay to the Register of the district land office at the time of filing an application a fee of five dollars if his lease application is for 1,000 acres or less and an additional five dollars for each additional 1,000 acres or fractional part thereof, which fee will be held suspended by the Register, pending action on the application. If the application is rejected the fee will be returned. If a lease, based on the application, is offered the applicant, and he refuses to accept the same, the fee will be retained as earned, as a service charge.

4. No application will be accepted for less than 640 acres, but two or more isolated or disconnected tracts, if otherwise of the proper status and character and totaling 640 acres or more, may be included in an application.

5. Upon receipt of an application you will assign a current serial number thereto, note the same on your records, and forward the original and two copies to this office. The remaining copy you will forward to the Special Agent in Charge of the Division of Investigations for the division in which the lands are situated. The original, duplicate, triplicate, and quadruplicate applications should be accompanied by a status report of all the lands applied for. Conflicting or junior applications will be received, noted, and disposed of in the same manner as senior applications. However, in forwarding such applications attention should be called to the conflicts.

6. The filing of an application under this section in conformity with these regulations and for not to exceed 3,840 acres will segregate the lands applied for from other disposition under the public land laws, subject to any prior valid adverse claim, except that at all times the mineral contents in the land shall be subject to prospecting, locating, developing, mining, entering, leasing, or patenting under the provisions of the mining laws and to appropriation for rights of way under existing laws, but will not confer on the applicant any right to exercise proprietorship or control over the lands pending action on the application.

The filing of an application for an acreage in excess of 3,840 will not, however, have the effect of segregating the lands unless or until it shall be determined that such action is warranted, and appropriate instructions are issued to you. Such applications will, however, be regularly received, serialized, noted, and disposed of as above indicated.

The filing of an application will not create any right in the applicant to a lease.

FRED W. JOHNSON, *Commissioner*.

I concur:

N. F. WADDELL,

Acting Director in Charge of Grazing.

Approved:

HAROLD L. ICKES,

Secretary.

REGULATIONS UNDER ACT OF MAY 26, 1934, GOVERNING SALE OF TRACTS NOT EXCEEDING FIVE ACRES OCCUPIED AS HOMESTEADS OR HEADQUARTERS IN ALASKA

[Circular No. 1342]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., November 23, 1934.

REGISTER, ANCHORAGE, ALASKA; REGISTERS AND RECEIVERS, FAIRBANKS AND NOME, ALASKA; DIRECTOR, DIVISION OF INVESTIGATIONS:

The act of May 26, 1934 (48 Stat. 809), entitled "An Act to amend section 10 of the Act entitled 'An Act extending the homestead laws and providing for right-of-way for railroads in the District of Alaska, and for other purposes', approved May 14, 1898, as amended", reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first paragraph of section 10 of the Act entitled "An Act extending the homestead laws and providing for right-of-way for railroads in the District of Alaska, and for other purposes", approved May 14, 1898, as amended (U. S. C., title 48, secs. 461, 462, 463, 464, and 465; U. S. C., Supp. VI, title 48, sec. 461), is amended by inserting after the first proviso in such paragraph as amended, the following:

Provided further, That any citizen of the United States after occupying land of the character described as a homestead or headquarters, in a habitable house, not less than five months each year for three years, may purchase such tract, not exceeding five acres, in a reasonably compact form, without any showing as to his employment or business, upon payment of \$2.50 per acre, under rules and regulations to be prescribed by the Secretary of the Interior, and in such cases surveys may be made without expense to the applicants in like manner as the survey of settlement claims under the Act of June 28, 1918 (40 Stat. 632), as amended by section 1 of the Act of April 13, 1926 (44 Stat. 243): And provided further, That the minimum payment for any such tract shall be \$10, and no person shall be permitted to purchase more than one tract except upon a showing of good faith and necessity satisfactory to the Secretary of the Interior.

1. APPLICATION.—Applications under said act must be filed in duplicate, if for surveyed land, and in triplicate, if for unsurveyed land, in the district land office for the district within which the land is situated. The applications must be in affidavit form, sworn to by the applicant, and corroborated by the affidavits of two persons familiar with the facts, and must show:

(a) Full name, post office address and age of applicant.

(b) Whether the applicant is a native-born or naturalized citizen of the United States, and if naturalized, evidence of such naturalization must be furnished.

(c) A description of the habitable house on the land, the date when it was placed on the land, and the dates each year from which and to which the applicant has resided in such house.

(d) That no portion of the tract applied for is occupied or reserved for any purpose by the United States, or occupied or claimed by any native of Alaska, or occupied as a townsite, or missionary station, or reserved from sale, and that the tract does not include improvements made by or in the possession of any other person, association or corporation.

(e) That the land is not located within a distance of 80 rods of any navigable waters, or that the land is not within a distance of 80 rods along any such waters, from any location theretofore made with a soldier's additional right, or trade and manufacturing site, homestead, Indian or Eskimo allotment, or school indemnity selection, or that it has been restored from reservation.

(f) That the land is not included within an area which is reserved because of hot, medicinal, or other springs, as explained in paragraph 1, under the heading "Springs and Water Holes", Circular No. 491. If there be any such springs upon or adjacent to the land, on account of which the land is reserved, the facts relative thereto must be set forth in full.

(g) That no part of the land is valuable for coal, oil, gas, or other valuable mineral deposits, and that at the date of settlement no part of the land was claimed under the mining laws.

(h) That the applicant has not theretofore applied for land under said act, or if he has previously purchased a tract he should make a full showing as to the former purchase and the necessity for the second application.

(i) All applications for surveyed land must describe the land by aliquot parts of legal subdivisions, not exceeding five acres.

(j) All applications for unsurveyed land must be accompanied by a petition for survey, describing the land applied for with as much certainty as possible, without actual survey, not exceeding five acres, and giving the approximate latitude and longitude of one corner of the claim.

2. ACTION ON APPLICATION.—Upon receipt of the application the Register will note its filing, assign a current serial number thereto and transmit the original application, unallowed, together with the accompanying papers to the General Land Office, and the duplicate copy to the Special Agent in Charge for report. With each application the Register will report the status of the land as shown by his records.

Where an application is for unsurveyed land, if the Register finds the showing satisfactory, and no objections appear of record, he will, if no shore space question is involved, transmit the triplicate copy to the District Cadastral Engineer, Public Survey Office, who, not later than the next succeeding surveying season, will issue instructions for the survey of the land, without expense to the applicant. If a shore space question is involved the regulations governing free survey of homestead claims without expense to settler, as set forth in the last paragraph of section 20, under the heading "Homesteads", Circular No. 491, will govern.

The report of the Special Agent in Charge will be made to the Director of the Division of Investigations, who will then transmit it to the General Land Office. The report should show the facts as to applicant's house and the occupancy of the land and whether the lands contain valuable deposits of coal, gas, or other minerals; whether they have power or reservoir possibilities; whether they are within an area which is reserved because of hot, medicinal, or other springs, and any other facts deemed appropriate.

3. PUBLICATION AND POSTING.—In the matter of publication and posting these applications will be governed by the instructions given in connection with applications for soldiers' additional homestead entries as set out in Circular No. 491, except that if a daily paper be designated, the notice should be published in the Wednesday issue for nine consecutive weeks, and if a semiweekly, in either issue for nine consecutive weeks.

3. PUBLICATION AND POSTING.—In the matter of publication and application by this office, all be found regular, the Register will be directed to issue a final certificate, upon payment for the land, and in the absence of objections shown by his records.

The payment for the land shall be at the rate of \$2.50 per acre, the minimum payment for any one tract being \$10.

ANTOINETTE FUNK,
Acting Commissioner.

Approved:

T. A. WALTERS,
First Assistant Secretary.

PROCEDURE ON GEOLOGICAL SURVEY'S REPORTS ON OIL AND GAS

[Circular No. 1344]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., January 19, 1935.

REGISTERS, UNITED STATES LAND OFFICES, AND SPECIAL AGENTS IN
CHARGE, DIVISION OF INVESTIGATIONS:

Departmental instructions of December 28, 1934, revoke those of January 23, 1930 (53 I. D. 41), and in substitution thereof the following instructions are announced:

Where the Geological Survey reports that land embraced in a nonmineral entry or claim on which final proof has not been submitted or which has not been perfected is in an area in which valuable deposits of oil and gas may occur because of the absence of reliable evidence that the land is affected by geological structure unfavorable to oil and gas accumulation, the entryman or claimant will be allowed 30 days from notice to furnish consent under the act of July 17, 1914 (38 Stat. 509), 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 must be advised that if a hearing is ordered the burden of proof will be upon him, and also that if he shall fail to take one of the actions indicated, his entry or claim will be canceled.

In a case where acceptable final proof has been submitted, or a claim has been perfected, and the Geological Survey thereafter makes report, as in the above or similar form, such report will not be relied upon as basis for adverse proceedings against the entry or claim unless the Government is prepared to assume the burden of proving, *prima facie*, that the land was known to be of mineral character, at the date of acceptable final proof or when the claim was completed, according to the established criteria for determining mineral from nonmineral lands, among which may be those recognized by the Supreme Court in the case of *United States v. Southern Pacific Company et al.* (251 U. S. 1). If the Government is thus prepared to assume such burden of proof, the General Land Office will institute adverse proceedings against the entry or claim, making a charge to that effect, giving the entryman or claimant the option of refuting the charge in accordance with regulations in force (Circular No. 460, 44 L. D. 572) or of consenting to the reservation of the oil and gas to the United States, and thereby avoiding the expense of litigation. The entryman or claimant will be advised that in the event hearing is had, the burden of proof will be upon the Govern-

ment; also, that if he shall fail to make answer or to exercise the option offered him within the time allowed, the entry or claim will be canceled without further notice.

FRED W. JOHNSON, *Commissioner.*

UNITED STATES v. STATE OF CALIFORNIA ET AL.

Sana. 021879 Decided January 24, 1935 See 20 F. Suppl. 427

SCHOOL LAND GRANT, CALIFORNIA—ACT OF MARCH 3, 1853—MINERAL LAND—JUDICIAL CONSTRUCTION.

The Act of March 3, 1853 (10 Stat. 246), which provides for the grant of the sixteenth and thirty-sixth sections of each township of public land in California to that State for public school purposes does not in terms except mineral land from the grant. Such an exception, however, was early spelled out by judicial construction, and has been adhered to ever since, in a long line of decisions involving this statute, and is too firmly entrenched to be uprooted save by legislative action.

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SCHOOL LAND GRANT, CALIFORNIA—MINERAL LAND—OFFICIAL SURVEY.

Title to Sections 16 and 36 does not pass to the State of California under its school land grant prior to the acceptance by the Department of the Interior of a survey officially identifying the land; and if the land was then known to be mineral in character, no title passed to the State under that grant.

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21 F. "
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SCHOOL LAND GRANT, CALIFORNIA—MINERAL LAND—TEST.

In determining whether land was of known mineral (oil) character, as contemplated by the public-land laws, and, therefore, excepted from a grant of public lands, knowledge of actual mineral content need not be shown, it being sufficient if known conditions are shown from which mineral character reasonably can be inferred. (*United States v. Southern Pacific Company et al.*, 251 U. S. 1).

MINERAL LAND—DETERMINATIVE TEST—PRESENT OR PROSPECTIVE VALUE.

Upon the question whether land is valuable as oil land in contemplation of the Federal public-land laws, held sufficient if its value as oil land is present or prospective.

SCHOOL LAND GRANT, CALIFORNIA—"KNOWN MINERAL CHARACTER OF LAND"—PROOF—CONDITIONS OBSERVED OR OBSERVABLE.

The mineral (oil) character of land embraced in a school section may be established by evidence of physical conditions observed or observable prior to or at the time of the official approval of the plat of survey which support the conclusion that "an ordinarily prudent man, understanding the hazards and rewards of oil mining, would be justified in purchasing the lands for such mining and making the expenditures incident to their development, and * * * that a competent geologist or expert in oil mining, if employed to advise in the matter, would have ample warrant for advising the purchase and expenditure." This evidence may consist of the testimony of witnesses, including experts and geologists, as to the conditions observed

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329 U.S. 654, 678, 697

by them which were observable on and prior to the date of the official approval of the plat of survey, and of extracts from scientific and other publications showing the state of geological knowledge and belief concerning the land at the time of approval of the survey.

SCHOOL LAND GRANT, CALIFORNIA—MINERAL CHARACTER—EVIDENCE—OBSERVED AND OBSERVABLE CONDITIONS.

The evidence shows that Section 36, T. 30 S., R. 23 E., M. D. M., was known to be mineral in character in 1903, and it was, therefore, excluded from the grant to the State of California for school purposes. The observable conditions before, on, and after January 26, 1903, were such as reasonably to engender, in a competent geologist or expert in oil mining, the belief that said Section 36, and each quarter-section thereof, contained oil and gas of such quality and in such quantity as would render extraction profitable, and these conditions were not only observable on and after January 26, 1903, but were observed before that date.

ICKES, *Secretary*:

The United States has appealed from a decision of the Commissioner of the General Land Office, dated February 23, 1933, which affirmed the dismissal, by a substitute register, of adverse proceedings covering all of the land in Sec. 36, T. 30 S., R. 23 E., M. D. B. & M. Both decisions held that the mineral character of this land was not known on January 26, 1903, when the survey officially establishing the boundaries of the section was approved by the Commissioner, and that title vested as of that date in the State of California under the Act of March 3, 1853 (10 Stat. 244, 246), which granted Secs. 16 and 36 in each township to the State in aid of public schools.

In 1899, when the California petroleum industry was still in its infancy and before the section in question had been surveyed, a number of residents of the lower San Joaquin Valley, on whose western border this section is situated, drew up a petition to the Secretary of the Interior and the Commissioner of the General Land Office for the withdrawal of a large amount of land in that vicinity from agricultural entry. As a result of this petition, the Commissioner, on February 28, 1900, directed the register and receiver at Visalia, California, to "suspend from disposition until further orders" many townships named in the petition, including the township in which this section is located. Ball, *Petroleum Withdrawals and Restoration Affecting the Public Domain*, Bull. 623 U. S. G. S. 61 (1916). This suspension was in effect in December 1901, when Sec. 36 was surveyed, and on January 26, 1903, when the Commissioner approved the survey. The surveyor returned as mineral in character all the lands in the township which were covered by his survey.

On December 10, 1903, the Commissioner directed a special agent of the General Land Office to examine the lands embodied in the withdrawals ordered in 1900, and to report whether their suspension from disposition should be continued. The special agent submitted

reports dated January 22, 1904, and March 22, 1904, which recommended the restoration of certain of these lands, including the land in T. 30 S., R. 23 E., M. D. B. & M. On the basis of this report, the Commissioner, on February 11 and February 20, 1904, relieved from suspension parts of this township, not including Sec. 36; and he relieved the remainder on April 5, 1904. Ball, *supra*, at pp. 95-98 (1916).

On September 14, 1908, the township was included in a withdrawal from agricultural entry pending examination and classification by the United States Geological Survey. The township was classified as oil land June 4, 1909, and, with a vast area of other lands, was withdrawn by Departmental order of September 27, 1909, from all forms of disposition under the mineral and nonmineral public-land laws "in aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain." President Taft confirmed this withdrawal and placed the township, together with other withdrawn petroleum lands in California, in Petroleum Reserve No. 2, on July 2, 1910. By Executive order of September 2, 1912, the township was placed in Naval Petroleum Reserve No. 1. Ball, *supra*, at pp. 109-110, 119-129, 135-149, 183-198, 283-4 (1916).

These proceedings, in their length and complexity, have rivaled *Thellusson v. Woodford* (11 Vesey, 112) and *Jarndyce v. Jarndyce*. On September 30, 1912, the General Land Office directed its agents in the field to examine and report on all entries, filings, selections, and school sections within Naval Petroleum Reserve No. 1. The report of Special Agent Gardner, dated December 31, 1912, with respect to Sec. 36, T. 30 S., R. 23 E., M. D. B. & M., was transmitted to the Commissioner by the chief of the second field division at San Francisco on April 5, 1913, together with a recommendation that proper steps be taken to recover possession of that section, on the ground that the land was known at the time of the survey to be mineral in character. On the basis of this report the Commissioner on January 14, 1914, ordered the register and receiver at Visalia to institute adverse proceedings covering the section in question, in accordance with the Circular of January 19, 1911 (39 L. D. 458), upon charges that the land was mineral in character, containing valuable deposits of petroleum, and that it was known to be of such character at and prior to December 20, 1901, when the survey was completed in the field. On January 21, 1914, the Visalia office requested the chief of the second field division to furnish the names and addresses of the parties who should be served with notice of the adverse proceedings. Apparently due to an administrative reorganization which the office of the chief of the second field division was then undergoing, this letter was misfiled, the names and ad-

dresses were not furnished, and no further action was taken by any branch of the Interior Department until 1921. The status of the case, however, was reported to the Commissioner by the register and receiver at Visalia on November 26, 1917, as a result of the Commissioner's request, dated October 12, 1917, for a list of all cases pending in the Visalia office. On February 2, 1921, the chief of the field division advised the Commissioner that he had discovered the documents embodying the charges preferred in 1914 in the file of closed cases, and requested instructions. On March 2, 1921, the Commissioner directed the register and receiver to proceed, in accordance with Circular of February 26, 1916 (44 L. D. 572), under amended charges that "the land is mineral in character, containing valuable deposits of petroleum", and "that the land was known to be mineral in character at and prior to the date of the acceptance of the plat of survey of this office, January 26, 1903."

The proceedings directed by the Commissioner on March 2, 1921, never went to trial. Representatives of the claimants of the land applied to Secretary Fall, praying that he should exercise his jurisdiction to determine as a matter of law that title vested in the State of California at the time of the approval of the survey, and that the Department had classified the land as nonmineral in 1904, when the suspension of 1900 was lifted on the basis of the special agent's report. A hearing on the application was had before Secretary Fall on June 8, 1921, at which representatives of the United States Navy, the Department of Justice, the Department of the Interior, and of the claimants were present. At the close of the testimony Secretary Fall orally directed that the contest be dismissed. On June 9, 1921, the Commissioner directed the register and receiver at Visalia to dismiss the proceedings and close the case upon the records.

On February 21, 1924, the President approved Public Resolution No. 6, 68th Congress (43 Stat. 15), introduced by Senator Walsh of Montana, which reads as follows:

Resolved 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 hereby is, directed forthwith to institute proceedings to assert and establish the title of the United States to sections 16 and 36, township 30 south, range 23 east, Mount Diablo meridian, within the exterior limits of naval reserve numbered 1 in the State of California, and the President of the United States is hereby authorized and directed to employ special counsel to prosecute such proceedings and any suit or suits ancillary thereto or necessary or desirable to arrest the exhaustion of the oil within said sections 16 and 36 pending such proceedings.

On May 8, 1925, Secretary Work "reversed, vacated, and set aside" Secretary Fall's order dismissing the proceedings, and directed the

register and receiver at Visalia to proceed to hold a hearing. *State of California et al.* (51 L. D. 141). The charges, which are the basis of this case, are:

(1) That the land is mineral in character, containing valuable deposits of petroleum and natural gas.

(2) That the land was known to be mineral in character at and prior to the date of the acceptance of the plat of survey by the General Land Office, January 26, 1903.

The Secretary denied a motion for rehearing of this decision on August 17, 1925. *State of California et al.* (51 L. D. 145).

Thereafter, on October 9, 1925, the Standard Oil Company of California, one of the claimants of the land, filed a bill in the Supreme Court of the District of Columbia, praying that an injunction issue restraining the Secretary from continuing the proceedings against the land. On the same day the Commissioner ordered the register at Visalia to suspend proceedings against the land until further orders. The court entered a decree in accordance with the prayer, and this action was affirmed by the Court of Appeals of the District of Columbia. *Work v. Standard Oil Company*, 57 App. D. C. 329, 23 F. (2d) 750 (1927). Upon certiorari to the Supreme Court of the United States these decrees were reversed, and it was held that neither Secretary Fall's order nor the other Departmental acts relied upon by the Standard Oil Company constituted a conclusive adjudication that the land was not known to be mineral in character at the time of the survey, that the land was not removed from the jurisdiction of the Interior Department, and that the Secretary might legally vacate the prior order of dismissal and order a hearing to determine the known character of the land. *West v. Standard Oil Company*, 278 U. S. 200 (1929).

On October 26, 1929, the Commissioner revoked the order of October 9, 1925, suspending proceedings, and directed the register at Sacramento, California, to proceed to a hearing. The register at Sacramento was relieved at his own request from hearing the case, because of prior business associations with some of the parties in interest, and Mr. Walter Spencer, the register of the United States Land Office at Denver, Colorado, was designated to sit as substitute register. A series of hearings was held at San Francisco, Bakersfield, Los Angeles, Sacramento, and other places in California, and the case was closed to testimony on April 25, 1931. No appearance on behalf of the State of California has been made. On February 24, 1932, the substitute register entered his decision dismissing the charge that the land was known to be mineral in character at the time of approval of the survey. His decision was affirmed by the Commissioner of the General Land Office on February 23, 1933.

Thereupon, this final appeal was taken, and argument was heard thereon June 14 and 15, 1933.

While various mineral locations were made on the section in question from 1899 to 1905, none of these was ever perfected by discovery, and all the present claimants trace title from patents issued by the State of California. On January 3, 1901, Alice J. Miller applied for a certificate of purchase for the whole section, and paid \$160, the initial payment required by law for the purchase of school lands in the State of California. On July 2, 1902, her rights under the certificate of purchase issued by reason of the application were sold for delinquent taxes, and a deed of her interest in the section was made to the State of California, pursuant to the tax sale, on July 2, 1907. On August 24, 1908, George Hay applied to the State to purchase the $W\frac{1}{2}$ and the $W\frac{1}{2}E\frac{1}{2}$ Sec. 36, and Mason W. Buffington applied for the purchase of the $E\frac{1}{2}E\frac{1}{2}$, comprising lots 1, 2, 5, 6, 7, 8, 11, and 12 of the section. These persons redeemed the land from the tax sale on the following day, and a certificate of purchase was issued to Hay on January 5, 1909, and to Buffington on February 8, 1909.

Hay assigned his certificate of purchase and gave a quitclaim deed to Oscar Sutro, an attorney for the Standard Oil Company, on November 29, 1909. Sutro had previously, on November 26, 1909, taken a quitclaim deed from Alice J. Miller, and her husband, E. A. Miller. Patent to the $W\frac{1}{2}$ and the $W\frac{1}{2}E\frac{1}{2}$ issued from the State to Oscar Sutro January 31, 1910, and Sutro deeded this land to the Standard Oil Company on March 21, 1910. The Standard Oil Company is the present claimant of the aforesaid portion of Sec. 36.

Buffington agreed on August 21, 1909, to sell to Frank J. Carman all of the $E\frac{1}{2}E\frac{1}{2}$ except lots 1 and 2, and, after patent issued to Buffington on January 20, 1910, he conveyed the land to Carman. Carman and Charles O. Fairbank, as owners in fee, and the Standard Oil Company, under a lease dated May 5, 1919, are the present claimants of this land.

Lots 1 and 2 in the $E\frac{1}{2}E\frac{1}{2}$ Sec. 36 are now claimed in fee, through mesne conveyances from Buffington, by Mrs. Sidney H. Greeley to the extent of an undivided one-half interest, and by Thomas A. O'Donnell and Edward L. Doheny each to the extent of an undivided one-quarter interest. The Pan-American Petroleum Company claims under a lease dated October 2, 1919.

On January 3, 1903, the Surveyor General of the State of California, as agent for the State, signed an application to select Sec. 6, T. 44 N., R. 3 E., M. D. B. & M., containing 639.17 acres, offering as base land 639.17 acres in the section here in question. This application was presented to the register at Redding, California, January 4, 1903, and was accepted and filed by him March 7, 1903. On

August 15, 1905, the State applied to amend the application by substituting as base land 639.17 acres in Sec. 16, T. 10 N., R. 5 E., H. M.

The State had previously, on July 29, 1902, made application for the same lieu land, offering as base part of Sec. 36, T. 2 S., R. 5 E., S. B. M., and this application was still in effect when the register accepted the application of 1903. Because of this conflict the Commissioner, on December 18, 1909, allowed the application of 1902, treating the application of 1905 as an amendment to it, and formally canceled the application of 1903, which had returned, as base, land in the section involved in the present controversy.

Section 36 is located in the Elk Hills on the southwestern border of the San Joaquin Valley. This valley is a major depression in Southern California, the narrow southern end of which is bounded on the east by the Sierra Nevadas, on the south by the Tehachapi Mountains, and on the west by the Temblor Range. The Elk Hills, which lie in the western part of Kern County, project out into the valley from the Temblors slightly south of eastward, forming the northern border of a wedge-shaped part of the valley lying between the Elk Hills and the Temblors. In the center and near the base of this wedge of low lands, and roughly halfway between the Temblors and the Elk Hills, is a low range of broken hills known as the Buena Vista Hills. The valley to the north between these hills and the Elk Hills is called the Buena Vista Valley, and that to the south between the Buena Vista Hills and the Temblors is the Midway Valley. At the foot of the Buena Vista Valley, and touching the southeastern end of the Elk Hills and the northeastern end of the Buena Vista Hills, was Buena Vista Lake. The tip of the wedge is formed by the narrow McKittrick Valley, which, dwindling to little more than a gully at its northern end, divides the Elk Hills from the foothills of the major uplift of the Temblors.

The Elk Hills are a low, elongated swell, crudely elliptical in outline, having a length from northwest to southeast of about sixteen miles and a maximum width of about six miles. They rise to a height of about 1,550 feet above sea level, and their crest is roughly 1,200 feet above the surrounding valley lands. They are devoid of vegetation except for low sagebrush and seasonal grasses. Their surface is scored by small gullies, formed by erosion caused by the scanty rainfall. Section 36 is situated a trifle southeast of the geographic center of the hills and near their crest.

On the eastern border of the McKittrick Valley, about a mile and a half from the western end of the Elk Hills, is the town of McKittrick. A railroad line, completed by the Southern Pacific Railroad in 1893, runs northeast from McKittrick through the gully which divides the Elk Hills from the Temblor foothills, and then turns to

the east and runs some thirty miles across the San Joaquin Valley to Bakersfield, about four miles from the Sierra Nevada foothills. Another line, completed late in 1901 or early in 1902, branches off near Bakersfield and runs southeasterly, skirting Buena Vista Lake, to the town of Maricopa, which lies at the base of the Temblors some twenty-five miles southeast of McKittrick. Near McKittrick and Maricopa, which was then known as "Sunset", the first oil wells of Kern County were drilled.

The presence of oil seepages and deposits of asphaltum in the Temblor foothills was known for many years prior to 1900; but serious development of the region may be said to have started in the early nineties. Even then more attention was given to the production of asphalt than of oil. As early as 1866 a very heavy oil was taken from pits and open cuts northwest of the present site of McKittrick, and in 1887 a well in that vicinity was drilled to a depth of 565 feet, in which oil rose nearly to the top of the casing. Several wells were drilled after 1890, and by 1900 there were 16 producing wells in the McKittrick district. W. L. Watts, *Oil and Gas Yielding Formations of California: Cal. State Min. Bur. Bull. No. 19, pp. 125-126 (1900).*

Development of the fields along the Temblors to the southeast of McKittrick was seriously delayed by lack of water and of transportation facilities. Some 2,000 acres of land near Sunset were located by a number of residents of Bakersfield, including Solomon Jewett and J. A. Blodgett, who were foremost in opening up the region; and active development was begun about 1890. A certain amount of asphalt was produced, and some oil was found; but what later became known as the "Sunset-Midway" fields were still commercially insignificant in 1900. R. W. Pack, *The Sunset-Midway Oil Field, California: U. S. G. S. Prof. Paper 116, vol. 1, pp. 63 to 64 (1920).*

In June 1899 the first wells of the Kern River Field on the eastern side of the San Joaquin Valley near Bakersfield were begun. At this field water was comparatively plentiful, transportation facilities were good, abundant oil was found in shallow wells, and the development was amazingly rapid. Little more than a year after the first wells were drilled over 130 wells had been completed. Watts, *supra*, at pp. 114 to 115. In 1902 the field was yielding about two-thirds of all the oil produced in California.

The swift development of the Kern River Field gave fresh stimulation to the search for oil in western Kern County. More wells were drilled in the Sunset Field, and prospecting started in the Midway Field, half way between Sunset and McKittrick. Here, however, the lack of water and of transportation, combined with the fall in the price of crude oil which soon resulted from the Kern River developments, operated after 1903 to check severely further development. Pack, *supra*, at pp. 64 and 65.

In 1907, development of the fields in western Kern County was greatly accelerated. Prospecting, which had hitherto been largely restricted to the Temblor foothills, began to move out into the Midway Valley. In 1909 a gusher was brought in by the Chanslor-Canfield Midway Oil Co., and a strong flow of gas was encountered by the Honolulu Consolidated Oil Co. in the Buena Vista Hills at a depth of about 1,600 feet. Early in 1910 the famous Lakeview gusher was brought in north of the Sunset Field, and a large flow of oil was obtained by the Honolulu well in the Buena Vista Hills at a depth of about 2,500 feet.

Development of the Elk Hills was begun very suddenly in 1910 immediately after the discovery of oil in the Buena Vista Hills. About thirty-five wells were drilled during 1910 and 1911, but of these not more than twelve were pushed to the depth at which oil was eventually found. The results were, on the whole, disappointing, although three wells produced substantial amounts of oil and one other well obtained a good flow of gas. Pack, *supra*, at pp. 65, 163 to 169.

Conflict over titles to lands within the Elk Hills, caused by the withdrawal of 1909 and inclusion of the Hills within the naval reserve, undoubtedly delayed their successful development. In 1918, however, the shortage of oil brought about by the war induced the Standard Oil Company to commence drilling on Sec. 36. On January 5, 1919, the initial well was brought in at a depth of 2,532 feet, which yielded an average daily flow of 225 barrels of oil during the first month. About a year later the eastern field of the Elk Hills was opened up by wells drilled by the Standard Oil Company on Sec. 36, T. 30 S., R. 24 E., M. D. B. & M. By the end of 1928 over four hundred wells had been drilled in the Elk Hills. There are now some thirty-five productive oil wells and three gas wells on the Sec. 36 here in controversy. Development of the Hills away from the proven areas has been slow, as most of the Hills is included in Naval Petroleum Reserve No. 1. Woodring, Roundy, and Farnsworth, *Geology Resources of the Elk Hills, California: U. S. G. S. Bull. No. 835, pp. 47 to 49 (1932).*

It is well settled that mineral lands are excluded from the lands granted to California by the Act of March 3, 1853 (10 Stat. 246). *Mining Co. v. Consolidated Mining Co.*, 102 U. S. 167 (1880). It is also clear that that act did not constitute a grant *in praesenti*, and that no title to any land passes under the statute prior to approval by the Commissioner of a survey officially identifying the land as Section 16 or 36 of a township. Until that time the United States can dispose of the land as it sees fit; and any segregation of land from the public domain prior to approval of the survey prevents

passage of title under the statutory grant. *United States v. Morrison*, 240 U. S. 192 (1916). If the Section 36 here in controversy was known to be mineral in character on January 26, 1903, title to it has never vested in the State of California and the claims of the transferees under patents granted by the State are invalid. See *West v. Standard Oil Co.*, 278 U. S. 200, 208 (1929). Section 36 was known to be mineral on that date if "the known conditions at that time were such as reasonably to engender the belief that the lands contained oil of such quality and in such quantity as would render its extraction profitable and justify expenditures to that end." *United States v. Southern Pacific Company*, 251 U. S. 1, 13-14 (1919).

The United States has put forward as proof of the known mineral character of Section 36, at the time of the approval of the survey, evidence which falls into two fundamental and distinct categories:

(1) Evidence of the conditions in the Elk Hills and in the surrounding country observable at that time, and of the then state of geological knowledge, supporting the conclusion that "an ordinarily prudent man, understanding the hazards and rewards of oil mining, would be justified in purchasing the lands for such mining and making the expenditures incident to their development, and * * * that a competent geologist or expert in oil mining, if employed to advise in the matter, would have ample warrant for advising the purchase and expenditure." *United States v. Southern Pacific Co.*, 251 U. S. 1, 13 (1919). This evidence consists of the testimony of witnesses and experts embodying the statements of others with respect to the conditions they had observed in the region prior to or shortly after 1903; voluminous testimony by geologists as to the conditions observed by them in the course of extended personal inspections before and during the hearings; exhibits consisting of extracts from scientific and other publications showing the state of geological knowledge and belief of 1903; and the testimony of four geologists called as expert witnesses to testify, on the basis of those conditions and that knowledge, that in 1903 "an ordinarily prudent man" advised by a "competent geologist or expert in oil mining" would have been justified in purchasing Section 36 for oil development.

(2) Evidence that specific people actually believed prior to 1903 that the Elk Hills were chiefly valuable for oil. This evidence comprises the testimony of a few witnesses who testified that prior to 1903 they believed that the Elk Hills were valuable for petroleum, and extracts from publications which are thought to show that the authors had come to a like conclusion. Three special pieces of evidence relied on by the Government likewise fall into this category of actual belief: (a) the miners' petition of 1899 and the resultant suspension from disposition in 1900 of the Elk Hills and adjacent land, (b) the return of Section 36 and other sections in T. 30 S., R.

23 E., M. D. B. & M., as mineral in character embodied in the official survey, and (c) a letter written on June 25, 1909, to the Attorney General of the United States, by Frank J. Carman, who claims part of Section 36, in which Carman stated that various sections of land in the Elk Hills then patented to the Southern Pacific Company, two of which adjoin Section 36, were known to be mineral in character prior to December 12, 1904, when the patents were granted.

The claimants of the land rely chiefly upon:

(1) Evidence consisting of the testimony of geologists and other witnesses that the conditions observable in 1903, regarded in the light of geological knowledge then available, did not justify the acquisition or development for oil of Section 36.

(2) An abundance of testimony by witnesses variously equipped to express and support an opinion upon the question that, prior to 1903 and for some years thereafter, they did not believe the Elk Hills to be valuable for oil, and that they had never heard contrary opinion expressed. In this class of testimony fall three pieces of evidence emphasized by the claimants: (a) the reports dated January 22, 1904, and March 22, 1904, of Special Agent E. C. Ryan, recommending lifting of the suspension of 1900, and the resultant restoration of the Elk Hills and adjacent lands on April 5, 1904; (b) a letter dated November 5, 1910, from George Otis Smith, Director of the Geological Survey, to the Secretary of the Interior, in response to the latter's inquiry dated October 26, 1910, with respect to certain sections in the Elk Hills involved in a suit to cancel patents issued to the Southern Pacific Company December 12, 1904, in which it is stated that "although these lands are unquestionably oil lands, this office does not know of any evidence which would be of value in canceling patent"; and (c) certain testimony given before Congressional committees in 1916, and contemporary statements by Secretary of the Navy Daniels, that very little commercial oil would be found in Naval Petroleum Reserve No. 1, which is comprised of land in the Elk Hills, including Section 36.

(3) As evidence both that reasonably prudent oil operators would not have been justified in developing Section 36 in 1903, and that no one then believed the Elk Hills to have any petroleum value, the claimants rely heavily on the evidentiary weight of the fact that no serious efforts to obtain oil in the Hills were made until after the discovery of oil in the Buena Vista Hills in 1910, seven years after the date of approval of the survey.

GEOLOGICAL CONDITIONS OBSERVABLE IN 1903

The surface of the Elk Hills is very generally covered by alluvial deposits, and only the uppermost stratum of the underlying rock is anywhere exposed at the surface. Analysis of the stratigraphy of

the hills, without recourse to the logs of wells drilled since 1903, therefore depends almost completely upon projection of the dip of strata exposed on the slope of the Temblors to the southwest, and at McKittrick to the west.

Along the slope of the Temblors which faces toward the Elk Hills, and from a point over ten miles north of McKittrick to a point south of Maricopa, are plentiful exposures of organic rocks, known as Monterey shales, which consist of siliceous shales of marine origin, containing diatoms. This shale is now and long before 1903 admittedly was believed to be the source of oil in western Kern County. The site of its occurrence in the Temblors is one of profound geologic disturbance; and the Monterey shales now lie in sharp, compressed folds or anticlines, and are frequently faulted. The thickness of this stratum varies, according to the testimony of the geological witnesses, from 3,000 to over 5,000 feet. The exposures farthest down the Temblor slope show the stratum to be dipping under the Midway Valley, the degree of dip varying with the particular exposure from five degrees to nearly forty degrees. The Monterey shale is overlain conformably by, and frequently intercalated with, a stratum of sands and conglomerates, also containing some diatoms, known as the Santa Margarita formation. Diatomaceous shales similar to, although not identical with, those which occur in the Temblors, are exposed on the eastern flank of the San Joaquin Valley, near the Kern River field, at Poso Creek.

The Monterey shale and the Santa Margarita formation are overlain unconformably by the Etchegoin, a marine or brackish water sedimentary formation consisting largely of sandstone, but approaching shale in spots, and containing coarse grit, conglomerates, and some clay. Exposures of this stratum are not plentiful, but it has been definitely identified at a point about a mile southeast of McKittrick and at two other points in the Temblors, one at Midway and the other west of Maricopa. Pack, *supra*, pp. 44-47. The limits of the Etchegoin are still hard to fix as it is not easily distinguishable from the Santa Margarita below and parts of the Tulare above. At the extreme south end of the San Joaquin Valley it is now thought to have a thickness of some 800 feet, while at McKittrick the exposure is probably not over 200 feet in thickness. There is no evidence that in 1903 this stratum had been isolated from the adjacent beds, and it was not named until at least two years thereafter; but it is undisputed that geologists and oil men in 1903 recognized in the sandstones and conglomerates of either the Santa Margarita or the Etchegoin a suitable reservoir bed for the oil produced in the underlying diatomaceous shale.

The topmost stratum has been called the Tulare or Paso Robles formation, and is referred to in the testimony as the "cap rock" series. This stratum includes sandstones, grit, layers of clay shale and marl beds and conglomerates. Whether it overlies the Etchegoin conformably or unconformably is a matter in which the testimony is in some conflict. Probably the question could not have been readily determined in 1903, but would have had to await the outcome of extensive geological mapping. Apparently it is now thought that these strata are conformable. Pack, *supra*, at p. 47; Woodring, Roundy and Farnsworth, *supra*, at p. 25. The thickness of the Tulare, where it is exposed along the Temblors, is about 2,000 feet.

All these strata dip down under a blanket of alluvium at the base of the Temblors, and no rock strata are exposed in the Midway or Buena Vista Valleys. In the vicinity of McKittrick there are exposures of Etchegoin and of a diatomaceous, bituminous shale which probably belongs to the Santa Margarita formation; but this is the only point which is nearer to the Elk Hills than is the edge of the Temblors where these underlying strata are observable at the surface. The Tulare alone is exposed in the Buena Vista and Elk Hills.

The area called the Elk Hills is admitted by the claimants to constitute an anticlinal fold, or elongated dome. From the high points of the structure the strata dip downward in all directions, and it is therefore referred to in the testimony as a "doubly plunging" anticline. The structure is not, of course, perfectly regular; near its base are one or two small, sharp folds called "pop-up" anticlines, and along the crest of the hills are several minor folds or wrinkles superimposed upon the principal structure. The dip of the strata along the flanks of the main fold is gentle, and, on the average, does not exceed five degrees. It is conceded that such a structure is now considered to be well adapted to imprison oil forced upwards through permeable strata by the pressure of subterranean water and is therefore an occurrence favorable to the accumulation and retention of oil.

Whether the Elk Hills structure is an "obvious anticline", as is claimed by the United States, or whether determination of its presence is as difficult as the discovery of "hidden faces in trees", as was figuratively suggested by one of the geological witnesses for the claimants, has been debated by the parties at length. As is stated by the register, "the entire area is covered with soil and decomposed strata to such an extent that one may travel miles over it without finding any very definite outcropping or indications of an anticlinal structure except the suspicion that might be created by the general topography." (Register's opinion, p. 18.) But careful examination in 1903 would have disclosed strata in various parts of

the hills dipping in opposite directions from their crest and this would have confirmed the suspicion to which the topography gives rise. Government geologists noted and commented on the anticlines in both the Buena Vista and Elk Hills in a publication dated 1910. Ralph Arnold and Harry R. Johnson, Preliminary Report on the McKittrick-Sunset Oil Region, U. S. G. S. Bull. 406, pp. 81, 93, 99, 210 (1910). Likewise a map has been submitted in evidence which was made by a geologist employed by the Southern Pacific Company, Josiah Owen, probably in 1903 and certainly before the death of Owen on December 19, 1909. On this map the crest of the Elk Hills anticline is accurately plotted, and shown to extend across the north part of Section 36. Frank J. Carman, one of the claimants, described lands in the Elk Hills in a letter to the Attorney General of the United States, dated June 25, 1909, as being "situated on the axis of a well-marked anticlinal fold." There is no suggestion that improvements in methods of geological mapping made what was possible in 1909 or earlier impossible in 1903. George M. Cunningham, the principal geological witness for the claimants, who severally criticized the Government's contention that the anticline is "obvious," himself admitted that, even before 1903, thorough geological mapping would have revealed "a very gently folded anticlinal structure." (Cunningham, 4408-09.) Taking all the evidence into account, there is no doubt that the existence of the Elk Hills anticline was determinable prior to January 26, 1903.

Concerning the question whether the Elk Hills anticline was ever actually observed and recognized by anyone prior to 1903, the evidence in the record is not plentiful. B. K. Lee, a witness for the United States, testified that he noticed an anticline in the Elk Hills in 1900 while passing through the railroad cut at the west end of the hills, that he discussed the anticline with Josiah Owen in the spring of 1903, and that in 1909 he traced the Elk Hills anticline down from the western end to Section 36. It is possible that Lee reached no conclusion before 1903 with respect to the relation which the main fold of the Hills bore to the anticline which he observed in the railroad cut; and he certainly did not determine its relation to Section 36 until long afterwards.

Another Government witness, Colon F. Whittier, showed an understanding of the principle which explains the accumulation of oil in anticlines, and testified that this knowledge on his part antedated 1903. He was never in the Elk Hills until long after that time, but he had, prior to 1903, passed through the railroad cut at the west end and over the road at the east end by Buena Vista Lake. He testified that he then thought the Hills had "the natural structure of an anticline", and that from the train windows

in the railroad cut he had observed dipping strata which he then thought showed the structure. Whittier's observation of the dipping strata at both ends of the Hills was sufficient to warrant his conclusion that an anticlinal structure was present.

While the testimony concerning the existence in the Elk Hills of any surface indications of oil is in great conflict, there is no dispute that oil seeps, deposits of brea and asphalt, and gas blow-outs, occur abundantly in western Kern County. Numerous seepages and outcrops lie in a line running from northwest to southeast, passing about a mile to the west and south of McKittrick, and following the course of a small anticline which runs out into the McKittrick Valley from among the Temblor foothills. The last of these outcrops occurs about a mile and a half southeast of McKittrick near the end of the anticline. Another and much more extensive series of seeps runs down the northeast slope of the Temblors from points well north of McKittrick past Sunset to the south. Across the San Joaquin Valley, near Bakersfield, are the seeps which led to the discovery of the Kern River field.

Near the east end of the Buena Vista Hills, in Sec. 11, T. 32 S., R. 24 E., M. D. B. & M., is an area of some 200,000 square feet where the sands are cemented with a brownish substance. Sulphurous fumes are given off, and the sands are inflammable. Professor Mather, a geological witness for the Government, testified that gas which can be ignited is still escaping here. Other witnesses, however, denied this. Arnold and Johnson in their report refer to the exposure as containing sands "very heavily impregnated with oil" and as "oxidized asphalt." Arnold and Johnson, *supra*, at pp. 82, 211. Gester, a geologist called by the claimants, denied that it was asphalt. (Gester, p. 4522.) But, whether or not the exposure is now or was in 1903 a live seep, and whether or not it contains oil, the great weight of testimony is that gas at one time escaped in this area, and that it is a strong indication of petroleum underneath. (Tolman, p. 143; Fairbanks, p. 51; Veatch, p. 12; Mather, p. 47; Gester, pp. 4522-23; Whittier, p. 398; Wiley, p. 3675; Williams, pp. 758-59; Arnold and Johnson, *supra*, pp. 82, 211. *Contra*: McMillan, p. 25; Bennett, p. 3324.) Clearly, too, it was seen and taken to be an indication of oil prior to 1903 (Whittier, p. 342-398).

The Government introduced testimony purporting to prove the existence of seepages in three places in the Elk Hills. One of these, alleged to have been found in the east end of the Hills on Sec. 2, T. 31 S., R. 24 E., M. D. B. & M., was thoroughly discredited by the claimants' testimony and may be disregarded. Deposits of dried oil and asphalt have been found in a dry wash running

through the railroad cut at the west end of the Elk Hills. After rainfall, a considerable volume of water rushes through this wash from the region near McKittrick, and much of the oil found in the cut has undoubtedly been carried down stream from the McKittrick seeps, and deposited along the shores of the wash. Professor Mather expressed some doubt that oil could flow so far, but Cunningham, who lived in Bakersfield and was well acquainted with the region, testified that he had actually seen oil from McKittrick washed down the cut (Mather, p. 44; Cunningham, p. 4353). Veatch did conclude that some of the oil which seemed remarkably free from impurities came from a seep in the cut itself (Veatch, pp. 13-18). But his conclusion probably was incorrect, in view of the undisputed fact that much oil does wash down the cut, and that the only oil found in that vicinity is found along its shores. The only conclusion which can fairly be drawn from the record is that the actual existence of seeps in the railroad cut has not been proved.

No question of fact in this case has been disputed more vigorously than that of the nature of the exposure of darkened earth in the northwest corner of Sec. 32, T. 30 S., R. 24 E., M. D. B. & M., which is the third occurrence in the Elk Hills alleged by the Government to be a surface indication of the presence of oil and gas in the Hills. Here some brown or black substance, which apparently was deposited in liquid form, has surrounded the sand particles, and cemented them together. It is not readily, if at all, inflammable, and the odor which is given off by the application of flame to it does not resemble the smell of burning oil. It is deposited in at least two places along the banks of a gulch, and penetrates the earth to a depth of about 10 feet. It is admitted by the Government that this substance is not in its present form bituminous, and that it does not now contain any oil; but it is vigorously contended that it is of petroleum origin and lacks the usual characteristics of petroleum only because of prolonged exposure and consequent oxidation. The geologists who appeared for the Government uniformly declared their belief to be that this so-called "Lamont seep" is of petroleum origin. The geologists called by the claimants, with equal uniformity, denied such belief and testified that it was in no way an indication of oil or gas in the ground beneath.

Detailed and exhaustive analyses of the material were made by Dr. Morse, a chemist called by the Government, and by Dr. Danner, also a chemist, and a witness for the claimants. Dr. Danner demonstrated that the material does not respond significantly to any of the usual tests for petroleum and succeeded in extracting a sugar from it, wherefore he concluded that it is of vegetable origin. Dr. Morse

showed that known hydrocarbons, if subjected to a long or intensive process of oxidation, will lose many of their characteristics, and cease to react to the usual petroleum solvents. He also succeeded in producing pentose sugar from hydrocarbons. But his tests, while they convincingly showed that Dr. Danner had not proved the "Lamont seep" not to be of petroleum origin, were not so effective in affirmatively establishing such origin. Dr. Morse never showed that vegetable and other nonpetroleum substances might not respond to his tests in the same manner as did the "Lamont seep" earth; and when asked upon what he based his conclusion with respect to its origin, he relied upon the appearance of the material and its presence in the general vicinity of known oil land—the very factors to which laymen would give weight. The result of the chemical disputation was, therefore, a stalemate, and the origin of the "Lamont seep" remains, so far as this controversy is concerned, undetermined.

But it does not follow that this occurrence should be dismissed from consideration. The testimony of Drs. Tolman, Mather, Morse, and Fairbanks certainly demonstrates the reasonableness of a belief in the "Lamont seep" as an oil indication. Its appearance and location are such as would normally arouse a prospector's curiosity and hopes, and even its failure to respond to the usual tests would not be likely in every case to destroy belief in it as an oil indication.

It is not surprising, therefore, that the "Lamont seep" attracted much attention after its discovery in 1899. J. I. Wagy, who saw it at that time, testified that he took it to be an oil and gas blowout, as it looked like similar manifestations in the Sunset field (Wagy, pp. 145-46). W. G. Sylvester found it the same year, and testified that he succeeded in burning it and believed it to be an oil indication (Sylvester, pp. 389, 420, 428). Other witnesses came to a like conclusion (McCutchen, p. 306; McMurdo, p. 432-433; Sarnow, p. 323). The Los Angeles Herald for October 30, 1901, carried a reference to the exposure which, while inaccurate in description, indicates that it was known to more than a few (U. S. Ex. 7-D). Of course, the uncertain nature of the substance led some to doubt its significance (Doan, p. 1247; Dyer, pp. 206-208; Crites, 1673, 1767). But the evidence clearly shows that, prior to 1903, the "Lamont seep" was thought by several persons to be an indication of oil, and that such belief in its significance was reasonable.

One well had been drilled in the Elk Hills prior to 1903. This was drilled at the eastern end of the hills in the northeast corner of Sec. 11, T. 31 S., R. 24 E., M. D. B. & M., and is referred to in the testimony as the "Hoy Well." It was drilled in 1901 by the Western Union Oil and Development Company, the members of which in-

cluded B. F. Hoy, who was not called as a witness, and F. D. Lowe, who was called by the Government. The promoters had, apparently, planned to drill to a depth of 1,200 feet, but after the well had reached 560 feet, financial difficulties led to the cessation of operations (Lowe, pp. 89-90). The well struck a small amount of gas, which was subsequently used to run a cooking stove in the camp (Allison, pp. 13-14; Lowe, p. 90; McMurdo, p. 432). Drops of oil were found on the bit of the drill, but it is unlikely that it was anything but lubricating oil used for drilling.

The claimants contend that the gas found in the Hoy well was "marsh gas" rather than petroleum gas. These two sorts of gas are similar chemically, in that marsh gas is composed of methane, which is the principal constituent of petroleum gas. Marsh gas comes from decayed vegetable matter and is not an indication of the proximity of oil. It is now known that gas is frequently found in the Elk Hills at depths less than 500 feet. Pack, *supra*, at p. 164; McLaughlin, *Natural Gas Development in the Elk Hills, Summary of Operation of California Oil Fields*, p. 5 (May 1919). But such knowledge was not available in 1903, and the question would have been determined largely by inference from the surroundings. The well was situated in a sort of small valley in the Hills, but was 500 feet above the adjacent countryside. The climate is arid, and vegetation is extremely scanty. In view of these factors it would have been reasonable to conclude that the gas in the Hoy well could not have come from decayed vegetable matter and that it was petroleum gas. The amount of gas obtained, however, was small, and the discovery did not attract much attention at that time, although one witness did then consider it an oil indication, and the Los Angeles Herald of October 30, 1901, commented on the discovery (McMurdo, p. 432; U. S. Ex. 7-D).

KNOWN CONDITIONS VIEWED IN THE LIGHT OF GEOLOGICAL KNOWLEDGE IN 1903

The evidence and inferences upon which the Government geologists base their conclusion that it could have been determined in 1903 that the Elk Hills were valuable for oil may be stated very briefly. Their conclusion is based upon the proposition that it could have been determined, by a competent geologist, from conditions observable and knowledge available in 1903, that: (1) the Monterey shale is the source of oil in western Kern County; (2) the Santa Margarita, Etchegoin, and perhaps parts of the Tulare constitute a suitable reservoir for oil produced in the underlying Monterey shale; (3) the Tulare is a formation sufficiently impermeable to imprison the oil and prevent its escape from the reservoir below;

(4) the source and reservoir strata continue from their outcrops along the Temblors and underlie the Tulare exposed in the Elk Hills; (5) oil tends to accumulate in anticlines and the Elk Hills is an anticline; and (6) the reservoir strata would be found in the Elk Hills at a depth within reach of the drill.

(1) Source Rock

The presence in the Coast Range of thick layers of shale heavily impregnated with bitumens was noted and discussed as long ago as 1855 by Dr. John B. Trask, the first State Geologist of California. Trask, *Geology of Coast Range, California*: Doc. No. 14, Cal. Sen., pp. 24, 25, 28 (1855); see also W. B. Phipps, *Exploration and Surveys for a Railroad from the Mississippi River to the Pacific Ocean*, vol. V, part 2, pp. 178, 189 (1857). By 1865 this shale was recognized as oil bearing and as a possible source of commercial deposits of petroleum. J. D. Whitney, *Geological Survey of California*, vol. I, pp. 116-118 (1865). A year later they were said to be the source of oil in Los Angeles County. E. Frignet, *Coup d'oeil sur la Constitution Geologique et Miniere de la Californie et de Territoires Voisins*: Bul. 23, Soc. Geol. de France, p. 357 (1866). And in 1894 it was stated in a publication of the Geological Survey that the diatomaceous shales were the probable source of most of the oil of California. A. C. Lawson, Report 1893-94, U. S. G. S., p. 178. An article written in 1897 by Dr. H. W. Fairbanks states that the bituminous shales were laid down under the ocean and are composed partly of the remains of microscopic animals, the decomposition of which produced the oil. Fairbanks, *Outline of the Geology of California*: vol. LXXIV, Mining and Scientific Press, p. 213 (1897). He also stated these shales to be the "main source of the oil and asphaltum which is so widely distributed through the Coast Ranges." Fairbanks, *Geology of a Portion of the Southern Coast Ranges*: *The Journal of Geology*, p. 562 (1898). McMillan, a geologist called by the claimants, who examined the Elk Hills prior to 1903, testified that he knew in 1900 or 1901 that the Monterey shales constituted "the principal source of oil, by chemical reaction." (McMillan, p. 49.) The current belief of most geologists with respect to the origin of oil in the Coast Range is not significantly different from that of Fairbanks, and is well stated by Pack:

The chief reservoirs of petroleum in the Sunset-Midway district are the feebly consolidated sandy beds of the McKittrick group, but the petroleum is believed to have originated not in these beds but in the fine-grained beds of organic origin that make up so large a part of the Maricopa shale and of the upper portion of the Vaqueros formation in certain parts of the region. These fine-grained beds are chiefly the so-called diatomaceous shales, which are composed in large part of the remains of minute plants and animals—

diatoms and foraminifers—and it is from the decomposition and alteration of these organisms that the petroleum now found in the Sunset-Midway field results. In parts of the region the organic material contained originally in the fine-grained beds appears to be not so much the remains of diatoms as of larger terrestrial vegetation, and it is probable that part of the petroleum has been formed by the alteration of this coarser vegetal material. But in any case it seems clear that the ultimate source of the petroleum is the organic material originally contained in these beds.

There is nothing new or startling in the theory that the petroleum in California has been formed from the organic material contained in the diatomaceous shales, for those shales have long been considered the source of the oil (Pack, *supra*, at p. 70).

All doubts on this question have not yet been removed. See W. A. English, *Geology and Oil Resources of the Puente Hills Region*, U. S. G. S., pp. 69–71 (1926). But it is clear that for many years before and after 1903 it was generally believed that the Monterey shales constituted a source of petroleum.

(2, 3) Reservoir and Cap Rock Series

It was well known long prior to 1903 that the mere presence of oil-producing strata is not alone sufficient to bring about commercial deposits of petroleum. There must also be present some sort of reservoir rock, with pores or interstices of sufficiently large dimensions to permit the movement of oil through them; and this rock must bear a stratigraphic relation to the source rock such as will permit the movement of oil out of the latter and into the former. In addition, there must be some sort of cover over the reservoir series to prevent oil from escaping and being dissipated over the surface of the earth. Sometimes the oil itself may coagulate and seal the surface openings, but it is preferable to find some comparatively impervious rock stratum overlying the reservoir series. These basic principles of oil accumulation were established well before the end of the nineteenth century. Edward Orten, *Preliminary Report upon Petroleum and Inflammable Gas: Geol. Surv. of Ohio*, pp. 9–15 (1886); I. C. White, *Petroleum and Natural Gas: W. Va. Geol. Surv.*, pp. 178–79 (1889); W. J. McGee, *Rock Gas and Related Bitumens: 11th Ann. Rep. U. S. G. S.*, p. 604 (1890); George I. Adams, *Principles Controlling the Geologic Deposition of the Hydrocarbons: 33 Trans. Am. Inst. Min. Eng.*, p. 342 (1903); J. D. Whitney, *supra*, pp. 17–18; Charles L. Brace, *The New West*, p. 298 (1869).

The pores in the sandstone and the interstices between the conglomerates contained in the Santa Margarita, Etchegoin, and parts of the Tulare, are well adapted to serve as a reservoir for oil; and this was certainly known prior to 1903, since oil was actually being produced from these strata at McKittrick, Midway, and Sunset. The shales of the Tulare are sufficiently permeable to constitute a cap

rock series; and this likewise was known, since most of the seepages occurred in sand strata and since wells were actually drilled through the Tulare to underlying oil sands.

(4) Presence of Source Rock and Reservoir Series Beneath the Elk Hills

While it is now known, from the logs of wells drilled in the Elk Hills since 1903, that the shales of the Monterey series and the sandstones, shales, and conglomerates of the Etchegoin underlie the Hills, there are no outcrops of these strata in the Hills which would in 1903 have disclosed their presence. Nevertheless, all the Government geologists testified that a competent geologist in 1903 could have determined that these strata extend out into the San Joaquin Valley from the Temblors, and underlie both the Buena Vista and Elk Hills. To understand this conclusion it is necessary to consider their analysis of the geological history of this region.

The historical evidence was developed in more detail by Dr. Tolman than by any other witness. To him, careful study of the surface of the region discloses "a definite history of marine invasion, of deposition of thick marine sediments, of uplift of the earth, the folding of the strata, of withdrawal of the sea, of readvance and extensive deposition of sands, and further folding: All of this history can be read by any competent geologist * * *" (Tolman, p. 119). Dr. Tolman went on to state in more detail that it is clear from the diatomaceous character of the Monterey shales that they were deposited in deep water, and that it is equally clear from the deposition of the shale on both sides of the San Joaquin Valley that the whole valley was once the floor of a great bay or arm of the ocean whose eastern shore was the base of the Sierra Nevada Mountains. The area which is now the Temblor range was subjected to great pressure, which lifted it above the water level and caused its present folded and faulted condition. The waters then withdrew, and erosion set in, which accounts for the consistent unconformity between the diatomaceous shales and the overlying strata. Then the ocean readvanced, turned the valley into a great bay, and extensive deposition of sands occurred. A gradual uplift of the valley floor, and the resurgence of more recent uplifts, such as the Elk Hills, followed. The water in the valley changed from ocean salt to brackish, and gathered in lakes. The Tulare was deposited on the floors of these lakes and, perhaps, subaerially. Its general conformity with the Etchegoin shows that no long period of erosion intervened between the two.

The geologists who testified for the claimants did not seriously dispute the conclusion that it could have been determined in 1903 that the Monterey shale, at some level, underlies the Elk Hills.

Cunningham did suggest that the exposures of shale on the eastern side of the San Joaquin Valley are thin, and that it could not be told in advance of drilling that the shales would be sufficiently thick under the Hills to produce commercial oil (Cunningham, p. 4302). The exposure of diatomaceous shale at Poso Creek, near the Kern River field is, however, of small extent, and Cunningham's testimony does not make it clear that the general thickness of the series is substantially reduced. As Dr. Mather suggested, the prolific oil production at the Kern River field is a strong indication that the shales are adequately thick at that point. And Dr. Tolman pointed out that in 1903 it was generally believed, as a result of the Challenger Expedition, that diatomaceous sediments were formed in the deep sea, and that a geologist of that time would have thought the maximum thickness of the Monterey shales to develop out in the valley away from the Temblors.

Cunningham alone of the geologists seems to have questioned the presence, determinable in 1903, of sands in the Elk Hills of a texture suitable for a reservoir. The only reason he gave for this doubt was that sand is not ordinarily found at a depth greater than 100 fathoms, and the possibility that the area now comprised in the Elk Hills was at a greater depth during the period of sand deposition (Cunningham, pp. 4306-4307). He admitted, however, that a gradual subsidence of the water, with a consequently migratory shore line, would lead to the deposition of sands over a wide area. Professor Tolman then pointed out that sand had been found prior to 1903 at depths as great as 900 fathoms in the Gulf of California, and that sands might be expected at a greater depth in a bay, particularly one into which rivers from high land empty, than on open shores (Tolman, on rebuttal, pp. 53-56). Professor Mather thought that the irregularity of bedding in the rocks showed that the currents were strong and the water shallow, and that sands would easily wash out to a distance of ten miles from the shore (Mather, p. 54). In addition, he relied upon the Buena Vista "blow-out" as evidence of continuity of the reservoir series at least to that point, and stated that even the absence of Etchegoin and Santa Margarita would not worry him, since the sand lenses in the Tulare should serve adequately as a reservoir. The preponderance of the geological testimony supports the Government's contention that the presence of source rock and reservoir series beneath the Elk Hills was determinable in 1903.

Evidence of actual knowledge of this condition is not plentiful. W. L. Watts, of the California State Mining Bureau, in publications dated 1894 and 1900, did express the belief that porous strata bearing gas and oil underlay the San Joaquin Valley. Watts, Gas and Petroleum Yielding Formations of the Central Valley of Cali-

fornia: Bull. No. 3, Cal. State Min. Bur., pp. 20-21, 68-69 (1894); Watts, Oil and Gas Yielding Formation of California, Bull. No. 19, Cal. State Min. Bur., pp. 109-110 (1900). There is also in evidence a rough sketch of the structure of the lower part of the San Joaquin Valley made by E. T. Dumble, chief geologist of the Southern Pacific Railroad in 1902. This map was sent by Dumble, with a letter dated September 11, 1902, to Josiah Owen, a field geologist in the employ of the railroad, to assist the latter in an examination of the oil lands around McKittrick. Dumble's sketch shows both a cross-section taken from McKittrick to Kern, and a horseshoe-like representation of the lower end of the San Joaquin Valley. Despite its lack of detail, it clearly shows a stratum of sand, and two underlying strata of shale underlying the whole valley from McKittrick to Kern.

An article by Marius Duvall published in 1901 clearly indicates the author's belief in the continuity under the San Joaquin Valley of the oil-bearing strata. Duvall, *The Oil Fields of Kern Co., California*: Vol. 1, National Oil Report No. 25, p. 6 (December 26, 1901).

(5) The Anticlinal Theory

Despite contrary contentions by the claimants, the evidence clearly shows that many leading geologists, prior to 1903, both in California and elsewhere, subscribed to the anticlinal theory of the accumulation of oil. The essence of this theory is that the pressure of ground water, which is heavier than oil, causes the latter to migrate in an upward direction. When the oil meets an impervious rock stratum it will accumulate under pressure; and, if the stratum is tilted, the oil will move laterally and upward beneath the inclined under surface of the impermeable rock until escape in that direction, too, is cut off. A doubly plunging anticline such as the Elk Hills, with an apex from which the strata slope downwards in all directions, is, as Dr. Mather testified, an ideal structure to trap oil beneath the crest (Mather, p. 28).

Professor Tolman made a very careful study of the geological literature published before 1903, with an eye to determining the extent to which the anticlinal theory was then accepted (U. S. Exs. AJ, AK). The extracts by him show the development and gradual acceptance of the theory after its initial statement in 1860. H. D. Rogers, *On the Distribution and Probable Origin of Petroleum, or Rock Oil, of Western Penna., New York, and Ohio*: Vol. 4, Pr. Phil. Soc. of Glasgow, No. 2, p. 356 (1860); T. S. Hunt, *Notes on the History of Petroleum or Rock Oil*: Smithsonian Report, pp. 325-26 (1861); T. S. Hunt, *Contributions to the Chemical and Geological History of Bitumens and of Pyroschists or Bituminous Shales*, 35

Am. Jour. of Sc. and Arts., 2d Series, p. 170 (1863); T. S. Hunt, On Petroleum Proceedings of the Am. Assoc. Advanc. Sci., p. 29 (1867); E. B. Andrews, Petroleum in its Geological Relations, 42 Am. Jour. Sci., 2d Series, p. 38 (1866); J. S. Newberry, Prospectus of the Neff Petroleum Co., pp. 18-19 (1866); C. A. Ashburner, Geology of Natural Gas: Am. Mfr. and Iron World, pp. 7, 9, (April 1886); I. E. White, The Anticlinal Theory of Natural Gas: Am. Mfr. and Iron World, p. 11, 13 (April 1886); W. Kennedy, Report on Grimes, Brazos, and Robertson Counties: Ann. Rep. Texas Geol. Surv., p. 437 (1892); I. C. White, Petroleum and Natural Gas, Vol. I, W. Va. Geol. Surv., pp. 175-180, 181, 182 (1899); Edward Orton, Preliminary Report upon Petroleum and Inflammable Gas: Geol. Surv. of Ohio, pp. 9-15 (1886); Edward Orton, The Origin and Accumulation of Petroleum and Natural Gas: Vol. VI, Geol. Surv. of Ohio, pp. 84-96 (1888); W. J. McGee, Rock Gas and Related Bitumens: 11th Ann. Rep. U. S. G. S., pp. 603-605 (1890); Hans Hofer, The Geology of Petroleum: 1st Int. Pet. Cong. in Paris, pp. 46-47 (1900); G. I. Adams, Principles Controlling the Geologic Deposition of the Hydrocarbons: Vol. XXXIII, Tran. Am. Inst. Min. Eng., pp. 342-343 (1903). There were, indeed, those who questioned the theory. J. P. Lesley, The Geology of the Oil Regions of Warren, Venango, Clarion, and Butler Counties: Report III, 2d Geol. Surv. of Penna., p. XVI (1880). Opposition did qualify the theory and caution its exponents, but Dr. Tolman testified that he had discovered no serious controversial article later than 1890 (Tolman, p. 21).

Most of the geologists mentioned above were easterners, and were speaking with particular reference to the oil fields of Pennsylvania, Ohio, Indiana, and West Virginia. But the application of the anticlinal theory to the California oil fields, different in structure and appearance as they were from those in the East, was recognized by California geologists prior to 1903. J. D. Whitney, Geology, Vol. I, Geol. Surv. of Cal., p. 117 (1865); H. W. Fairbanks, Some Notes on the Petroleum Deposits of California: Vol. LXXVIII, No. 20 Min. and Sci. Press, p. 533 (1899); A. S. Cooper, Genesis of Petroleum and Asphaltum in California: Cal. State Min. Bur. Bull. No. 16, pp. 8, 9, 19-23, 86-87 (1898); California Oil Fields, San Francisco Chronicle, p. 6c, December 31, 1899; G. H. Eldridge, The Petroleum Fields of California: Bull. No. 213, U. S. G. S., p. 321 (1903); E. W. Claypole, Notes on Petroleum in California: Vol. XXVII, Am. Geologist, pp. 156-57 (1901).

The correspondence between Owen and Dumble, beginning in 1902, shows their appreciation of the importance of anticlines in the search for oil (U. S. Exs. 10-A, 10-E, 10-J). McMillan and Brown were

both apparently relying on the anticlinal theory when they examined the Elk Hills before 1903, as both rejected them because they did not find any evidence of such a structure (McMillan, p. 18; Brown, pp. 4272, 4275). And the testimony of Whittier indicates that at least some of the operators were aware of the importance of anticlines. True, Whittier had not then any belief in areas barren of seepages, but he stated the essentials of the anticlinal theory when, in answer to the question whether he understood in 1902 or 1903 what an anticline was, he replied:

Yes, we had learned to believe that the syncline, being a low part of the formation, would be filled full of water and drive the oil to the high parts of the ground, which would be the anticline, and naturally we would look to the higher territory next to the seepage to find oil. (Whittier, p. 335.)

(6) Depth of the Oil

Three Government geologists attempted to give reasoned estimates of the depth at which oil might have been expected, in 1903, to be encountered under Section 36 in the Elk Hills. Their methods by no means coincided. Dr. Fairbanks estimated that the diatomaceous shales would be found between 3,400 and 4,000 feet beneath the surface. He arrived at this figure by taking the thickness of the overlying strata along the Temblors as 1,400 feet, adding thereto 3,000 feet to allow for the thickening of these strata out under the valley, and subtracting 800 to 1,000 feet of estimated erosion on the crest of the Elk Hills (Fairbanks, p. 118). Dr. Fairbanks believed that oil would migrate vertically upward through the porous strata, placed the probable depth at which oil would be found at 3,000 feet, and stated that he had so concluded in 1909 and would have so concluded in 1903 (Fairbanks, p. 47).

Dr. Mather proceeded to his estimate by gauging the dip of reservoir strata exposed southeast of McKittrick and six miles west of Section 36. Projecting this dip toward Section 36, he stated that a 1903 geologist would have expected to reach the reservoir series at a depth somewhere between 2,000 and 4,000 feet below the surface of Section 36 (Mather, p. 56). The difficulty of gauging the dip at the exposures with precision he thought would prevent any closer estimate. And he did not venture to say where in the reservoir series the oil would be struck.

Dr. Tolman's analysis of the problem was much more elaborate. He expressed himself as dissatisfied with any result obtained by the projection of dips, on the ground that structures buried under the alluvium of the valley between the exposures and the Elk Hills might vitiate the projection, and he therefore set about the determination of some key horizon from which vertical measurements might be made

(Tolman, p. 123). In the course of making his geological map of the region he discovered and plotted various reef beds of marly limestone in the Tulare, which outcrop in the Elk and Buena Vista Hills along the Temblors and at McKittrick. By making a lithological study of these beds and adjacent strata he concluded that the zone in which they lie constitutes a definite geological horizon. From exposures at McKittrick he calculated that the lowest key bed is separated from the top of the Etchegoin by 1,000 feet of cap rock, and from other outcrops on the slope of the Temblors in the Midway district he found a thickness of 1,000 feet between the lowermost and uppermost key beds. On the northern flank of the Elk Hills north of Section 36 he discovered an outcrop of a marl bed which he concluded to be the uppermost of the horizon. This bed, if projected over the crest of the Hills, would come about 500 feet above the surface of Section 36, wherefore Dr. Tolman concluded that, from erosion or other cause, 500 of the 2,000 feet which separate the uppermost key bed from the Etchegoin is absent at Section 36, and that the reservoir series would be encountered at a depth of 1,500 feet. He stated that oil might be expected to occur somewhere in the Etchegoin series, but did not estimate how far below the 1,500-foot level it would be found (Tolman, pp. 134-41).

The methods used by Government geologists in making their estimates were subjected to severe criticism by Cunningham. He testified that unconformities between the strata, as well as the hidden structures in the valley referred to by Dr. Tolman, would render highly uncertain any estimates based upon the projection of the dips. He concluded that Dr. Tolman's estimate based upon key horizons was of no value, because it depended upon an identification of the topmost bed exposed at McKittrick with that exposed on the Temblors and that in the Elk Hills; and he did not believe such identification possible (Cunningham, pp. 4296-4300, 4320).

When Dr. Tolman testified in rebuttal he considerably qualified his original statements. He decided that there was not 1,000 feet of cap rock between the lowest reef bed and the Etchegoin, but, on the other hand, that this 1,000 feet also contained reef beds, nearly down to the contact with the Etchegoin. This, however, did not alter his estimate of the depth of the Etchegoin, as the topmost reef bed was still estimated by him to be 2,000 feet above the reservoir series. He admitted that recent geological mapping shows the marl bed in the Elk Hills, from which he measured, to be present on the very crest of the Hills, and that his projection of it 500 feet above the crest was erroneous. The error adds 500 feet to Dr. Tolman's estimate of the depth of the Etchegoin.

In determining the depth to which oil wells could be drilled in 1903, it is important to distinguish between those in the eastern and

those in the western oil fields. A well had been drilled at Erie, Pennsylvania, in 1889, to a depth of 4,460 feet, and in Monroe Township, Ohio, in 1894, a well was put down 3,950 feet (Mather, p. 71; J. A. Bownocker, *The Occurrence and Exploitation of Petroleum and Natural Gas in Ohio*, Bull. No. 1, 4th series, Geol. Surv. of Ohio, p. 241, 1903). But the wells of the eastern fields did not need, as a general rule, to be cased to the bottom. In California, the formations are usually too soft to permit drilling below the casing, which must be strong enough to sustain the pressure of the side walls (Def. Ex. 39). The difficulty with drilling deep wells in California did not lie in the mere digging of the hole, but in developing casing stout enough to sustain its own weight, and not part when strung to great depth.

But while no wells cased to the bottom had been driven as deep as those mentioned above, such wells had penetrated far below the depths of 800 to 1,500 feet at which most of the production in California was coming. In Jackson Township, Ohio, a fully cased well drilled in 1902 was 2,449 feet deep. (Bownocker, *supra*, at p. 278.) A cased water well in Galveston in 1892 was sunk to 3,070 feet. J. A. Singley, *Preliminary Report on the Artesian Wells of the Gulf Coastal Shore*, 4th Ann. Rep. Geol. Surv. of Texas, pp. 87-95 (1892); Hayes and Kennedy, *Oil Fields of the Texas-Louisiana Gulf Coastal Plain*: Bull. 212 U. S. G. S., pp. 45-48 (1902). And in California, at the Fullerton Field, in January 1903, a cased well was producing oil at a depth of 2,000 feet and another was down 2,500 feet and was being driven deeper (Def. Ex. 39). The evidence places the probable maximum depth which could be reached by drilling in California in 1903 at 3,000 feet.

Commercial oil was ultimately discovered under Section 36 at a depth of about 2,500 feet. But the evidence does not show that a competent geologist could have determined in 1903 that oil, if it existed, would be found at a depth of 3,000 feet or less. Dr. Mather testified that the reservoir series might have been thought to be as deep as 4,000 feet, and Dr. Fairbanks' estimate of 3,000 feet to oil is at the outside limit of reachable depth, and is based upon a calculation of the presence of the diatomaceous shale at a depth of 3,400 to 4,000 feet. There were, indeed, several factors which might have led a geologist, in 1903, to think the oil to be reachable. The gas blow-out in the Buena Vista Hills, the "Lamont Seep", if he believed it to be such, in the Elk Hills, the gas in the Hoy well, and the presence of seeps and the discovery of oil in a well on the so-called "McKittrick Front", which was recognized by Owen, Arnold and Johnson, and Pack as a continuation of the Elk Hills structure to the northwest of the railroad, all favored such a belief, as did the probability that the waters of the bay which once overlay the San Joa-

quin Valley were not extremely deep (Mather, p. 54). It also is significant that Arnold and Johnson, who surveyed the area before 1910, estimated the depth of oil in the Elk Hills at the crest at 900 to 1,400 feet, basing this upon a stated thickness of the "McKittrick Formation"—the strata overlying the diatomaceous shale—of 1,500 to 2,000 feet. (Arnold and Johnson, *supra*, pp. 209-10.) The register in his opinion laid great stress upon Pack's estimate of the total thickness of the McKittrick formation at 5,400 to 6,000 feet (Reg. Dec. p. 12). But Pack thought the total thickness of strata clearly identifiable as Tulare to be but 2,300 feet, recognized that oil might be found well above the bottom of the Etchegoin, and placed the strata exposed in the center of the Hills as stratigraphically lower by 1,000 feet than those on the edge of the Hills. Pack, *supra*, pp. 44, 163.

The conclusion which it seems most fair to draw from the record is that, while observable conditions provided a sufficient basis in 1903 for a reasonable belief that oil, if present, was at a depth then drillable, no such determination could be made with any certainty, and a belief that the oil was out of reach also would not have been unreasonable. It is true, as the register said, that no one knew how deep the oil sands lay until they were disclosed by the drill. This, of course, is the almost invariable situation in unproven territory. An unexpected thickness of the strata overlying the oil horizon is one of the most ordinary and usual hazards of oil mining. But that a competent geologist in 1903 might reasonably have determined that the possibilities that oil was in reach were great enough to justify drilling, there can be little doubt.

There is, however, no evidence that any geologist so advised anyone prior to 1903, or that anyone had made a careful effort to gauge the depth of oil in the Hills prior to the survey by Arnold and Johnson. All the record discloses in this particular is that several persons declined or decided not to drill in the Elk Hills because they thought that the oil, if it was there, was deep, and this depth would add both to the uncertainty and the expense of the undertaking (Sarnow, p. 325; Whittier, pp. 344, 353, 369).

POSSIBILITIES STRESSED BY THE CLAIMANTS' GEOLOGISTS

The preceding discussion fairly states the affirmative case made out by the Government geologists. On cross-examination and through their own experts, the claimants sought to develop several possibilities which would have prevented the occurrence of commercially producible oil in the Hills, even though all of the conditions contended for by the Government were present. Two of these possibilities require analysis.

(1) Intervening Formations

The claimants have vigorously contended throughout these proceedings that, while the Monterey shales and the reservoir series are known to be in contact along the Temblors and at McKittrick, there is no evidence that they remain in contact out under the San Joaquin Valley, and particularly under the Elk Hills. A formation intervening between the diatomaceous shales and the reservoir beds, they argue, would tend to prevent the migration of the oil out of the shales and into the reservoir series, and might tend to eliminate from the underlying strata an anticline present in those above. And the claimants assert that a competent geologist could, in 1903, have determined the possibility that such a formation is present in the Elk Hills.

Both Dr. Mather and Dr. Tolman admitted that the conditions observable in 1903 did not utterly exclude the chance of such an intervening stratum (Mather, p. 94; Tolman, pp. 242-44). But while they recognized the possibility, neither thought it strong enough to have led a geologist, in 1903, to believe the occurrence at all probable. Dr. Tolman relied on the exposure of source rock in contact with the reservoir series at McKittrick, and thought this sufficiently close to the Elk Hills to make extremely unlikely the presence of an intervening stratum under them (Tolman, p. 244). Dr. Mather thought the interstratification of source and reservoir beds observable along the Temblors looked in the same direction (Mather, pp. 98-99). Dr. Tolman further stated that, even if such a formation were present, he would not expect it to spread over a large enough area to shut off all access of the oil to the Elk Hills anticline, and that lateral and vertical migration would circumvent the hypothetical barrier (Tolman, pp. 242, 245-46).

Cunningham testified that the diatomaceous shales and the reservoir beds are not in contact in the Elk Hills (Cunningham, p. 4356). His conclusion was based upon cores taken from a well drilled by the Standard Oil Company in 1928 to a depth of over 8,300 feet. This well is situated in Sec. 31, T. 20 S., R. 25 E., M. D. B. & M., one mile west of the extreme eastern tip of the Elk Hills, at an elevation of about 400 feet above the valley. Cunningham stated that this well struck the Monterey shale over 8,300 feet below the surface, and that a stratum of nonorganic, hard blue shale 2,600 feet thick intervenes between the Monterey shales and the Etchegoin. The blue shale he thought to be a completely effective barrier to the migration of oil from the diatomaceous shale to the Etchegoin. He further stated that a well drilled in the extreme western end of the Hills by the railroad, in Section 14, T. 30 S., R. 22 E., M. D. B. & M., to a depth of 4,200 feet, encountered blue shale near the bottom (Cunningham, pp. 4356-68, 4377, 4431-35).

Cunningham's testimony was supplemented by Mr. G. C. Gester, chief geologist for the Standard Oil Company, who testified that the blue shale referred to by Cunningham is overlain by about 3,000 feet of less compact blue shale carrying lentils of sand, which belongs to the Etchegoin series, but underlies the Etchegoin sands from which oil is produced. He agreed with a statement in a publication by W. A. English that this upper blue shale, which contains artesian water and gas, makes it unlikely that the oil found in the Elk Hills originated in the Monterey shale. English, *Geology and Oil Resources of the Puente Hills Region, Southern California*: U. S. G. S. Bull. No. 768, pp. 69-71 (1926). He was not sure whether the blue shale encountered in the well by the railroad cut belonged to the upper or the lower series (Gester, pp. 4462-65, 4557-63).

Whether these formations actually constitute a barrier to the migration of oil upward into the Etchegoin, and whether the Monterey shales are the source of the oil produced in the Elk Hills, is a highly speculative issue. The lower blue shale has been certainly identified only at the extreme eastern end of the Hills, and it is not present in the Buena Vista Hills or at McKittrick. There is no evidence from which the dip of the stratum can be gauged. Dr. Tolman, when called in rebuttal, doubted whether it extended under the whole area of the Hills, and stated that, even if it did, it would be brittle and liable to be faulted, that faults are known to exist in the Elk Hills, and that these faults might well provide an avenue of escape for oil. He doubted, apparently, that the upper blue shale was impermeable, and his testimony with respect to faults would apply equally to the upper stratum. According to English, with whom Gester agreed, the upper stratum cannot be wholly impermeable, for it contains gas and water, and some lenses of sand. Moreover, according to the claimants' witnesses oil also must be present in the upper blue shale. The total thickness of both of the "barrier formations" in the deep well is 5,600 feet. This would bring the top of the upper blue shale 2,800 feet below the surface, and oil is said to be present in the well at a depth of 3,300 feet (Gester, p. 4563; Cunningham, p. 4431). The claimants have not suggested any possible source of oil other than the diatomaceous shale, and abundant oil is present.

But the question whether these blue shales are a barrier to oil migration is irrelevant. They were not discovered until more than twenty years after the date of the survey. They are relevant solely with respect to the unknown adverse possibilities which should have been considered in 1903 in estimating the oil value of the Elk Hills.

Cunningham alone testified that the existence of the lower stratum of blue shale could have been determined in 1903. This determination, he stated, could have been made "by an examination of the

outcrops along Reef Ridge, outside the limits of this area" between McKittrick and Coalinga (Cunningham, p. 4436). Gester also stated that similar blue shales outcrop south of Coalinga, which lies over 70 miles to the northwest of McKittrick. Tolman thought it absolutely impossible that the presence of the blue shale in the Elk Hills could have been predicted. The outcrops known as the Reef Ridge opposite the Kettleman Hills, he said, have never been definitely classified as to formation. They are found over 50 miles to the northwest in a different series, and he therefore thought projection under the Elk Hills impossible, particularly in the absence of any exposure for miles on all sides of the Hills (Tolman, on rebuttal, pp. 106, 107).

There is nothing substantial in the record indicating that the existence of the beds of blue shale in the Elk Hills could have been determined in 1903. But, as has been stated, both Dr. Tolman and Dr. Mather acknowledged the possibility that some barrier might exist. Neither thought it sufficiently probable to discourage exploitation of the Hills.

The fear of a barrier formation could not have been a very substantial obstacle in 1903. If a geologist had then examined such a possibility, he would have found no suggestion of the existence of a barrier for miles around the Hills; he would have found the Etchegoin and source rock in contact at McKittrick; he would have seen seeps and an oil well on an extension of the structure under consideration; and he might reasonably have given weight to the gas blowout in the Buena Vista Hills, the "Lamont seep", and the discovery of gas in the Hoy well. Watts, who apparently appreciated the fact of unconformity between the source rock and the overlying reservoir series, in his discussion of oil possibilities throughout the lower San Joaquin Valley, does not seem to have been troubled by fears of unexposed barriers. (Watts, *supra*, Bull. No. 19, Cal. State Min. Bur., p. 107.) Likewise, Arnold and Johnson gave no weight to such a possibility. The upshot of the debate is that, while a geologist in 1903 might reasonably have feared the possible existence of a barrier to oil migration, this possibility was one of the usual hazards of operating in unproven territory, and was not in itself a hazard sufficiently serious to discourage a favorable estimate of the oil value of the land.

(2) Absence of Water From the Structures

The anticlinal theory, resting as it does upon the tendency of water to cause oil to migrate in an upward direction, postulates the existence in and around the structure of enough water to exert this upward pressure. In the absence of water, oil may descend and be found in synclines. The possibility that lack of water in adjacent

strata might cause the crest of the Elk Hills anticline to be barren of oil was recognized by several of the geological witnesses as a possibility of which account would have had to be taken in 1903 (Tolman, pp. 259-60; Veatch, p. 64; Cunningham, p. 4311). An article published in 1911, which relies upon earlier publications of the United States Geological Survey, states broadly that, "since it is uncertain whether or not the rocks of the California oil fields are saturated with water it is doubtful if the anticlinal theory applies * * *." Marius R. Campbell, *Origin and Accumulation of Oil*, 6 *Economic Geology*, p. 388 (1911). The earlier publications, however, were written with reference to two particular oil fields, and make no such statement with reference to California oil fields in general. One of them states that some water is present in the field discussed, and that where it is present, the anticlinal theory "seems to hold good." The other states that, despite the absence of water, the oil tends to rise, probably because of the gas found in association with it. Arnold and Anderson, *Preliminary Report on the Coalinga Oil District*, Bull. No. 357 U. S. G. S., pp. 70-71 (1908); Arnold and Anderson, *Geology and Oil Resources of the Santa Maria Oil District*, Bull. No. 322 U. S. G. S., pp. 72-73 (1907).

There is no evidence that lack of water in the strata sufficient to force oil into the Elk Hills anticline was considered or would have been considered a serious possibility in 1903. Most of the oil fields then discovered were developed in connection with anticlines. Eldridge, *Petroleum Fields of California*, Bull. No. 213 U. S. G. S., p. 321 (1903). Abundant water had been struck by wells drilled in the San Joaquin Valley and some by wells in the Midway Valley. Like many of the adverse possibilities raised by the claimants, lack of water is one of the usual hazards of drilling on anticlines in unproven territory.

THE IMPORTANCE OF GEOLOGY IN 1903

Strongly contesting the importance of the geological case made by the Government, the claimants introduced testimony intended to show that oil operators in California in 1903 paid little attention to geology and geologists, and would not have proceeded to determine the oil value of Section 36 in accordance with the principles set forth by the Government geologists. This testimony tended to show that operators uniformly drilled near seepages and on sharp folds, that it was believed that salt water would prevent the recovery of oil below sea level, that drilling operations in western Kern County consequently had been restricted before 1903 to a narrow belt of production along the Temblors and at McKittrick, and that it was believed the oil sands "pinched out" or turned to water below the valley.

This contention, of course, raises the legal question whether the mineral character of land must be known to or knowable by a skilled geologist or by an average operator in order to meet the standard laid down by the Supreme Court in *United States v. Southern Pacific Co.*, 251 U. S. 1 (1919). For the argument, if valid, does not impugn the correctness of the principles set forth by the Government geologists, but shows that operations were not actually carried on with an eye to those principles. This legal issue will be discussed below in some detail.

With reference to the facts underlying the claimants' contention, the evidence shows that, while seepages were regarded as of the utmost importance, and little drilling was done except where they were located, and while most drilling was done on sharp folds, neither of these factors was considered absolutely essential. In 1903 the largest oil field in the State—that at Kern River—was on a horizon the slope of which is barely perceptible, and seven prospect wells, one of which had encountered a large amount of gas, had been drilled in the Kettleman Hills, a gentle structure lying about 50 miles to the north of the Elk Hills, upon which there are no seepages. Watts, *Oil and Gas Yielding Formations of California*: Bull. No. 19, Cal. State Min. Bur., pp. 135-36 (1900); Arnold and Anderson, *Geology and Oil Resources of the Coalinga District*: Bull. No. 398, U. S. G. S., p. 232 (1910). Nor was a depth below sea level invariably considered fatal, for oil was being produced from wells drilled in the ocean at Summerland, and from wells inland at Fullerton at depths well below sea level. It probably is true that most oil operators in western Kern County had made no attempt at a geological projection from the Temblors or McKittrick out into the valley, and that they doubted the continuity of the oil sands toward the east. But that there were some who saw the possibility of a wider belt is shown by the drilling on the McKittrick front, the Hoy well, the Aroostock well in the Buena Vista Hills, and by the few wells which had been drilled out on "the flat."

Geologists unquestionably played a smaller part in the course of development of the California oil fields in 1903 than they have over the past 10 or 15 years. Commercial exploitation of those fields was then still in its early stages. The enormous market for petroleum ultimately provided by the automobile was then virtually nonexistent. Many of the pioneers in the oil business were new to the field and those who followed them relied largely on the experience of their predecessors, rather than on professional consultants.

But the position taken by the claimants that geologists were uniformly ridiculed and regarded as a species of witch doctor and that no one relied on their advice, cannot be maintained. Geologists had not infrequently been employed to survey various fields in Cal-

ifornia before 1903. The larger companies in particular seem to have relied upon them. Thus the Southern Pacific already was relying on Dumble and Owen in the reservation of its granted lands and in its indemnity selections. And the evidence of the claimants' own witnesses brought out that the Standard Oil Company had sent a geologist named Starke to Sunset for several months in 1905 or 1906 (Gordon, p. 2926). Other oil experts referred to by the claimants as "geologists" had been in the region near McKittrick at an earlier date. McMillan worked there for the Pacific Improvement Co. in 1902 (McMillan, p. 6; Doan, p. 1246). E. Call Brown, who testified for the claimants in the present proceedings, examined the western end of Kern County for an oil man named W. H. H. Hart in 1903 (Brown, p. 4266). He was apparently a subordinate of a Professor Bailey of the University of Chicago, who was in charge of the mission (Brown, p. 4237). C. F. Lufkin, whose training does not appear, but who was employed as a professional evaluator of oil property by the Standard Oil Company, examined the McKittrick, Sunset, and Midway fields in 1902 and 1903. It is impossible to conclude, in the face of this evidence, that geology was of no importance to oil men and that geologists were disregarded. The ordinary operator may or may not have paid little attention, but the larger companies employed geologists and relied to some extent upon their opinions.

ACTUAL KNOWLEDGE OF MINERAL CHARACTER OF THE ELK HILLS

Lapse of time and the consequent death of many persons whose testimony would have been illuminating have sadly beclouded the true facts with reference to the extent to which the mineral character of the Elk Hills actually was known or believed in prior to 1903. It is doubtful whether any person competent to do so had made a detailed geological examination of the Hills before that time; and certainly no such person has testified in this case or left a record of his conclusions. It is proposed here to state briefly the evidence upon which the Government chiefly relies in order to show actual knowledge or belief.

(1) Wagy, Lamont, and Blodgett

The belief of these witnesses in the mineral value of the Elk Hills was based upon their discovery of the "Lamont seep" heretofore discussed. Wagy, who was a farmer and contract teamster, found this exposure in 1899 while driving some mules across the Hills. He took a sample to H. A. Blodgett, of the firm of Jewett and Blodgett. In 1899 and for several years thereafter this firm was considered a pioneer and principal operator in the western Kern fields. Blodgett

gave the sample to W. E. Youle, upon whom the firm relied largely for advice in drilling matters, and who was regarded as a practical oil expert (Blodgett, pp. 134, 136; Meacham, p. 139; Jordan, p. 1926). Youle, who had died before the hearings, is stated to have tested the material; but the results obtained by him are not disclosed. Later, Wagy took him to examine the exposure, and it is testified by both Charles Youle, his son, and Wagy that the elder Youle was "enthusiastic over the outlook" (Wagy, p. 147; Youle, pp. 222, 300). In consequence, Wagy, Blodgett, and others formed the Wagont Company and located some fifty sections of land in the Hills. C. W. Lamont, one of the locators, was employed to reside on the claims. Some assessment work was done; but it is not clear that any substantial amount of money was expended, and the parties relocated every two years so that failure to do the requisite amount of work would not cause the claims to lapse. No drilling operations were ever undertaken, and eventually, in 1907 or thereabouts, the claims lapsed on account of failure to relocate.

The sincerity of Wagy's belief in the oil value of the Elk Hills is, as stated by the register, unquestionable. Its reasonableness is more open to doubt. He relied solely on the "Lamont seep" as a basis for his belief (Wagy, p. 172). He was not then an oil man and is not shown to have known anything about structure or the theory of oil accumulation. Indeed, of the group, Youle, upon whom the others apparently relied, alone seems to have had more competence than a layman, and the extent of his belief in the Hills is difficult to gauge. It may be inferred, however, that he believed them to be worthy of location with a view toward oil development, since it is otherwise difficult to see why he and the others should have taken the time and trouble to record and post locations and to maintain Lamont upon the premises.

(2) Colon F. Whittier

Whittier started in the oil business in Los Angeles in 1897, and worked for several years as a tool dresser and driller. He went to Kern County in 1900, and became interested in two small oil companies. He spent some time looking over the country for places to drill, and was also called for advice by the people who were drilling the Aroostock well in the Buena Vista Hills. Although he was never in the Elk Hills until long after 1903, he had looked at them when passing by either end and had decided that they constituted an anticlinal structure. He also understood something of the significance of such structures to the petroleum geologist. He considered locating in the Hills, but was unable to interest his brother Max, an active operator, in them, and lameness deterred him from undertak-

ing the locations himself. He thought the oil, if there was any, would be deep, and evidently did not contemplate immediate drilling; but he did testify that the Hills had sufficient oil value "to justify development. I thought at that time there was oil in there somewhere" (Whittier, p. 349). Counsel for the Government failed to develop the basis of Whittier's belief. It may be inferred that he was depending on a projection of strata from the Temblors, hoping for "lenses" higher than the projected depth, and giving weight to the anticlinal structure (Whittier, pp. 337-344).

(3) Other Government Witnesses

Two other witnesses besides those interested in the Wagont Company were impressed by the "Lamont seep" and made locations on the strength of it (Sarnow, pp. 323, 325; Sylvester, pp. 387, 389, 396). E. W. McCutchen made some locations in 1903, although he apparently did not find the "Lamont seep" until 1907 (McCutchen, pp. 292, 297, 301, 306). F. D. Lowe, who located in the Hills in 1901, and who invested some money in the Hoy well, apparently relied on the judgment of B. F. Hoy, who was not a witness, and the grounds of whose belief in the success of the venture are not in evidence. With the possible exception of Sarnow, none of these witnesses demonstrated any special competence to form a judgment, and Sarnow did not admit to anything more than a belief that there might be oil at an excessive depth.

(4) Publications

The most interesting publication introduced by the Government is an article from the Los Angeles Sunday Times of February 16, 1902, entitled "Geology and Geography of Kern County and Adjacent Oil Fields—A Geologist's Opinion", by F. C. Grimes. This article expresses the opinion that the San Joaquin Valley was at one time an arm of the sea of which the eastern coast was the Sierra Nevadas, and that the oil in the valley has come from the marine vegetable deposits laid down on the ocean floor, and has accumulated in the sands under impervious coverings of clay or shale. It recognizes the importance of "folds" in locating oil, and amply displays a thorough and accurate grasp, on the part of its author, of the scientific and practical knowledge and principles then current concerning the accumulation, location, and mining of petroleum. Accompanying the article is a map of the lower end of the San Joaquin Valley, on which the area covered by then developed oil fields is indicated, and also an area designated by the author as "probable oil fields." This latter belt rims the southern end of the valley, extending out some distance into the flat, and clearly includes the

area occupied by the Elk Hills, as well as the regions where the Buena Vista, Wheeler Ridge, Belridge, Lost Hills, Kettleman Hills, Round Mountain, and Poso fields were subsequently brought in. The article recognizes the possibility that the oil might be beyond reach of the drill in some parts of this area, and that the oil sands, in other parts, might thin out and render production unprofitable. But this is treated, clearly enough, as one of the normal hazards of oil prospecting not sufficient either to preclude drilling in the delineated areas or to detract from their designated character as "probable oil fields." Also, there is nothing to indicate that Grimes believed there was any greater danger of encountering the difficulties to which he refers in the Elk Hills than in any other part of the area. On the contrary, he recognizes the influence of folds on the accumulation of oil and expresses the belief that the percentage of error in drilling for oil need not be very great where the stratifications are exposed in folds. Also, he refers to the fact that the formations flatten out away from the seepages and rise again "in another range of hills into another short fold", thus referring specifically to the outlying hills flanking the valley of which Elk Hills is the chief and most notable example. Indeed, the chief objections to the article as evidence in the Government's favor are that it nowhere discusses specially the then unnamed region later to become known as the Elk Hills, and that the statements in the article were not supplemented by a personal examination of its author on the witness stand. By not calling Grimes to testify at the hearings, the Government on the one hand deprived the claimants of an opportunity to cross-examine him, and on the other hand itself failed to establish the precise extent of his actual knowledge concerning the Elk Hills in general and Section 36 in particular and the precise basis of his belief in their character as oil lands. However, the article was written and published at a time when litigation concerning the oil character of the lands was neither pending nor in contemplation. It plainly was intended as an unbiased scientific discussion of the oil possibilities of the lands in the western part of Kern County. Its contents sufficiently reflect adequate scholastic attainments on the part of its author and warrant the inference that the accompanying map was drawn in accordance with the scientific principles discussed in the article. The discussion, moreover, indicates that Grimes personally visited the region and to some extent examined its oil possibilities. This, as is amply clear on the basis of other evidence in the record, he hardly could have done without passing at least around part of the Elk Hills and observing their general structure. In view of these reasonably inferable facts, I am convinced that Grimes had sufficient reason to conclude, as he did, that the area covered by Elk Hills con-

sisted of "probable oil fields." The article likewise makes clear that by "probable oil fields", the author meant fields where, subject to the usual hazards of oil prospecting, the discovery of oil in paying quantities was sufficiently probable to justify the expenditures necessarily incident to commercial development. Consequently, while there is nothing to show that Grimes had in any way centered special attention on the Elk Hills, the article does show that the deductions subsequently drawn by the Government geologists from the history of the region had, in large part, been made before 1903, and that someone who had examined the region, made those deductions, published his views and designated the territory in question as probable oil lands as early as February 16, 1902, in a newspaper of general circulation in the city of Los Angeles.

A short article in the Los Angeles Herald for October 30, 1901, concerning the Hoy well is not significant except as it indicates that Hoy, Lowe, and the members of the Wagont Company were influenced by the McKittrick front, where the Sea Breeze well had found oil. The article clearly treats the Elk Hills as part of a "range of sand hills" which includes the McKittrick front.

An article printed in the National Oil Reporter of December 26, 1901, entitled "The Oil Fields of Kern County, California," by Marius Duval, recognized the marine history of the San Joaquin Valley, and stated that operations to that date had touched only the rim of the oil basin and that oil would eventually be produced from the foothills and well in toward the center of the valley. This is in line with Watts' view earlier expressed that "deep borings in the valley lands of Kern County would be quite likely to penetrate gas-yielding and possibly oil-yielding strata." Watts, *supra*, Bull. No. 3, Cal. State Min. Bur., p. 21 (1894). Neither of these statements is evidence of actual knowledge of the oil character of the Elk Hills in particular, but a belief is shown that the lands, of which the Hills form a part, in the future would prove valuable for oil.

THE MINERS' PETITION OF 1899

This petition was circulated in the latter part of 1899, and the suspension from disposition based upon it was ordered February 28, 1900. The petition set forth that many lands in various counties of Southern California were essentially mineral in character, and should be withdrawn from agricultural entry. It refers to oil and tar springs and asphaltum beds found in the region. Upon a blueprint map which accompanied the petition is plotted the area for which suspension was requested. This area covers several townships east and north of Bakersfield in the Kern River region, and a vast stretch of territory running up the western side of the San

Joaquin Valley from Sunset to Merced County. It included all but the eastern end of the Elk Hills, and all of the Buena Vista and Kettleman Hills. The map and petition show that Grimes' vision of a wide belt of productive territory on the west side of the valley, and of an expansion of the Kern River field, was shared by many others. The signers of the petition included mineral claimants and persons from many other occupations. Clearly the framers of the petition were "oil-minded" enough to foresee extensive development of oil operations in the surrounding country, and intelligent enough to ascertain most of the territory which future operations were to prove valuable.

THE DUEE SURVEY

Section 36 and other sections in the southern part of T. 30 S., R. 23 E., M. D. B. & M., were surveyed in November and December 1901, by James M. Duce, whose name was subsequently changed to Dewey. In his general description of the land, returned with his plat and field notes, he stated that the town was in the Midway Mineral District, and that the surveys of the ground showed "a geological formation, with asphaltum exudations, that is regarded by experts as an almost sure indication of the presence of valuable petroleum deposits." He returned all the land which he surveyed as mineral in character, and attached a list of all mineral claimants.

Dewey was associated with and financed by John A. Benson, a real estate dealer who gave much attention to sale of indemnity school lands selected in lieu of mineral sections. He therefore had a clear interest in obtaining mineral returns on newly surveyed sections, in order that he might colorably offer them as mineral base lands. The testimony shows that Dewey's field notes were sent to Benson's office to be typed and edited. Dewey himself was a man of small literary ability, and he testified that he spent little time going over the notes after they were sent back to him from Benson's office. Benson's reputation was somewhat doubtful, and there was abundant opportunity to alter the notes. Whether Dewey would have countenanced changes is a matter of conjecture.

Dewey had absolutely no training as a geologist or experience in the oil business, and he was in no way competent to form a judgment of the oil value of the Elk Hills. Were there no suspicion of fraud involved, his statement would not be entitled to much weight. When, in addition, the general description refers to nonexistent asphaltum exudations; is written in a style not even remotely resembling Dewey's, and the survey emanates from the office of a man of questionable reputation who had an obvious interest in having the land returned as mineral, the only fair conclusion is to give the mineral return no

evidential weight on the issue of the character of the land. It should be noted, however, that the questionable character of the return was not clear on its face and that one properly examining the title of Section 36 would be certain to encounter it in the records and would not be justified in rejecting it without some further inquiry. Whether its existence therefore was sufficient to put the claimants and their predecessors in title on notice of the possible mineral character of the land, and what significance properly should be attached to such notice, may be left for later consideration.

THE CARMAN LETTER

On June 25, 1909, Carman, after he and his associates had made some locations in the Elk Hills, but before he had acquired any interest in Section 36, wrote a letter to the Attorney General of the United States intended to persuade him to institute suits to cancel patents granted to the Southern Pacific Company in 1904 covering lands in the Elk Hills, some of which adjoin Section 36. Carman apparently believed that, should the patents be canceled, he would obtain, by virtue of his locations, a right to the land superior to that of other claimants. This letter, which was written the same day that gas was discovered in the Buena Vista Hills, reads in part as follows:

DEAR SIR: An association of gentlemen, ten in number, have appointed me their attorney and agent to investigate the validity of the title of certain lands in the western part of Kern County, California. These parties located this land for various minerals, including petroleum. The lands are situated on the axis of a well-marked anticlinal fold, which has attracted the attention of petroleum prospectors for the past ten years. It is in the vicinity of an oil field that has been producing for more than that period, and has always been considered well within the oil belt.

In 1901 and 1902 two wells were drilled on the axis of this fold at points about five miles apart. Each of them struck some petroleum. In 1901 the lands in question were located for petroleum by parties who spent \$8,000.00 in surveying (the land was unsurveyed by the U. S.) in properly monumenting, building a road and camp. The amount of this expenditure is merely cited to show that these were not merely random locations made by parties who attached no particular value to their claims. These claims expired in two years, and the territory was again located in 1903. During the life of this latter set of claims, the Southern Pacific Ry. obtained a patent to the territory in question. At that time, and for some years previous, it was generally known by oil men to be highly desirable territory, and by oil men operating in adjacent fields this anticlinal fold was well known and considered to be valuable oil territory. * * *

Acting for my friends, who have located the territory hereinafter described, and who have found that the railroad holds a patent to the same, I make the claim that the land was well known to be of mineral character at and before the time the patents were granted, and that circumstances were such that the railroad presumably knew of this fact. I wish to emphasize the

fact that no oil development whatever has taken place along this anticlinal fold, or in the vicinity, since the date of patent that would cause the land in question to be considered of any more value now than at that time. In other words, the value of the territory for oil is based solely upon considerations which were known at the date mentioned, and nothing has occurred since to enhance the value.

The land above cited consists of the following sections: Sections 19, 21, 25, 27, 29, 33, and 35 in Township 30 South, R. 23 East., Sections 31 and 33 in Township 30 South, 24 East.

This letter was written at a time when Carman had a substantial interest in having the lands determined to have been known to be mineral in character in 1904. It is quite possible that his statements were colored accordingly. On the other hand, Carman would not have written such a letter or made locations on the patented lands unless he thought there was some basis for his statements. His assertions were too nearly accurate to have been drawn from thin air, and there is no sufficient reason to refuse credence to the conclusion, plainly to be drawn from them, that for some time prior to 1903, some of the oil men operating in adjacent fields looked upon the Elk Hills as prospective oil land.

THE CLAIMANTS' WITNESSES

The claimants called as witnesses some 70 persons of varying experience in the oil business, most of whom testified either that they did not in 1903 or thereafter believe the Elk Hills to be valuable for oil or that they had never heard them talked of as oil lands. Most of them had neither the experience nor the educational qualifications to form a judgment on the oil value of the Hills. A few of them, such as McMillan and E. Call Brown, might be called "practical geologists." There is no necessity to discuss their testimony in detail, because it is largely cumulative. One may draw from it the following conclusions: (1) That many people living in or passing through western Kern County either had never heard the Elk Hills spoken of as oil lands before 1910, or else have forgotten such discussions; (2) Many operators, looking for seeps near which to drill, treated the Elk Hills as valueless for oil because they found nothing therein which they considered a seepage; (3) That many operators working in the Temblers regarded it as doubtful whether the oil sands would be thick enough and near enough to the surface to make possible the recovery of oil from the Elk Hills; (4) That at least two "practical geologists", Brown and McMillan, had examined the Elk Hills and had refused to recommend them. The record shows that Brown's examination of the Elk Hills occurred in August 1903, only six years after his studies had termi-

nated, and two years after he came to California, and lasted only two days. He made no mention of the "Lamont seep", and found no clear evidence of structure. One may infer from his testimony that, had he known of the discovery of gas in the Hoy well, and detected the anticline, his conclusion might have been different (Brown, pp. 4272-4275). McMillan was not a satisfactory witness because of his advanced age and nervous condition, but he testified that the reason he declined to recommend the Elk Hills was because he could find no anticline in them (McMillan, p. 18).

If the ideas and theories relied upon by many of those who located in the Elk Hills were insubstantial, the reasons given by those who scoffed at the idea that the Hills were oil lands were, on the whole, no less so. Those who were led to their conclusion solely by the fact that there was no certain oil seepage in the Hills overlooked the fact, known by many before 1903, that a seepage is an important clue in the search for oil, but is not essential where the presence of source, reservoir, cap rock, and a suitable structure can be determined. McMillan and Brown failed to observe that the Hills constituted an anticline. But the anticline was there and even Cunningham admitted that careful geological mapping would have disclosed this fact in 1903 (Cunningham, pp. 4408-09). The doubts based upon the dip of the strata and the continuity of the sands were more substantial. But geological analysis of the history of the region should have led to the conclusion that sands underlie most of the San Joaquin Valley. Dumble, Watts, Grimes, and perhaps Duvall realized this, and theirs was the more reasonable as well as the correct view. The depth of the oil remained an uncertain matter until the question was settled by the drill; but this was one of the usual hazards of drilling in unproven territory. There was no reasonable basis for believing that the dip of the sands and shales continued with no flattening whatsoever, for the cap rock series reappeared both in Buena Vista and Elk Hills, and unless the sands and shales below flatten out there would have had to be an enormous wedge-shaped mass of unexposed rock stretching far out into the valley, with its edge nosing up to the Temblors. The real danger was not that the dip of the source and reservoir strata would continue unabated, but that the cap rock and upper reservoir series might thicken so much that the oil would be too deep to recover. The geological testimony shows, however, that there was reasonable basis for a belief that the depth would not be too great, although the matter remained for a long time uncertain.

It cannot be said, therefore, that the testimony of the claimants' lay witnesses substantially weakens the evidence presented by the Government. It does show that many people in the region doubted

THE RYAN REPORT

or never thought about the oil value of the Elk Hills. It does not show that those who did believe in the Hills were unreasonable.

E. C. Ryan, a special agent of the General Land Office, was ordered on December 10, 1903, to examine the lands suspended from disposition in 1900 as a result of the miners' petition and report on their mineral character. In reports dated January 22 and March 22, 1904, Ryan recommended lifting the suspension of T. 30 S., R. 23 E., M. D. B. & M., and the township was reopened to entry by orders dated February 11, February 20, and April 5, 1904.

The Ryan report is of no more evidential weight than Duee's mineral return. He was not a geologist nor a miner, and he had never examined any oil lands prior to 1899 (Ryan, pp. 2490, 3191). Apparently the absence of drilling operations and the fact that he found no seepages were sufficient to convince him of the nonmineral character of the Elk Hills. In addition, he interviewed a number of residents of western Kern County, and relied on information given by them. It is interesting to note that, after the withdrawals of 1900, 1901, and 1902 in California, Oregon, Louisiana, and Wyoming, "a sentiment against the withdrawals seems to have developed in the Department, and the agents sent to investigate the fields appear to have reported as nonoil land nearly every tract upon which there were no derricks." Ball, *Petroleum Withdrawals and Restorations Affecting the Public Domain*: Bull. 623, U. S. G. S., p. 22 (1916). The record bears out the register's conclusion that "the evidence of Ryan appears to be of value only as to its historical character."

THE GEORGE OTIS SMITH LETTER

On October 26, 1910, Secretary of the Interior Ballinger addressed the following Departmental letter to the Director of the Geological Survey:

THE DIRECTOR OF THE GEOLOGICAL SURVEY:

SIR: Sections 15, 21, 23, 27, 29, 33, and 35, lots 1 to 12 of Sec. 17, lots 3 to 14 of Sec. 19, lots 1 to 12 of Sec. 25 and the W/2 of Sec. 25, T. 30 S., R. 23 E., M. D. M., California, patented to the Southern Pacific Railroad December 10, 1904, and the SW/4 Sec. 1, T. 30 S., R. 23 E., patented to the company January 9, 1905, lie within the limits of petroleum withdrawal made upon your recommendation.

You will please advise me as to whether your bureau is in possession of or knows of any evidence available showing that the lands in question were known to contain deposits of oil or other minerals at and prior to the dates when patents issued to the railroad company. Inasmuch as the six-year period prescribed by statute for instituting suits for the vacation of patents will soon expire, the matter should be made special for report.

Very respectfully,

R. A. BALLINGER, *Secretary*.

Director George Otis Smith replied on November 5, 1910, as follows:

THE HONORABLE THE SECRETARY OF THE INTERIOR:

SIR: In reply to your letter of October 26, 1910, with regard to Sections 15, 21, 23, 27, 29, 33, and 35, lots 1 to 12 of Sec. 17, lots 3 to 14 of Sec. 19, lots 1 to 12 of Sec. 25 and the W/2 of Sec. 25, T. 30, S., R. 23 E., M. D. M., California, patented to the Southern Pacific Railroad December 10, 1904, and the SW/4 of Sec. 1, of the same township, patented to the company January 9, 1905, in which you request advice as to whether this office is in possession of or knows of any available evidence showing that the lands in question were known to contain deposits of oil or other minerals at or prior to the dates when patents issued to the railroad company:

Although these lands lie in extremely promising oil territory, the immediate area in which they are situated was virtually unprospected as late as 1908. In a report by W. L. Watts issued in 1900 (Oil and Gas Yielding Formations of California, California State Mining Bureau Bul. #19, pps. 125-131), the township in which these lands lie is very definitely not included in the list of townships comprising the McKittrick and Temblor oil districts, although the township to the west and the township to the south are both included.

In a report published in 1904 by Lewis E. Aubury, State Mineralogist (Production and Use of Petroleum in California, Cal. State Mining Bureau Bul. #32, p. 41), this township is not shown on the maps of oil territory.

The geologic conditions in this township are very similar, in fact almost identical with those in the McKittrick district in the next township to the west, but the only indication known to this office that these lands might have been considered of any possible mineral value is shown in a report published in 1894 by W. L. Watts, (The Gas and Petroleum Yielding Formations of the Central Valley of California, Cal. State Mining Bureau Bul. #3). In this report Sections 25 and 36 of T. 30 S., R. 22 E., as well as other lands in the same township, are shown to be covered by asphalt locations of the Standard Asphalt Company. These two sections are only a short distance from some of the lands in question.

Although these lands are unquestionably oil lands, this office does not know of any evidence which would be of value in canceling patent.

Very respectfully,

GEO. OTIS SMITH, *Director*.

While the claimants lay great emphasis upon this letter, and regard it as a finding that the Elk Hills were not known to be mineral in character in 1904, the importance of the letter is not obvious. The Director neither denied nor affirmed the known mineral character of the Hills as of that date. He stated merely that the Survey did not know of any evidence which would be of value in establishing that they were then known to be mineral. No detailed examination of the Elk Hills had been made by the Geological Survey prior to that of Arnold and Johnson beginning in 1907. There is no reason why the Survey should have been in possession of any evidence bearing on the known character of the Hills in 1904, and the Secretary's inquiry was answered so soon as to preclude the possibility that any careful investigation, beyond the records of the Survey and available publications, was made after the letter was received. The letter has no evidential weight in this case.

THE NAVAL RESERVE HEARINGS OF 1916

In 1916 certain hearings were held before the Committee on Public Lands of the United States Senate concerning a bill (H. R. 406) to regulate the exploration and disposition of public lands valuable for coal, oil, gas, and certain other minerals.

Officials of the Navy Department took an active part in these hearings in order to protect their interests in the naval petroleum reserves. Many oil men and oil companies who had located claims prior to the withdrawals of 1908 and ensuing years, but who had made no discovery until after the withdrawals, were endeavoring to obtain inclusion in the bill of a provision protecting these locations, particularly locations situated in Naval Reserve No. 2, which included much land in the Buena Vista Hills. The oil men were, therefore, anxious to establish that Naval Reserve No. 1, in the Elk Hills, constituted a good reserve, and that Reserve No. 2 did not.

In the course of these hearings Mr. E. B. Latham, former consulting geologist of the Santa Fe Railroad, appeared before the committee to testify as an expert. Mr. Latham expressed the opinion that the Elk Hills did not constitute a suitable naval reserve, and contained no commercial oil. He further stated that gas and a little oil were present, but that the sands were only two inches thick, and that therefore the amount of oil recoverable was very small. His estimate of the thickness of the sands was based, apparently, upon a theory that the sands in that region are wedge-shaped, being 40 to 90 feet thick at the Temblors, and six to eight feet thick in the Buena Vista Hills, with the narrow end of the wedge under the Elk Hills.

The claimants lean heavily upon Mr. Latham's testimony, and regard it as showing that, as late as 1916, the Hills were not known oil lands. They also stress Secretary Daniels' refusal of an offer by the Standard Oil Company to deed to the Government the Section 36 here in question in return for an agreement by the Government not to contest the locations in Reserve No. 2. With respect to the latter consideration, there is no evidence that Secretary Daniels had any personal knowledge of the Elk Hills; and, even if he had, his failure to agree to such a trade is thoroughly understandable, as the value of the lands in the contested claims was enormous. With respect to Mr. Latham's opinion, the report of the hearings shows that he was sharply contradicted by Mr. R. W. Pack of the Geological Survey, who stated that Mr. Latham had underestimated the thickness of the oil-bearing zone in the Temblors and the Buena Vista Hills. Pack regarded the wells of the Associated Oil Company in the Elk Hills as proof of their oil value. His opinion was buttressed by that of Mr. W. A. Williams, Chief of the Petroleum Divi-

sion of the Bureau of Mines, who estimated that Naval Reserve No. 1 contained 128,800,000 barrels of oil. Mr. Williams had been chief geologist of the Associated Oil Company at the time that company drilled three productive wells in the Elk Hills, and must have been in possession of the information disclosed by the drilling of those wells. The basis of Mr. Latham's conclusion with respect to the sands is not apparent, and his testimony is fully overcome by the testimony of Williams and Pack.

ABSENCE OF DRILLING OPERATIONS

The decisions of both the register and the Commissioner appear to have been influenced by the fact, greatly emphasized by the claimants, that no drilling (except the Hoy well) was done in the Elk Hills until 1910, after the discovery of gas and oil in the Buena Vista Hills. It therefore becomes pertinent to inquire into the extent to which this circumstance evidences lack of knowledge of the oil character of the Elk Hills, and the extent to which the failure to drill may be attributable to other factors. In making this inquiry, reference will be had not merely to the evidence in the record but also to facts published in scientific periodicals, textbooks, and official records and publications, of which judicial notice properly may be taken.

In 1897 McKittrick and Sunset were the only proven oil fields in Kern County. Although both of these fields had produced asphaltum and heavy oil since 1890, their combined production formed no appreciable fraction of the total oil production of California, which in that year was nearly 2,000,000 barrels, worth a little over \$1 a barrel. Two-thirds of this amount came from the fields in Los Angeles County, and most of the remainder from Ventura and Santa Barbara Counties. In 1898 California's production rose to two and one-quarter million barrels, of which Kern County produced only 10,000 or less than 0.5 percent. In 1899 the State produced over 2,640,000 barrels, of which some 15,000 come from Kern County. During these three years the price of oil remained at approximately \$1 a barrel, and well over a half of the production came from the Los Angeles fields.

During the latter part of 1899, the Kern River field was opened up, and in 1900 its production had placed Kern County second among the oil-producing counties of California, being exceeded only by Los Angeles County. The production for the State rose well over 4,000,000 barrels, of which about 900,000, or some 20 percent, came from Kern County. The average price per barrel for the State dropped slightly below \$1, and the average price for Kern County to less than 80 cents.

1901 saw an enormous expansion of the Kern River field. The production for the State was approximately doubled, and of this amount Kern County produced over one-half. The average price of oil for the State dropped to about 50 cents, and the price in Kern County was at least 20 cents lower. Total production for the State nearly doubled in 1902 and again in 1903, when it reached 24,382,472 barrels. In the former year Kern County produced over two-thirds of the total supply, and in the latter year nearly three-fourths of it. The price per barrel of oil in Kern County was about 35 cents in 1902 and 21 cents in 1903. By far the largest part of the oil produced in Kern County from 1901 to 1903 came from the Kern River field, its production in 1902 being over ten times as great as that of the McKittrick, Sunset, and Midway districts combined, and in 1903 about nine times as great.

It is clear that, prior to 1903, the fields of western Kern County had not played any significant part in the oil history of California. Pioneer operations had, indeed, been carried on since 1890, but the real stimulus to development of the region was provided by the opening up of the Kern River field, and by the expansion of the petroleum market which may be said really to have started in 1899 or 1900. Even in 1900, when many wells were drilled along the Temblors, lack of transportation facilities crippled commercial exploitation. McKittrick had been connected by railroad to Bakersfield in 1893, but the railroad to Sunset was not completed until the end of 1901, and was not opened to regular traffic until 1902. The enormous increase in production produced a shortage of tank cars, which persisted for several years after 1902. The Midway field remained without any form of transportation facilities except automobiles and teams until 1907, when a pipe-line connection was completed. In 1908 the field was connected by railroad to Sunset. Until 1908, therefore, all the material for drilling in the Midway had to be hauled by teams, first from McKittrick or Bakersfield, and, after 1901, from Sunset. No oil could be marketed profitably until 1907.

After 1903, the oil business in California entered a phase of stagnation which lasted until 1907. The market had not kept pace with the great increase in production, which continued to rise, though not as rapidly as theretofore, to over 29,000,000 barrels in 1904, and over 33,000,000 in 1905 and 1906. During this period the average price per barrel for the State dropped under 25 cents, and oil was sold in Kern County as low as 10 cents, although the average price for a year never was below 17 or 18 cents. Toward the end of 1906 conditions began to improve, and by 1907 a revival of the oil business in the State was well under way. In 1905 and 1906 the Sunset field had begun to develop a market for its product as road oil, which

now was exploited more fully, and with the completion of the pipe line in 1907 and the railroad in 1908 the Midway field rapidly assumed a position of great importance.

The claimants have earnestly contended that the decline in the price of oil which took place in 1901, and the ensuing five years of low prices, cannot be considered contributing factors in the failure to drill the Elk Hills before 1910. They cite numerous publications and statements of witnesses to the effect that, despite the poor condition of the market, wildcat operations continued to be carried on through all these years, and conclude that a low market price does not tend to discourage prospecting for new oil pools. To some extent this argument is well founded. The last few years have abundantly shown that low prices do not invariably discourage drilling. But it is impossible to believe that the decline in prices in 1901 did not substantially check wildcat operations. The claimants have furnished a table showing that 331 wells were drilled during the sixteen years from 1895 through 1910 in California counties where commercial oil fields did not exist (Def. Ex. 247). But another table shows that 254, or over three-fourths of these wells, were drilled during the first eight years of the period (Defendants' Ex. 248). These figures seem to show a very substantial decline in prospecting.

The statistics of the amount of drilling done in Kern County during the years in question lead to the same conclusion. In 1901, 487 wells were completed. This figure dropped to 153 in 1902, rose to 212 in 1903, and again dropped to 198 in 1904, 96 in 1905, and 59 in 1906. If the number of dry holes be taken as a more accurate index of the amount of prospecting, it may be noted that in 1901 61 of the wells drilled were dry and that this figure likewise dropped to 24 in 1902, 26 in 1903, 3 in 1905, and zero in 1906. The drilling in the McKittrick-Midway-Sunset area followed the same course. In 1901, 147 wells were drilled in this region, of which 39 were dry holes. In 1902 these figures were 71 and 18, respectively, and in 1903, 67 and 20. Some 40 wells were drilled in 1904 and only 7 in 1906.

In addition to the effect of the low price of oil, the lack of transportation facilities undoubtedly made the Sunset and Midway areas unattractive for wildcat operations (8 Pacific Mining and Oil Reporter No. 5, page 5, January 5, 1907). William Edwards, a witness for the claimants, who was an employee of the Standard Oil Company in California at the time Section 36 was acquired, and who was well acquainted with the development of western Kern County, himself commented upon the "slowness with which the oil men were moving to acquire and to extend" the Midway field (Edwards, p. 2764).

Finally, it is a mistake to think that during the period from 1900 to 1909 no one discussed or believed in the possibility that the lands in the Midway flat and in the Buena Vista and Elk Hills were oil lands. The evidentiary force of the Carman letter and of Whittier's testimony that he had heard many people refer to the Elk Hills as "possible oil lands" has already been discussed. An article in the Pacific Oil Reporter for February 25, 1905 states, at page 10, that—

There is a number of the best oil men in the McKittrick field, who have been there a long time and are personally familiar with the country, who are paying a considerable amount of attention to the hills that lie to the east of McKittrick. Many samples of the formation have been brought in from that locality and there is no doubt but what the surface indications justify further development work in this promising section. There is considerable talk of a rig being moved into that part of the country and its operations will be watched with great interest by oil men generally.

The "hills that lie to the east of McKittrick" are undoubtedly the hills which have, since 1908 or thereabouts, been known as the Elk Hills.

Another significant comment is found in David T. Day, *The Production of Petroleum in 1909* (1911). At page 77 there is a short note by Ralph Arnold commenting upon the new oil fields developed in California in 1909. Particular attention is directed to the discovery of gas in the Honolulu well in the Buena Vista hills. Mr. Arnold then states that "no new territory was developed outside of the territories which have been for a long time considered oil lands."

A review of the situation which obtained in the oil fields of Kern County from 1900 to 1910 suggests that the failure to drill the Elk Hills before the later date is attributable to the following circumstances:

(1) During this period there was a great abundance of possible oil land. Along the whole eastern flank of the Temblors were numerous surface indications of the presence of petroleum. Across the Temblors on the Carrizo Plain, and at the southern end of the San Joaquin Valley, near the present Wheeler Ridge oil field, were more seepages. Judged by the standards of most operators at that time, all of this expanse of territory was preferable to the Elk Hills. Active seepages and outcrops of oil sand dissipated doubts concerning the presence of whatsoever constituted the source of oil, and of a reservoir stratum. They offered an opportunity for a very close estimate of the depth at which the oil sands would be struck. In the Elk Hills, on the other hand, there was no certain seepage and no outcrop of sands. Determination of their oil bearing character depended upon some knowledge of the principles governing the accumulation of petroleum, and some conception of the manner in which the strata which outcrop at the Temblors were deposited, in order

to project them out into the Valley. The depth hazard was much greater. The amount of capital necessary to open them up was much larger than that required to put down a well in the virtually proven territory along the "break" in the Temblors. Many of the operators in western Kern County were, of course, financially able to drill oil wells. But few of them had the resources to justify an excursion into unproved territory devoid of certain seepages or out-crops and several miles from existing development, when there was abundant territory where the hazards of drilling were not nearly so great. Even to such operators as may have recognized the possibility or probability that the Elk Hills contained oil, these factors must have been very persuasive of the desirability of drilling along the Temblors, where there was abundant territory and a minimum of risk, rather than in the Elk Hills.

(2) In addition, there were undoubtedly many operators who did not believe that oil would be found in the Elk Hills. Whether this disbelief arose from lack of investigation and reliance upon an uninformed general opinion, or from failure to recognize the conditions from which the probable oil value of the Hills could be learned, or from a genuine belief that one of the possible hazards would materialize and prevent profitable exploitation, this lack of belief greatly reduced the number of those who might be expected to drill in the Elk Hills.

(3) Finally, for reasons already stated, it must be concluded that the decline in the price of oil in 1901, and the continuation of low prices until 1907, coupled with the poor transportation facilities at McKittrick and Sunset, owing to the shortage of tank cars and the total lack of railroad or pipe-line service in the Midway District, constituted a powerful check upon prospecting operations from 1902 to 1907.

In summary, therefore, it cannot be decided that the failure to drill the Elk Hills before 1910 proves that the Hills were not knowable or known mineral land, or that no one reasonably believed them such. It does tend to indicate that many operators either did not believe them to be mineral or had no opinion in the matter, and that there was a great deal of territory in Kern County which prospectors and operators thought to be preferable.

CONCLUSIONS OF LAW AND FACT

(1) The Critical Date

All parties to these proceedings apparently are agreed that in order to prevail in this case the Government must prove the mineral character of Section 36 to have been known on January 26, 1903, the date when the survey was approved by the Commissioner of the

General Land Office. In Mr. Justice Brandeis' opinion in the suit brought by the claimant Standard Oil Company to enjoin continuation of the proceedings there is a statement in accord with this assumption; but the point was neither in dispute nor necessary to a determination of the case. See *West v. Standard Oil Company*, 278 U. S. 200, at p. 208 (1929). Certainly the critical date cannot be set any earlier than January 26, 1903. Even if the grant to the State of California be construed as a grant *in praesenti*, so that upon identification of the granted land by the survey the State's title would relate back to the date of the granting act, no title whatsoever would pass if, at the date of approval of the survey, the land was known to be chiefly valuable for minerals. *Mining Company v. Consolidated Mining Company*, 102 U. S. 167 (1880); *United States v. Morrison*, 240 U. S. 192 (1916).

But it can be strongly contended that no title could have vested in the State until April 5, 1904, when the suspension of February 28, 1900, was lifted, and that consequently a showing that the land was known to be mineral prior to the former date would be sufficient forever to bar the passage of title. In view of the provisions in section 7 of the granting act of 1853 authorizing the State to make lieu selections where settlements are made upon a sixteenth or thirty-sixth section, or where such sections are reserved for public uses, before the survey, it is difficult, if not impossible, to construe the act of 1853 as a grant *in praesenti*. *Heydenfeldt v. Daney Gold, etc. Co.*, 93 U. S. 634 (1877); see *United States v. Morrison*, 240 U. S. 192, at pp. 203-207 (1916); *West v. Standard Oil Company*, 278 U. S. 200, at p. 208 (1929); *Thompson v. Sawidge*, 110 Wash. 486, 498, 188 Pac. 397, 401 (1920); *State of California v. Poley & Thomas*, 4 Copp's L. O. 18 (1877); *Larsen v. Pechierer*, 1 L. D. 401, at p. 403 (1882); *cf. United States v. Bonners Ferry Lumber Co.*, 184 Fed. 187 (C. C. N. D. Ida. 1910). But *cf. Higgins v. Houghton*, 25 Calif. 252 (1864). If the grant is *in futuro*, the authorities are clear that the sixteenth and thirty-sixth sections remain subject to control and disposition by Congress. If, subsequent to the granting act and prior to identification of the section by a survey, the United States disposes of the lands or reserves them for public uses, so that they cease to be part of the public domain, no title to such sections passes to the State when the survey is approved. The State must either await restoration of the lands to the public domain or recoup its loss by means of a lieu selection. *Minnesota v. Hitchcock*, 185 U. S. 373 (1902); *United States v. Morrison*, 240 U. S. 192 (1916); *Heydenfeldt v. Daney Gold, etc. Co.*, 93 U. S. 634 (1877). The same has been held to be true even though the grant be *in praesenti*. *United States ex rel. New Mexico v. Ickes*, 72 F. (2d) 71 (App. D. C. 1934); *State of Montana*, 38 L. D. 247 (1909); *cf. Black Hills*

National Forest, 37 L. D. 469 (1909); *State of Washington v. Lynam*, 45 L. D. 593 (1916). Furthermore, section 7 of the California granting act (10 Stat. 247) states: "That where any settlement, by the erection of a dwelling house or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections, before the same shall be surveyed, or where such sections may be reserved for public uses or taken by private claims, other land shall be selected by the proper authorities of the State in lieu thereof * * *." This provision clearly indicates the intent of Congress that a reservation for public uses subsequent to the statute and prior to the survey would prevent immediate passage of title to the State of school sections included in the reservation. Cf. *Sherman v. Buick*, 93 U. S. 209 (1876).

The question whether the suspension of February 28, 1900, was of such a nature that it would prevent passage of title to the State upon approval of the survey is not free from perplexities. At the outset, the difficulty arises that the intended scope and effect of the suspension are not clear. The withdrawal was effected by a telegram from the Commissioner of the General Land Office to the register and receiver at Visalia, which merely instructed him to "suspend from disposition until further orders" various townships including the one in question. On its face this would seem to import a suspension of the land from all forms of appropriation under the land laws. Mr. Edward C. Finney testified before Judge Bean in 1912 in the case of *United States v. Southern Pacific Co.*, 251 U. S. 1 (1919) that, at the time of the withdrawal of 1900, when he was an examiner in the Mineral Division of the General Land Office, he and other employees of the General Land Office conceived the effect of the withdrawal to be a suspension of the lands from all forms of disposition, including mineral entry. Transcript of Record, U. S. District Ct. S. D. Cal. N. D., pp. 2370-71. But the petition to the Secretary and the Commissioner, which led to the withdrawal, prayed only that the lands "be withdrawn from entry as agricultural lands" (U. S. Ex. 7-H). A telegram from the Commissioner to the register and receiver at Visalia dated July 19, 1900, which continued in force the withdrawal of February 28, 1900, "for a reasonable time pending inquiry as to the true character of the lands which is now in progress," states that "these suspensions do not include mineral land." When parts of T. 30 S., R. 23 E., M. D. B. & M. not including Section 36, were relieved from suspension on February 11 and 20, 1904, the orders of those dates stated that the suspension of 1900 was "from disposition under the agricultural land laws." Ball, *Petroleum Withdrawal and Restorations Affecting the Public Domain*: Bull. 623, U. S. G. S., pp. 95-97

(1916). Probably the withdrawal should be construed as a temporary suspension of the lands from agricultural entry pending examination of their nature. See *Southern Pacific Co. v. United States*, 249 Fed. 785, at p. 789 (C. C. A. 9th, 1918); Ball, *supra*, at p. 23, n. 1. But the mere fact that the suspension was temporary would not rob it of its usual effect of temporarily barring passage of title to the State. *United States v. Morrison*, 240 U. S. 192 (1916); *Alberger v. Kingsbury*, 6 Cal. App. 93, 91 Pac. 674 (1907); *Walker v. Kingsbury*, 36 Cal. App. 617, 173 Pac. 95 (1918); *State of Utah*, 53 I. D. 365 (1930); *State of California*, 37 L. D. 499 (1909). And in *Joseph C. Bringham* 50 L. D. 628, at p. 632 (1924), Assistant Secretary Goodwin stated the broad proposition that "all withdrawals and reservations in effect when the plat of survey of a granting school section is accepted defeat, at least temporarily, the grant to the State * * *." There are, however, contrary implications in the decisions of this Department. *George O. Frandsen*, 50 L. D. 516 (1924); *Ex parte E. P. Weaver*, 52 L. D. 237 (1927).

If the view taken in *Joseph C. Bringham*, *supra*, should be adopted here, title could not have passed to California before April 5, 1904. Even so, it might conceivably be argued that title passed on that date if the land was not known to be mineral at the time it was identified by the survey regardless of whether or not it was known to be mineral when the suspension was lifted.

On the other hand, it has often been said that title will not vest in the State if the land is known to be mineral in character at the date when it would vest but for its known character. See *United States v. Sweet*, 243 U. S. 563, at p. 572 (1918); *State of Utah*, 32 L. D. 117 (1903).

But there is no need to decide these questions at this time. The only evidence of any possible importance which would gain new force, were the inquiry directed to the later date, would be that concerning Owen's examination of the region and discovery of the anticline. This evidence might become admissible to show that the existence of the anticline actually was known to Owen prior to April 5, 1904. But this would add little to the case as it stands under the present charges, for there is already sufficient evidence that the anticline had been observed by Whittier prior to January 26, 1903. This being so, the case will be decided on the basis that the assumption is correct that knowledge or lack of knowledge as of January 26, 1903, is determinative. The preceding comments on the effect of the withdrawal of 1900 are inserted only to make it clear that this case is not to be taken as a decision that such withdrawal did not postpone the opportunity for passage of title until April 5, 1904. That question being unimportant in view of the facts in this case, it is expressly left undecided.

(2) Legal Subdivisions of Section 36

Knowledge that oil would be found somewhere in the Elk Hills, the claimants contend, was not sufficient to have prevented passage of title; the Government must prove the known mineral character of Section 36 itself and, indeed, of each smallest legal subdivision thereof. If the evidence here showed that the known conditions from which the mineral character of the Elk Hills is determinable did not apply with equal force to all parts of Section 36, it might be necessary separately to deal with that section and with each of its subdivisions. But the evidence does not show any such state of facts. The location of Section 36 on the very crest of the anticline was just as determinable as the existence of the anticline itself; and the observable conditions which established the known mineral character of the anticline as a whole also necessarily established the known mineral character of the land situated on its crest. It is true that a person who did not want to strike much gas might have drilled near the southern edge of the section, which is farthest from the crest of the anticline. On the other hand, one who feared that the oil would be deep, or that the amount of oil in the hills was not large, might have preferred to drill along the northern edge, which is directly on the crest of the ridge. Even by those like Wagy and his associates, whose belief in the oil character of the Elk Hills depended on the Lamont Seep rather than on other observable conditions, Section 36 was regarded as sufficiently near the seep to be worthy of acquisition with a view to oil development; and, upon the basis of their belief, there was no reason to differentiate between the various subdivisions of the section. Thus, it hardly can be said that conditions pointed to any other section in preference to Section 36, or to any one subdivision of that section in preference to any other.

The claimants also suggest that since a local tightness or a thin spot in oil sands will often lead to the occurrence of dry holes even within the limits of proven oil fields, and since such a tightness or thin spot might conceivably underlie a whole subdivision, it therefore could not be foretold with certainty that any particular subdivision of Section 36 would be valuable for oil. This argument has no force. Its acceptance would mean that no land could be considered known mineral land unless there were a producing well on it. For land to be "known mineral land", as will be shown presently, it is not necessary that its mineral character be known with absolute certainty. There is always a possibility that the likeliest land in view of the observable conditions may in fact be valueless because of unforeseeable or apparently improbable contingencies. These contingencies constitute the ordinary hazards of the business, and do not prevent land from being "known mineral land" if prospecting is justifiable on the basis of observable conditions.

(3) Known Mineral Land

The Act of March 3, 1853 (10 Stat. 246), which provides for the grant of the sixteenth and thirty-sixth sections of each township of public land in California to that State, does not expressly except mineral land from the terms of the grant. Such an exception, however, was early spelled out by judicial construction (*Mining Company v. Consolidated Mining Company*, 102 U. S. 167) and has been adhered to ever since in a long line of decisions involving the California and a similar Utah statute. *Mullen and Another v. United States*, 118 U. S. 27 (1886); *United States v. Sweet*, 245 U. S. 563 (1918); *Work v. Braffett*, 276 U. S. 560 (1928); *Johnson v. Morris*, 72 Fed. 890 (C. C. A. 9th, 1886); *Milner v. United States*, 228 Fed. 431 (C. C. A. 8th, 1915), appeal dismissed (mem. decision) 248 U. S. 594; *Dunbar Lime Co. v. Utah-Idaho Sugar Co.*, 17 F. (2d) 351 (1926); *Hermocilla v. Hubbard*, 89 Cal. 5, 26 P. 611 (1891); *Utah v. Allen et al.*, 27 L. D. 53 (1898); *State of Utah*, 32 L. D. 117 (1903). The exception, therefore, is too firmly entrenched to be uprooted save by legislative action. Such action actually has been taken, but express provisions in the pertinent legislation admittedly perpetuate the exception in a situation such as is presented in this case. See Act of January 25, 1927, 44 Stat. 1026, as amended May 2, 1932, 47 Stat. 140, 43 U. S. C., sec. 870.

The exception was stated, in *Mining Company v. Consolidated Mining Company*, *supra*, simply as applying to "mineral" land. The actual mineral character of the land there in controversy was well known at the time the grant took effect. No need existed on the facts for the court to block out carefully the scope of the exception, and the court did not purport to do so. In *Deffebach v. Hawke*, 115 U. S. 392 (1885), however, the court dealt with this question and laid down the dual requirement that the lands must have been both *valuable* for minerals and *known* to have been so at the time when their transfer otherwise would have taken place. Here, too, the facts admittedly met both these requirements, no matter how strictly construed, and there was no occasion for the court authoritatively to delineate the broadest, rather than the narrowest, bounds of the exception. The definitive decisions came later (*Francoeur v. Newhouse*, 43 Fed. 236, 238 (1890); *Diamond Coal Co. v. United States*, 233 U. S. 236 (1914); *United States v. Southern Pacific Co.*, 251 U. S. 1 (1919); *Dunbar Lime Co. v. Utah-Idaho Sugar Co.*, 17 F. (2d) 351 (1926); *Don C. Roberts*, 41 L. D. 639 (1913); *United States v. New Mexico*, 48 L. D. 11 (1921)), and among them *United States v. Southern Pacific Co.* probably affords the best general statement of the rule as well as a striking factual analogy to the instant case. In the *Southern Pacific* case, the Supreme Court,

speaking through Mr. Justice Van Devanter, said (251 U. S., at pp. 12-14) :

Geologists and men of wide experience and success in oil mining—all of whom had examined that territory and some of whom had been familiar with it for years—were called as witnesses by the Government and gave it as their opinion, having regard to the known conditions in 1903 and 1904, as just outlined, that the lands were valuable for oil, in that an ordinarily prudent man, understanding the hazards and rewards of oil mining and desiring to engage therein for profit, would be justified in purchasing the lands for such mining and making the expenditures incident to their development, and in that a competent geologist or expert in oil mining, if employed to advise in the matter, would have ample warrant for advising the purchase and expenditure.

Other geologists and oil operators, called by the company, gave it as their opinion that the lands were not, under the conditions stated, valuable for oil; but as respects the testimony of some it is apparent that they were indisposed to regard any lands as within that category until they were demonstrated to be certainly such by wells actually drilled thereon and producing oil in paying quantities after a considerable period of pumping. This is a mistaken test, in that it takes no account of geological conditions, adjacent discoveries and other external conditions upon which prudent and experienced men in the oil mining regions are shown to be accustomed to act and make large expenditures. And the testimony of some of these witnesses is weakened by the fact that their prior acts in respect of these lands, or others in that vicinity similarly situated, were not in accord with the opinions which they expressed.

After considering all the evidence, we think it is adequately shown that the lands were known to be valuable for oil when the patent was sought and obtained, and by this we mean that the known conditions at that time were such as reasonably to engender the belief that the lands contained oil of such quality and in such quantity as would render its extraction profitable and justify expenditures to that end. See *Diamond Coal Co. v. United States*, 233 U. S. 236.

If applicable here, the test laid down in the foregoing quotation requires only that it be shown that, from the "known conditions" the mineral character of the land can reasonably be inferred. It does not require a showing that any person or persons actually knew that Section 36 contained oil in order to support a decision that that section did not pass to the State of California. The claimants have contended, however, that the principles enunciated in the *Southern Pacific* case are not applicable in the instant case because there, unlike here, the suit was one to cancel a patent to lands selected under a railroad grant and required proof of fraud on the part of the railroad in securing the patent, the fraud consisting in a representation by the railroad that to the best of its knowledge and belief the lands were nonmineral, whereas its officers in fact believed them to be mineral.

It is perfectly true that the *Southern Pacific* case did involve this issue of fraud and that the present case does not. But the *Southern Pacific* case also involved a question as to the mineral or nonmineral character of the land quite apart from the fraud. It

had long been settled that in a suit to cancel a federal land patent on the ground of a false representation respecting the patentee's knowledge and belief concerning the mineral character of the land, cancelation would not be ordered merely upon proof of the misrepresentation. It was necessary also to establish that the land was known to be valuable for minerals at the time of the proceedings resulting in the patent. *Diamond Coal Co. v. United States*, 233 U. S. 236, at p. 239 (1914); *United States v. Central Pac. R. Co.*, 84 Fed. 218 (C. C. N. D. Cal. 1898). In addition to the issue of fraud, the *Southern Pacific* case therefore involved an issue as to the known mineral character of the land; and it is this issue which is the primary subject of consideration in the part of the opinion quoted above. The test which the Supreme Court applied there in determining whether the land was known to be valuable for mineral is applicable to a consideration of the same question here, and that test relates, not to knowledge of actual mineral content, but to "known conditions" from which mineral character reasonably can be inferred.

What is meant by "known conditions" presents a more difficult series of problems. In the first place, a question arises as to whether the pertinent conditions must be known in the abstract or known in the concrete, i. e., whether they need merely be of a type known to be associated with oil deposits and susceptible of observation on an inspection of the land in its proper setting, or whether the conditions themselves must actually have been observed by one or more persons. For the sake of clarity, the term "observable conditions" will hereinafter be used in place of the term "known conditions" in its former sense, and the term "observed conditions" in place of that term in its latter sense. It should be pointed out, however, that, as will appear from the findings of fact shortly to be made, all the conditions from which the oil character of Section 36 could have been determined were not only observable but actually had been observed, although there is no evidence that all of them had been observed by any one person.

A careful consideration of the *Southern Pacific* case will demonstrate that the Supreme Court made no distinction between observable and observed conditions, treating either or both as sufficient to meet the test of mineral character. Toward the bottom of page 12 and the top of page 13 of the opinion, the court states that geologists and practical oil men, called as witnesses by the Government, gave it as their opinion that "having regard to the known conditions in 1903 and 1904" the lands were valuable for oil. These witnesses, as can be ascertained from an examination of their testimony, did not purport to base their opinions either on conditions actually

observed by them during or prior to 1904, or on conditions proved to have been observed by others and called to the attention of the experts as the basis for a hypothetical question. Indeed, the Government experts for the most part testified to and relied on conditions which they themselves had observed after 1904, but which they regarded as observable in and before that year. When, therefore, the Supreme Court referred to the opinion of these witnesses as "having regard to the known conditions in 1903 and 1904", it must have been using the term "known conditions" indiscriminately to designate observable conditions, or observed conditions, or both, whichever the experts happened to have relied on for their conclusions.

This inference is verified by a consideration of the court's opinion even without regard to the testimony in the record. The reference, toward the top of page 13, is to "the known conditions in 1903 and 1904, as just outlined." The "outline" takes up most of page 12 and commences with the statement that "The observable geological and other physical conditions at the time of the patent proceedings, as shown by the evidence, were as follows:" The court, therefore, not merely used the term "known conditions" to refer to many conditions which, on the record, merely had been proved to have been observable, but also itself used the term "observable conditions" as interchangeable with the term "known conditions" and thereby indicated that no difference was perceived to exist between them so far as concerned an application of the test laid down in the opinion.

Furthermore, in applying a test based indiscriminately on observable and observed conditions, the Supreme Court did not depart from the rule sanctioned in prior decisions. An examination of the court's opinion in *Diamond Coal Co. v. United States*, 233 U. S. 236 (1913), in the light of the record in that case, will reveal that the same test was adopted and applied there. Long before this, the test had been approved expressly in a charge to a jury, although its application was not necessarily involved in the case. *Francoeur v. Newhouse*, 43 Fed. 236, at 238 (C. C., N. D. Cal., 1890). And it likewise has been sanctioned impliedly in at least one reported departmental decision. *Don C. Roberts*, 41 L. D. 639 (1913); see *United States v. New Mexico*, 48 L. D. 11, at p. 14 (1921). The observable-condition test also has been applied in at least two cases decided subsequent to the *Diamond Coal* and *Southern Pacific* cases. One of these involved the same parties as the latter, but different lands and proof. *United States v. Southern Pac. R. Co.*, 11 F. (2d) 546, 550 (S. D. Cal., 1926). It never reached the Supreme Court. The other was *Dunbar Lime Co. v. Utah-Idaho Sugar Co.*, 17 F. (2d) 351 (C. C. A. 8th, 1926).

The claimants have contended that a test based in whole or in part on observable conditions is unwarrantably severe, that it imposes

an undue burden of investigation on one who purchases land in school sections from a State, and that it will lead to a general unsettling of titles to such lands.

To this contention there are several answers. In the first place, it is no part of the function of this Department to criticize, qualify, or modify the rules of law and the interpretations of statutes enunciated by the Supreme Court. Its function is to determine the facts of cases before it with fairness and impartiality, and to apply to those facts the law as it is discovered to have been authoritatively declared. Neither zeal to protect the interests of the United States Government nor sympathy for the claims of private parties can be allowed to influence the decisions of the Department on either the law or the facts. In the second place, under the Act of January 25, 1927 (44 Stat. 1026), as amended May 2, 1932 (47 Stat. 140, U. S. C., sec. 870), all of the school grant statutes have been extended to include mineral lands, with the exception of lands embraced in Government reservations or in existing valid applications under the land laws, and with the exception of lands involved in pending litigation in the courts of the United States. Consequently, the question of the mineral character of school sections cannot arise at all since the passage of this statute, except in the narrow classes of cases expressly excluded from its operation. The prospect of a general unsettling of titles to school lands thus is more imaginary than real; and such limited unsettling as still remains possible is the result of an express statutory provision enacted by Congress after, not before, the rule as to observable conditions was laid down by the Supreme Court in the *Diamond Coal* and *Southern Pacific* cases. Furthermore, no undue hardship is perceived to be entailed in a rule which requires prospective purchasers of school lands to take note of the observable geological and other physical conditions indicating the mineral character of the land in which they are interested. Certainly, a requirement that they do so is no more severe than a requirement that they take note of the knowledge of others concerning those conditions; and it is not and cannot reasonably be contended that they themselves must have had actual knowledge of the pertinent conditions for their title to be open to successful attack.

I conclude, therefore, that the rule permitting consideration of observable as well as of observed conditions not only is one I am bound to apply but also is one against whose application no reasonable objection can be made. The question of when the conditions must have been observable has already been discussed, and I pass now to the question of what these conditions must have revealed in order to have prevented title from passing to the State.

The answer is to be found in a proper interpretation of the statement of the Supreme Court, in the *Southern Pacific* case, that the conditions must have been "such as reasonably to engender the belief that the lands contained oil of such quality and in such quantity as would render its extraction profitable and justify expenditures to that end" (251 U. S. at pp. 13-14). In seeking to apply this test, several problems arise. In the first place, it must be determined whether the reasonableness of the belief is to be judged in the light of the standards that properly should have guided a competent geologist or oil man familiar with the scientific principles and knowledge available in January 1903, or in the light of the considerations that would have influenced an ordinary oil prospector unfamiliar with the scientific knowledge of the times, or in the light of the factors that might have controlled the ordinary layman who was neither interested in nor familiar with any of the facts and theories relating to oil mining.

Of these three alternatives, the last is readily eliminated. The rule that the mineral character of land is not to be judged by the beliefs of those who have neither an interest in determining the question nor any capacity to do so intelligently is too obviously founded on reason and too well supported by authorities to require discussion. As between the other two alternatives a more difficult choice is presented. The point was not expressly considered in the *Southern Pacific* case; the Supreme Court merely held that the known conditions, both observable and observed, were such as to render the lands—

valuable for oil, in that an ordinarily prudent man, understanding the hazards and rewards of oil mining and desiring to engage therein for profit, would be justified in purchasing the lands for such mining and making the expenditures incident to their development, and in that a competent geologist or expert in oil mining, if employed to advise in the matter, would have ample warrant for advising the purchase and expenditure.

The court's language is not altogether free from ambiguity. While the court's statement is in the conjunctive rather than in the disjunctive, it does not necessarily follow that the court meant to lay down a dual requirement under which both a competent geologist and an ordinarily prudent oil man would have to be justified, on the basis of the proved conditions, in believing the land to be valuable for oil. Although the evidence in the *Southern Pacific* case actually met both requirements, proof satisfying either one might have been sufficient. This, I believe, is the proper interpretation of the court's language. But it is not necessary to insist upon the accuracy of this interpretation. As will become apparent from the findings of fact shortly to be made, the conditions proved

to have been observable and observed in this case were amply sufficient to justify both a competent geologist and an ordinarily prudent oil man in believing the land to be valuable for oil and in acting on that belief.

If it were necessary to choose between these interpretations, I should be inclined to adopt the former. Indeed, I am prepared to go even further and hold that if geologists and practical oil men reasonably could have been governed by different standards in 1903, proof of observable conditions justifying a belief as to mineral character on either standard would be sufficient to establish the mineral character of the land. But it is not necessary to go to such lengths in this case, as will become evident in the light of the final findings of fact presently to be made.

Before proceeding to those findings, attention should be called to one further set of problems relating to the question whether the land must be deemed to be sufficiently valuable for immediate or only for future acquisition and oil development. There are three possibilities. Proof conceivably might be necessary to show that the land was sufficiently valuable to justify immediate acquisition for immediate development, or immediate acquisition for future development, or future acquisition for future development. Of these three possible requirements, the first probably is too harsh and the third too lax. The second was, I am convinced, regarded as sufficient by the Supreme Court in the *Southern Pacific* and *Diamond Coal* cases. It also has consistently been held sufficient in departmental decisions. I hold it sufficient in this case, although the evidence also meets the requirements under the first as well as the third alternative, provided it is not necessary to establish that immediate acquisition for immediate development would have been immediately profitable on the basis of oil prices and local economic conditions prevalent in California on January 26, 1903. Obviously, neither the advisability of developing oil land nor the mineral character of the land can be made dependent upon local market and industrial conditions of a single day. Since the extraction of the oil is of necessity protracted over a long period, the profitable nature of its extraction must be estimated with a view to the conditions that reasonably can be expected to operate during the period as a whole rather than on the basis of the conditions actually operating on the first day of the period; and so the Department has consistently held. *United States v. State of Utah*, 51 L. D. 432, 436 (1926); *Central Pacific Ry. Co.*, 45 L. D. 223 (1916); *Narver v. Eastman*, 34 L. D. 123 (1905); *Freeman v. Summers*, 52 L. D. 203 (1927).

Upon the basis of the facts as disclosed in the record and discussed in this opinion, I conclude that:

(1) Section 36, T. 30 S., R. 23 E., M. D. B. & M., was known to be valuable for oil and gas before, on, and after January 26, 1903, and that title thereto has never passed to the State of California.

(2) The observable conditions before, on, and after January 26, 1903, were such as reasonably to engender, in a competent geologist or expert in oil mining, the belief that Section 36, and each quarter-section thereof, contained oil and gas of such quality and in such quantity as would render extraction profitable in the sense heretofore defined.

(3) An ordinarily prudent man, understanding the hazards and rewards of oil mining and desiring to engage therein for profit, would have been justified, on a reasonable interpretation of the observable conditions, in acquiring Section 36 as a whole or any legal subdivision thereof, at any time on or after January 26, 1903, with a view to its future development, and in acquiring Section 36 as a whole or any 80-acre subdivision thereof, on or after that date, with a view to its immediate development, through the drilling of wells thereon and extraction of the oil and gas for commercial purposes (Mather p. 70).

(4) A competent geologist or expert in oil mining, if employed to advise in the matter, would have had ample warrant for advising such acquisition and expenditure.

(5) It was known, prior to January 26, 1903, that the diatomaceous Monterey shales were a source of oil, that sands and conglomerates above a source bed constitute a suitable reservoir stratum, that the Tulare formation was relatively impermeable and would serve as a cap-rock series, and that oil tends to accumulate in anticlines. The outcrops of source rock and reservoir series at the Temblors were observable, and their probable continuation under the Elk Hills was determinable in the light of the then knowledge of the history of the San Joaquin Valley. The anticlinal structure of the Elk Hills and the location of the land, which became Section 36, on the crest of the anticline, were observable. Geological projection according to the methods of that time would have provided a reasonable basis for a belief that oil would be found at a depth less than that to which cased wells could be driven in California, and, in view of the much deeper wells which had been drilled in the East, it would have been reasonable to anticipate improvement in drilling methods which would greatly diminish the risk of excessive depth.

It is not intended to state this conclusion so as to imply that a geologist could have reached an absolutely certain determination with reference to the oil value of the Elk Hills. There was a pos-

sibility that the source rock and reservoir series might thin out or disappear between the outcrops on the Temblors and the Elk Hills. There was a possibility that lack of water might rob the anticlinal structure of accumulative effect. There was a possibility that hidden faults or unexposed intervening strata might prevent the migration of oil into the anticline or increase the depth at which it collected. A competent and conscientious geological adviser should have revealed to an operator that these risks were present. But these possibilities, individually and in conjunction, were not strong enough so that they should have deterred a geologist from recommending the Elk Hills as probable oil land. Nor would they have rendered unreasonable a belief that Section 36, and each legal subdivision thereof, was chiefly valuable for oil. There were no greater hazards than are ordinarily assumed by an operator in developing unproved territory.

(6) All of the conditions, on the basis of which a geologist could have reached the conclusion that Section 36 was valuable oil land, were not only observable on and after January 26, 1903, but were observed before that date. The outcrops of diatomaceous shale and reservoir sands along the Temblors and at McKittrick had been observed, and oil development was being prosecuted near the surrounding seepages. The geological history of the San Joaquin Valley was known to Grimes, and he, as well as Dumble, Watts and Duvall, believed that the oil-bearing sands underlay the San Joaquin Valley. Whittier had observed the anticlinal structure of the Elk Hills. The land formally identified by the survey as Section 36 had been located, and must have been known to be in the center and on the crest of the Hills. Although there is no evidence that anyone had endeavored to calculate the probable depth of the oil, the exposed and dipping strata of shale and oil sands had been observed and through their projection a rough estimate of their depth beneath the Hills could have been made. Seepages were well known to exist at McKittrick and along the Temblors. The presence and significance of the gas blow-out in the Buena Vista Hills were known. The gas in the Hoy well, and the "Lament Seep", upon each of which a geologist or operator might reasonably have relied as an oil indication, had both been discovered.

(7) By January 26, 1903, geological theory and practice had reached a stage of development which rendered it reasonable for one not himself a competent geologist or expert in oil mining, before making large expenditure for the acquisition or development of oil land, to employ a competent geologist or expert in oil mining to advise in the matter.

(8) Many persons, however, in fact prospected for oil without themselves being competent geologists or experts in oil mining and

without consulting such geologists or experts. Such persons relied primarily on oil seepages.

(9) Such persons could, on January 26, 1903, have observed the "Lamont Seep" on the land which was identified by the survey as Section 32. They would have been justified in regarding the conditions there observable as indicating an oil seepage and, on the basis of the standard by which such persons governed their conduct, as indicating the oil character of the surrounding land, including Section 36 and each subdivision thereof. Because the land in Section 36 lies above that in Section 32, they might have regarded the former as inferior in value to the lands below the seepage. This would not have led them to conclude that the lands in Section 36 were not worthy of immediate acquisition with a view to future oil development after the possibilities of the locations they deemed preferable had been explored.

(10) The "Lamont Seep" not only was observable on January 26, 1903, but also had actually been observed before then. It was, in fact, the chief factor which had led Waggy and the other members of the Wagont Company to locate the several subdivisions of Section 36, among others, as oil lands and to make the expenditures already referred to with a view to acquiring the land for oil development.

The foregoing conclusions are more than sufficient to dispose of the present case. However, should it become necessary to resort to the courts in order to call the claimants to account for the oil already extracted from Section 36, the following findings as to actual belief in the oil value of that land, justified by the evidence, may prove helpful:

(a) While all the conditions reasonably justifying a conclusion that Section 36 was valuable for oil were observed as well as observable prior to January 26, 1903, there is no evidence to show that all of them had been observed by any one person.

(b) A few persons then actually believed the Elk Hills to be worthy of acquisition and development as oil land. These included Lowe and the others who had drilled a well in the Hills to a depth of 560 feet, Waggy, Blodgett, Youle, Sarnow, McCutchen, Sylvester, Whittier, and Grimes.

(c) Many oil men active in western Kern County, either did not believe the Elk Hills to be oil lands or had no opinion on the question. But this disbelief, in the light of then existing geological knowledge, was not reasonably justified by the considerations on which it was based.

(d) Among those who believed in the oil value of the Elk Hills, Grimes was the only one equipped with sufficient technical knowledge and actual information to have had a reasonable and geologically sound basis for his belief. He knew not merely the geologic

structure of the area in western Kern County, which includes the Elk Hills, but also the history of its formation and the reasons which led to his conclusion that oil in vast quantities would be discovered there. He also knew that the oil would tend to accumulate in the anticlines or folds, as they were often referred to at that time, and that the anticlines afforded the most favorable locations to drill for the oil. It also is reasonable to conclude that he had observed the Elk Hills fold or anticline, and had recognized that this anticline, on the crest of which Section 36 is situated, would be a favorable structure to drill for oil.

(e) Lamont, Wagy, and the other members of the Wagont Company were chiefly influenced by the "Lamont Seep." They believed this exposure to be an oil indication and concluded from it that the surrounding land on which they made locations, including Section 36, was chiefly valuable for oil. Their belief as to the character of the "Lamont Seep" was reasonable. The conclusion which they reached on the basis of this seep also was reasonable, if the standard of reasonableness is supplied by the views and beliefs of the ordinary oil propector in January 1903. It was not reasonable, however, if the standard must have reference to the then existing geological knowledge. The discovery of the seepage was not in itself a sufficient geological basis for a conclusion that the adjacent land was chiefly valuable for oil. It indicated that oil existed or had existed in the vicinity; but commercial development was not possible unless there was an accumulation of oil. A seepage did not necessarily signify the presence of a pool, and seepages in a faulted area might have suggested that some or all of the oil had escaped and had been dissipated.

(f) Whittier understood the anticlinal theory in a general way and recognized the structure of the Elk Hills. But his belief in their oil value was based, so far as the record in this case shows, only on his perception of the anticline. There is not sufficient evidence, either as to his technical or as to his actual knowledge, to warrant the conclusion that his belief in the oil character of Section 36 was reasonable.

(g) The basis of the belief of Sarnow, McCutchen, and Sylvester is not clear from the record. Their belief, therefore, cannot be said to have been proved reasonable on any test.

Before concluding, I wish to advert again to the possible significance of the original mineral withdrawal of Section 36 and of the return of that section as mineral in the Dewey survey. I have attached no weight at all to the latter so far as it bears on the question of the mineral character of the land. But if it were necessary to go beyond the observable condition test, I am of the opinion that it would be enough if, in addition to the existence of the requisite

observable conditions, there was some fact or facts which, from the very moment that the State could have claimed title, served as a *caveat* that title may not have passed. Such a *caveat* would put those desirous of acquiring title from the State upon notice of the possible mineral character of the land and point significantly to the advisability of consulting an expert before relying upon the title of the State. The original mineral withdrawal might have been sufficient alone to supply such a *caveat*. Clearly the mineral return in the Dewey survey was sufficient, for it is part of the very document which must be relied on to identify Section 36 and from which must be traced such title as the State could have acquired. The significance of the original mineral withdrawal and of the Dewey survey is mitigated to a considerable extent by the revocation of the withdrawal in 1904 and by the Ryan report. I believe, however, that these were not sufficient so far to allay doubts concerning the State's title as to dispense with an effort to investigate the possible existence and significance of observable conditions affecting the character of the land.

In conclusion, attention again should be called to the similarity between this case and *United States v. Southern Pacific Co.* It is apparent from a reading of the *Southern Pacific* decision and an examination of the record in that case that the principles there set forth are not being stretched beyond their proper application by a decision in favor of the Government in the present case. The lands involved in the *Southern Pacific* case were odd-numbered sections, within the limits of the grant to the Southern Pacific Railroad, lying in the Elk Hills. Patent to those sections issued on December 12, 1904, less than two years after the critical date in the case at bar. Of course, there are numerous differences between the testimony in one case and that in the other. The *Southern Pacific* case was tried in 1912; the present case was tried between 1929 and 1931. Consequently, the contemporary evidence was much fuller in the former suit, since many more witnesses were available. On the other hand, the geological evidence was not as completely developed. Certain differences of detail are of no great significance. Owing to an error made by one of the witnesses in the designation of a township, the Supreme Court was led to believe that two wells rather than one had been drilled in the Elk Hills before 1904. But it is apparent that the Court regarded these wells, since neither was commercially productive, as militating against rather than in favor of the oil value of the Hills, for it pointed out that obviously neither well had gone to an adequate depth. Likewise, the Supreme Court appears to have been convinced by the evidence in that case that the "Lamont Seep" is in fact a seepage, whereas in the present case the evidence leaves its

real nature in doubt. But, again, this difference is not of critical importance, for it is shown in this case that it could have been and in fact was reasonably believed that the "Lamont Seep" was a real seepage and an oil indication.

The *Southern Pacific* case is not, of course, *res judicata* of the present proceedings, for the parties to the respective causes are not identical. The present case must therefore be examined and decided on its own facts. But those facts must be construed in accordance with the legal principles set forth in the *Southern Pacific* case as well as in other applicable decisions. In applying abstract standards to a new set of facts, it is illuminating as well as permissible to examine the facts of the cases in which the standards were declared in order to gauge more accurately their intended scope and effect. These remarks are not intended to suggest that the *Southern Pacific* case is accorded the force of *stare decisis* in determining the questions of fact in the case at bar. *Cf. State v. Carson*, 185 Ia. 568, 170 N. W. 781 (1919). But examination of the record in the *Southern Pacific* case discloses that the facts in that suit were sufficiently similar to those in the instant case to justify an application of the principles there set forth to the facts here proved. *Cf. Heisler v. Thomas Colliery Co.*, 274 Pa. 448, 118 Atl. 394 (1922); *Clyde v. Brooklyn Union Elevated Ry. Co.*, 148 App. Div. 705, 135 N. Y. Supp. 1 (1912).

It follows from the conclusions of fact and of law herein set forth that Section 36, T. 30 S., R. 23 E., M. D. B. and M., was known to be mineral in character at the time of its formal identification by approval of the survey, and that title to this section has never vested in the State of California or its transferees, but remains in the United States.

The decision of the Commissioner is, accordingly,

Reversed.

WITHDRAWAL OF PUBLIC LANDS FOR CLASSIFICATION AND IN AID OF LEGISLATION

EXECUTIVE ORDER

ALASKA

By virtue of and pursuant to the authority vested in me by the act of June 25, 1910 (ch. 421, 36 Stat. 847), as amended by the act of August 24, 1912 (ch. 369, 37 Stat. 497), and subject to the conditions therein expressed, to valid existing rights, and to the provisions of existing withdrawals, it is ordered that all the public lands in the following townships in Alaska be, and they are hereby, temporarily withdrawn from settlement, location, sale, entry, or other

form of appropriation, and reserved for classification, to conserve the public interests, and in aid of such legislation as may hereafter be proposed or recommended:

SEWARD MERIDIAN

Tps. 17 N., Rs. 1, 2, and 3 E.
 Tps. 18 N., Rs. 1, 2, and 3 E.
 Tps. 19 N., Rs. 1 and 2 E.
 Tps. 17 N., Rs. 1 and 2 W.
 T. 18 N., R. 1 W.

This order shall remain in full force and effect unless and until revoked by the President or by act of Congress.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,

February 4, 1935.

WITHDRAWAL FOR CLASSIFICATION OF ALL PUBLIC LAND IN
 CERTAIN STATES ¹

EXECUTIVE ORDER

WHEREAS title II of the National Industrial Recovery Act, of June 16, 1933 (ch. 90, 48 Stat. 195), provides among other things for the preparation of a comprehensive program of public works which shall include among other matters the conservation and development of natural resources, including control, utilization, and purification of waters; prevention of soil or coastal erosion, and flood control; and

WHEREAS in furtherance of the said act the Special Board for Public Works appointed by Executive Order No. 6174, of June 16, 1933, has by its resolution of July 18, 1934, included in the comprehensive program of public works contemplated by title II of the National Industrial Recovery Act certain projects known as "The Land Program, Federal Emergency Relief Administration"; and

WHEREAS the said Land Program contemplates the use of public lands in the States of Alabama, Arkansas, Florida, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, Oklahoma, Washington, and Wisconsin for projects concerning the conservation and development of forests, soil, and other natural resources, the creation of grazing districts, and the establishment of game preserves and bird refuges; and

¹ See Executive order of Nov. 26, 1934, in 54 I. D., p. 539.

WHEREAS I find and declare that it is necessary to classify all the unreserved and unappropriated lands of the public domain within the said States for the purpose of the effective administration of the said Land Program:

Now, THEREFORE, by virtue of and pursuant to the authority vested in me by the act of June 25, 1910 (ch. 421, 36 Stat. 847), as amended by the act of August 24, 1912 (ch. 369, 37 Stat. 497), and subject to the conditions therein expressed and to valid existing rights, it is ordered that all the public lands in the States of Alabama, Arkansas, Florida, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, Oklahoma, Washington, and Wisconsin be, and they are hereby, temporarily withdrawn from settlement, location, sale, or entry, and reserved for classification and pending determination of the most useful purposes to which said lands may be put in furtherance of said Land Program, and for the conservation and development of natural resources.

Public lands within any of the States herein enumerated which are on the date of this order under an existing reservation for a public purpose are exempted from the force and effect of the provisions of this order so long as such existing reservation remains in force and effect.

This order shall continue in full force and effect unless and until revoked by the President or by an act of Congress.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,

February 5, 1935.

MONTANA EASTERN PIPE LINE COMPANY

Decided February 7, 1935

OIL AND GAS LEASE—LEASE FORM—SCOPE OF AUTHORITY OF THE SECRETARY OF THE INTERIOR.

Under the authority granted by section 32 of the Act of February 25, 1920 (41 Stat. 437), "to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this act," which act, furthermore, does not set forth the form of either the permit or lease, the Secretary of the Interior may insert in an oil and gas lease such reasonable provisions as are necessary to effectuate the purposes of the act.

MINERAL LEASING ACT—REGULATIONS—SCOPE OF AUTHORITY OF THE SECRETARY OF THE INTERIOR.

"The so-called "unitization provision" included in lease forms issued under the Act of February 25, 1920, which provides for unitary development and

operation of lands containing oil and gas by lessees, where deemed by the Secretary in the public interest, is designed to prevent recognized existing destructive practices in the oil and gas industry, and, therefore, its inclusion in the lease forms is a proper exercise of the Secretary's authority to give effect to the recognized conservation policy of the act.

MINERAL LEASING ACT—PERMITTEE—LEASE—FORM OF LEASE

The Mineral Leasing Act provides that the permittee, upon the establishment of the required facts, shall be granted a lease, but does not contemplate that he has acquired a vested right to a particular form of lease, as, for instance, that form in use at the date a prospecting permit was granted to him.

WALTERS, First Assistant Secretary:

By the Department's decision, A. 17664, dated October 8, 1934, in connection with the application of the Montana Eastern Pipe Line Company for leases of land embraced in its consolidated oil and gas prospecting permit, the insertion of the following paragraph in the lease forms to be submitted to the applicants for execution was approved:

The lessee agrees to enter into and abide by any unit agreement for the development and operation of the pool, field, or area embracing the lands included herein which may be acceptable to the Secretary of the Interior, and in the event of the lessee's failure to agree to such plan, to conform to and abide by any such unit plan for the pool, field, or area as may be prescribed by the Secretary of the Interior.

The applicants refuse to execute the lease forms containing this provision and have appealed from the ruling of the Department. They contend that the Secretary is without authority to insert the provision in the lease form. The appeal will be considered as a motion for rehearing.

Section 13 of the act of February 25, 1920 (41 Stat. 437), authorizes the Secretary of the Interior to issue permits to qualified applicants to prospect for oil and gas upon the public domain.

Section 14 provides that upon establishing to the satisfaction of the Secretary of the Interior that valuable deposits of oil and gas have been discovered, the permittee shall be granted a lease for one-fourth of the land embraced in the permit and a preference right to a lease for the residue.

Section 32 of the act grants to the Secretary of the Interior the authority "to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act."

The act does not set forth the form of either the permit or lease, and since this is the case, it seems clear that the authority delegated to the Secretary in the act to administer its provisions necessarily includes the authority to prescribe these forms. In prescribing the

forms, the Secretary is authorized to insert such reasonable provisions as are necessary to effectuate the purposes of the act. See *Wilbur v. Texas Co.* (40 F. (2d) 787—certiorari denied 282 U. S. 848).

The omission from the act of a form of lease to be used, together with the inclusion of the provision in section 32 thereof that the Secretary is authorized "to do any and all things necessary to carry out and accomplish the purposes of this Act", clearly indicates that a broad discretionary power with regard to the terms of the lease was intended to be delegated. In *United States ex rel. McLennan v. Wilbur* (283 U. S. 414), the Supreme Court held that the Secretary in his discretion could refuse to grant permits where he considered it necessary to effectuate the conservation policy of the act. Certainly, then, he has power to impose conditions upon their issuance and the issuance of leases which he considers necessary to effectuate this policy. It cannot be denied that the "unitization provision" is reasonably adapted to further the conservation policy of the act. It is designed to prevent recognized existing destructive practices in the oil and gas industry, namely, the overdrilling and overproduction of oil and gas which result from the unregulated development of oil and gas pools. It has been found that in a pool divided among many competing operators, overdrilling and overproduction ensue from the endeavor of each operator to reach the productive formation ahead of his competitors and to produce at maximum capacity in order to prevent drainage from his tract and to induce drainage from other tracts to his.

Obviously Congress could not anticipate or foresee all of the situations which might arise. Consequently, the Secretary was delegated authority in section 32 to cope with these situations as they arise.

In this connection it should be noted that this construction of the act has been followed from the date of its enactment and numerous modifications of the lease form originally approved have been made. Probably the most recent modification was the insertion in the lease form of a provision requiring compliance with the provisions of the codes of fair competition.

The contention that, conceding the authority of the Secretary to impose the condition, the provision cannot be inserted in a lease where it was not present in the prospecting permit, cannot be sustained. The permittee, in proceeding under the permit, is not entitled to rely on the fact that he will secure the form of lease in use at the date his permit is acquired. The act provides that the permittee, upon the establishment of the required facts, shall be granted a lease, but it does not contemplate that he shall acquire a vested right to a particular form of lease. The terms and conditions of the lease, as

we have seen, are left to the discretion of the Secretary. Since the constantly changing condition of the oil and gas industry at times necessitates immediate modification of the policy of the Government with regard to the deposits of oil and gas in the public domain, it is not reasonable to believe that the act intended to commit the Secretary, during the period of two years in which a prospecting permit is effective, to a particular form of lease. Certainly it seems that if an alteration in conditions, between the date the prospecting permit is issued and application for lease is made, requires the modification of the lease form to effectuate the policy of the act, the Secretary not only may, but should, so modify the lease form.

The conclusion that the provision may be inserted in the lease form although not present in the prospecting permit gains support from section 31 of the act, which provides:

That any lease issued under the provisions of this Act may be forfeited and canceled * * * whenever the lessee fails to comply with any of the provisions of this Act, of the lease, or of the general regulations promulgated under this Act and *in force at the date of the lease* * * *. [Italics supplied.]

While the subject matter of the foregoing section is not directly pertinent to the question in issue, the section clearly indicates that the controlling date is the date of the lease, not the date of the permit.

Therefore, the inclusion of the unitization provision in the lease forms of the applicant is held to be a valid exercise of the supervisory authority and discretion reposed in the Secretary of the Interior.

The motion for rehearing is accordingly

Denied.

GIFTS OF LANDS AND FILING OF APPLICATIONS FOR EXCHANGES OF PRIVATELY OWNED AND STATE LANDS UNDER SECTION 8, TAYLOR GRAZING ACT

REGULATIONS

[Circular No. 1346]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., February 8, 1935.

REGISTERS, UNITED STATES LAND OFFICES:

Section 8 of the Taylor Grazing Act, approved June 28, 1934 (48 Stat. 1269), makes limited provision (a) for the acceptance by the Secretary of the Interior of lands within the exterior boundaries of a grazing district as a gift, (b) for exchanges of privately owned lands

within a grazing district for public lands within or without a grazing district, and (c) for exchanges of State lands within or without grazing districts for public lands within or without such districts. The section reads as follows:

That where such action will promote the purposes of the district or facilitate its administration, the Secretary is authorized and directed to accept on behalf of the United States any lands within the exterior boundaries of a district as a gift, or, when public interests will be benefited thereby, he is authorized and directed to accept on behalf of the United States title to any privately owned lands within the exterior boundaries of said grazing district, and in exchange therefor to issue patent for not to exceed an equal value of surveyed grazing district land or of unreserved surveyed public land in the same State or within distance of not more than fifty miles within the adjoining State nearest the base lands: *Provided*, That before any such exchange shall be effected, notice of the contemplated exchange, describing the lands involved, shall be published by the Secretary of the Interior once each week for four successive weeks in some newspaper of general circulation in the county or counties in which may be situated the lands to be accepted, and in the same manner in some like newspaper published in any county in which may be situated any lands to be given in such exchange; lands conveyed to the United States under this Act shall, upon acceptance of title, become public lands and parts of the grazing district within whose exterior boundaries they are located: *Provided further*, That either party to an exchange may make reservations of minerals, easements, or rights of use, the values of which shall be duly considered in determining the values of the exchanged lands. Where reservations are made in lands conveyed to the United States, the right to enjoy them shall be subject to such reasonable conditions respecting ingress and egress and the use of the surface of the land as may be deemed necessary by the Secretary of the Interior. Where mineral reservations are made in lands conveyed by the United States, it shall be so stipulated in the patent, and any person who acquires the right to mine and remove the reserved mineral deposits may enter and occupy so much of the surface as may be required for all purposes incident to the mining and removal of the minerals therefrom, and may mine and remove such minerals, upon payment to the owner of the surface for damages caused to the land and improvements thereon. Upon application of any State to exchange lands within or without the boundary of a grazing district the Secretary of the Interior is authorized and directed, in the manner provided for the exchange of privately owned lands in this section, to proceed with such exchange at the earliest practicable date and to cooperate fully with the State to that end, but no State shall be permitted to select lieu lands in another State.

GIFTS OF LANDS TO THE UNITED STATES

1. *Offer to Convey*.—Gifts of lands within the exterior boundaries of a grazing district may be accepted by the Secretary of the Interior on behalf of the United States "where such action will promote the purposes of the district or facilitate its administration." Any person desiring to make such a gift of lands should submit to the Commissioner of the General Land Office at Washington, D. C., an offer to voluntarily convey and transfer to the United States any

lands within a grazing district, describing such lands by legal subdivisions of the public land surveys. The offer should be accompanied by an affidavit showing that the offerer is the record owner in fee of the lands so offered, free and clear of all encumbrances, and that there are no persons claiming the land adversely to the offerer. The affidavit should also show whether the taxes have been paid on the land for the preceding year and whether there are any taxes due or unpaid on such land or that could operate as a lien thereon. The application and affidavit should be submitted in triplicate.

2. *Action by General Land Office.*—The offer of gift and accompanying affidavit will be promptly considered upon receipt in the General Land Office, and if found regular and the records of said office show the land involved to be in private ownership and in a grazing district, the duplicate will be transmitted to the Director of Grazing for a report as to whether the acquisition of such lands will promote the purposes of the grazing district or facilitate in its administration, and the triplicate will be transmitted to the Director of the Division of Investigations for report as to what the records of the county in which the land is situated disclose as to the ownership of such land and any taxes that may be unpaid in connection with such land, and as to whether there are any persons occupying and claiming the lands adversely to the offerer. These reports shall be expedited to the Commissioner of the General Land Office, and if upon consideration thereof it shall appear that the offerer has good title to the land offered as a gift and that the acquisition of such land by the United States would be warranted, the register of the district land office will be advised, with the approval of the Secretary of the Interior, of such offer and agreement to accept the same in behalf of the United States, and that a serial number should be assigned to the case and the General Land Office advised thereof, and that appropriate notations of the offer should be made on the district land office records. The register shall be instructed to advise the offerer of the agreement to accept the land involved as a gift, and that the offerer should submit a voluntary deed of conveyance to the United States of the land so offered, an affidavit stating that such offerer has not conveyed or encumbered the land in any manner from the time of making the offer up to and including the date of recordation of the deed, and evidence by the proper county official to show that all taxes due on the said land or that could operate as a lien thereon have been paid in full. If, upon receipt in the General Land Office of the conveyance and additional evidence, the same are found regular, title shall be accepted to the offered land as a gift, and the register shall be advised thereof and

instructed to advise the donor of the acceptance of the gift of land involved.

3. *Deed of Conveyance.*—The deed of conveyance to the United States must be executed, acknowledged and duly recorded in accordance with the laws of the State in which the lands are situated. The deed should recite that it is made "as a gift", as authorized by section 8 of the act of June 28, 1934 (48 Stat. 1269). Where such deed is made by an individual, it must show whether the person making the conveyance is married or single. If married, the wife or husband of such person as the case may be, must join in the execution and acknowledgment of the deed in such manner as to bar effectually any right of curtesy or dower, or any claim whatsoever to the land conveyed, or it must be fully and satisfactorily shown that under the laws of the State in which the land conveyed is situated, such husband or wife has no interest whatsoever, present or prospective, which makes his or her joining in the deed of conveyance necessary. Where the deed of conveyance is by a corporation, it should be recited in the instrument of transfer that the deed was executed pursuant to an order or by the direction of the board of directors, or other governing body, and a copy of such order or direction must accompany such instrument of transfer and both should bear the impression of the corporate seal.

EXCHANGE OF PRIVATELY OWNED LANDS

4. *Application for Exchange.*—Section 8 of the act authorizes and directs the Secretary of the Interior to exchange for privately owned lands within a grazing district surveyed grazing district lands or unreserved surveyed public lands in the same State or within a distance of not more than 50 miles within the adjoining State nearest the base lands when the public interests will be benefited thereby. Whether or not an exchange will benefit the public interests is a question of fact to be determined by the Secretary of the Interior in the light of all the circumstances.

Persons, firms, or corporations desiring to exchange lands pursuant to this section should file in the district land office having jurisdiction over the selected lands, or in the General Land Office, when there is no United States district land office within the State, an application, in triplicate, setting forth by legal subdivisions of the public land surveys the lands offered to the Government and the lands to be selected in exchange therefor. The application should contain the full name and post office address of the applicant, identify the grazing district in which the offered lands are situated, state whether or not any reservations of minerals, easements, or other rights in or to the offered

lands are desired, and what use thereof is contemplated. It should also show the reservations or easements which are acceptable to the applicant and are to be made by the United States affecting the selected lands.

The application must be accompanied by an affidavit showing that the applicant is legally capable of consummating the exchange, that he is the owner of the lands offered in exchange, that such offered lands are not the basis of another selection or exchange, and that the selected lands are unappropriated and are not occupied, claimed, improved, or cultivated by any person adversely to the applicant.

The application must be accompanied with a corroborated affidavit relative to springs and water holes on the selected lands, in accordance with existing regulations pertaining thereto. The application must also be accompanied with an affidavit showing that the lands relinquished and the lands selected are approximately of equal value. The act requires that the value of the selected lands shall not exceed that of the offered lands, consideration being given to any reservation of minerals or easements which may be made by the applicant or the United States. The values of both offered and selected lands are to be determined by the Secretary of the Interior.

Payment of fees will be required at the rate of \$2.00 for each selection of 160 acres or fraction thereof.

5. *Action by Register.*—If the application for exchange appears regular and in conformity with the law and these regulations, the register will assign the current serial number thereto and, after making appropriate notation upon his records, will transmit the original copy of the application to the General Land Office, together with a report as to any conflicts of record, and will transmit the duplicate copy of the application to the Director of Grazing, who will report to the Commissioner of the General Land Office as to whether the consummation of such exchange will benefit the public interests and as to whether in his opinion the exchange should be authorized.

Upon receipt of a favorable report from the Director of Grazing, the Commissioner of the General Land Office will, all else being regular, request the Director of the Division of Investigations to have a field investigation made for the purpose of determining the values of the offered and selected lands; whether the selected lands are occupied, improved, cultivated, or claimed by another; whether the selected lands contain minerals, timber, springs, water holes, hot or medicinal springs, or any special features which should be considered in acting on the application; whether the reservation which the applicant desires to make in the offered lands, if any, together with the contemplated use of such reservation will in any

way affect adversely the administration of the grazing district; and whether there are any reasons why the exchange should not be consummated. The field examination should be made as soon as possible and report and special recommendation should be submitted to the General Land Office.

6. *Evidence Required.*—When the field investigation report is received and an exchange of equal values has been established, the Commissioner of the General Land Office, unless he has reasons to do otherwise, will, with the approval of the Secretary of the Interior, issue notice for publication of the contemplated exchange, and will require the applicant, through the register of the district land office, to submit proof of publication of notice, a deed of conveyance of the offered lands duly recorded, an abstract of title showing that at the time the deed of conveyance to the United States was recorded the title to the lands covered by such deed was in the party making the conveyance, a certificate that the lands so conveyed were free from judgments or mortgage liens, pending suits, tax assessments, or other encumbrances, and a certificate by the proper official of the county in which the lands conveyed are situated showing that all taxes levied or assessed against the lands conveyed to the United States, or that could operate as a lien thereon, have been fully paid, or whether there is a tax due on such lands that could operate as a lien thereon but which tax is not yet payable and that there are no unredeemed tax sales and no tax deeds outstanding against such lands conveyed to the United States.

7. *Publication of Notice.*—The publication notice must give the name and post office address of the applicant, serial number and date of the application, act under which application is filed, describe both the offered and selected lands in terms of legal subdivisions of the public land surveys, and state that the purpose of the notice is to allow all persons claiming the selected lands or having bona fide objection to such exchange and opportunity to file their protests or other objections in the district land office, or in the General Land Office, together with evidence that a copy of such protest or objection has been served upon the applicant. Such notice must be published at the expense of the applicant once a week for four consecutive weeks in some designated newspaper of general circulation in the county or counties in which may be situated the lands offered to the United States, and in the same manner in some like newspaper published in any county in which may be situated any lands selected in exchange. In the event the newspaper is a daily, the publication should be made in the Wednesday issue thereof. A similar notice will be posted in the district land office during the required period of publication and the register shall certify as to the posting. Such

notice for publication will be sent by the General Land Office to the register for forwarding by him to the applicant with instructions for publication in the newspaper or newspapers designated, but where there is no United States land office in the State, the notice will be sent direct to the applicant with instructions for publication in the newspaper designated. Proof of publication of notice shall consist of an affidavit by the publisher, or foreman, or other proper employee of the newspaper, showing the dates of publication, and attaching thereto a copy of the notice as published. The register shall transmit such evidence of publication to this office with his report as to whether or not protests or contests have been filed against the proposed exchange, and shall certify as to the posting of notice in his office.

8. *Deed of Conveyance.*—The deed of conveyance to the United States must be executed, acknowledged, and duly recorded in accordance with the laws of the State in which the lands are situated. Such revenue stamps as are required by law must be affixed to the deed and canceled. The deed should recite that it is made “for and in consideration of the exchange of certain lands, as authorized by section 8 of the act of June 28, 1934 (48 Stat. 1269).” Where such deed is made by an individual, it must show whether the person making the conveyance is married or single. If married, the wife or husband of such person as the case may be, must join in the execution and acknowledgment of the deed in such manner as to bar effectually any right of curtesy or dower, or any claim whatsoever to the land conveyed, or it must be fully and satisfactorily shown, that under the laws of the State in which the land conveyed is situated, such husband or wife has no interest whatsoever, present or prospective, which makes his or her joining in the deed of conveyance necessary. Where the deed of conveyance is by a corporation, it should be recited in the instrument of transfer that the deed was executed pursuant to an order or by the direction of the board of directors, or other governing body, and a copy of such order or direction must accompany such instrument of transfer and both should bear the impression of the corporate seal.

9. *Abstract of Title.*—The abstract of title must show that the title memoranda contained therein are a full, true, and complete abstract of all matters of record or on file in the offices of the recorder of deeds and in the offices of the clerks of courts of record of that jurisdiction, including all conveyances, mortgages, pending suits, judgments, liens, *lis pendens*, or other encumbrances or instruments which are required by law to be filed with the recording officer and which appear in the records of the office of the clerks of courts of record affecting in any manner whatsoever the title to the land to be conveyed to the United States. The abstract of title may be

prepared and certified by the recorder of deeds or other proper officer under his official seal, or it may be prepared and authenticated by an abstractor or by an abstract company, approved by the General Land Office, in accordance with section 42 of the mining regulations of April 11, 1922 (49 L. D. 15, 69).

10. *Taxes.*—In case taxes have been assessed or levied on lands conveyed to the United States, and such taxes are not due and payable until some future date, the applicant, in addition to the certificate above required relative to taxes and tax assessments, may furnish a bond with qualified corporate surety for the sum of twice the amount of taxes paid on the land for the previous year in order to indemnify the United States against loss for the tax as assessed or levied but not yet due and payable. In lieu of the bond the applicant may submit a sum similar to that required in the bond, and if and when proper evidence is furnished showing the taxes on the land conveyed have been paid in full, the said sum will be returned to the applicant.

11. *Action by General Land Office.*—The publication of notice, conveyance, abstract of title, and other evidence required of the applicant will, upon receipt in the General Land Office, be examined, and if found regular and in conformity with law, and there are no objections, title will be accepted to the offered land and patent will issue for the land selected in exchange.

Should the report from the Director of the Division of Investigations, upon field investigation, disclose inequalities of value, the Commissioner of the General Land Office will advise the applicant and afford him an opportunity to adjust matters so as to bring the exchange within the provisions of the law.

Notices of additional requirements, rejection, 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. Protests against exchanges should be filed in the district land office, from where they will be transmitted to the General Land Office for consideration and disposal.

Should the application for exchange be finally rejected or the selection canceled for any reason, the abstract of title will be returned, and the applicant will be advised of his right to apply for a quitclaim deed under existing law for the land conveyed to the United States.

An application for exchange will be noted "suspended" by the register and unless disallowed, the lands applied for in exchange will be segregated upon the records of the district land office and General Land Office, and will not be subject to other appropriation, application, selection, or filing.

EXCHANGE OF STATE LANDS

12. *Application for Exchange.*—Section 8 of the act authorizes exchanges of lands between the United States and a State, when public interests will be benefited thereby, and provides for the issuance of patent for the selected lands upon acceptance of title to the lands conveyed to the United States in exchange therefor. The lands offered in exchange by a State may be lands owned by the State within or without the boundary of a grazing district, and the selected lands may be an equal value of surveyed grazing district lands or unreserved surveyed public lands of the United States within the same State. Whether or not an exchange will benefit the public interests is a question of fact to be determined by the Secretary of the Interior in the light of all the circumstances.

A State desiring to exchange lands under the provisions of this act should file application, in triplicate, in the district land office having jurisdiction over the selected lands, or in the General Land Office, when there is no United States district land office within the State. Such application should describe the lands offered to the Government as well as those to be selected in exchange, by legal subdivisions of the public-land surveys, or by entire sections, and nothing less than a legal subdivision may be surrendered or selected. The application for exchange should identify the grazing district in which the offered lands are situated, if in a grazing district, and should state whether or not any reservations of minerals, easements, or other rights in or to the offered lands are desired, and what use thereof is contemplated. It should also show the reservations or easements which are acceptable to the State and which are to be made by the United States affecting the selected lands. Each application for an exchange must be accompanied by the following certificate and affidavits:

(A) A certificate by the selecting agent showing that the selection is made under and pursuant to the laws of the State.

(B) An affidavit showing that the State is the owner of the lands offered in exchange, that such offered lands are not the basis of another selection or exchange, and that the selected lands are unappropriated and are not occupied, claimed, improved, or cultivated by any person adversely to the State.

(C) A corroborated affidavit relative to springs and water holes on the selected lands in accordance with existing regulations pertaining thereto.

(D) An affidavit showing that the lands relinquished and the lands selected are approximately of equal value.

The act requires that the value of the selected lands should not exceed that of the offered lands, consideration being given to any

reservations of minerals or easements which may be made by the State or the United States. The values of both offered and selected lands are to be determined by the Secretary of the Interior.

Payment of fees will be required at the rate of \$2.00 for each selection of 160 acres or fraction thereof.

13. *Action by the Register.*—If the application for exchange appears regular and in conformity with the law and these regulations, the register will assign the current serial number thereto, and, after making appropriate notations upon his records, will transmit the original copy of the application to the General Land Office, together with a report as to any conflicts of record, and will transmit the duplicate copy of the application to the Director of Grazing, who will report to the Commissioner of the General Land Office as to whether the consummation of such exchange will benefit the public interests and as to whether in his opinion the exchange should be authorized.

Upon receipt of a favorable report from the Director of Grazing, the Commissioner of the General Land Office will, all else being regular, request the Director of the Division of Investigations to have a field investigation made for the purpose of determining the values of the offered and selected lands; whether the selected lands are occupied, improved, cultivated, or claimed by any one adversely to the State; whether the selected lands contain minerals, timber, springs, water holes, hot or medicinal springs, or any special features which should be considered in acting on the application; whether the reservation which the State desires to make in the offered lands, if any, together with the contemplated use of such reservation, will in any way affect adversely the administration of the grazing district; and, whether there are any reasons why the exchange should not be consummated. The field examination should be made as soon as possible, and report and special recommendation should be submitted to the General Land Office.

14. *Evidence Required.*—When the field investigation report is received and an exchange of equal values has been established, the Commissioner of the General Land Office, unless he has reason to do otherwise, will, with the approval of the Secretary of the Interior, issue notice for publication of the contemplated exchange, and will require the State, through the register of the district land office, to submit proof of publication of notice, a deed of conveyance of the offered lands, duly recorded, a certificate of the proper State officer showing that the offered lands have not been sold or otherwise encumbered by the State, and a certificate by the recorder of deeds or official custodian of the records of transfers of real estate, in the proper county, or by an abstractor or abstract company approved by the General Land Office, that no instrument purporting to convey or

in any way encumber title to the offered land is of record or on file in his office. If, however, the offered lands were ever held in private ownership and were acquired by the State from such source, it will be necessary for the State to furnish an abstract of title showing that at the time the deed of conveyance to the United States was recorded the title to the lands covered by such deed was in the State making the conveyance, a certificate that the lands so conveyed were free from judgments or mortgages, liens, pending suits, tax assessments, or other encumbrances, and a certificate by the proper official of the county in which the lands conveyed are situated showing that all taxes levied or assessed against the lands conveyed to the United States, or that could operate thereon as a lien, have been fully paid or that no taxes have been levied, or whether there is a tax due on such lands that could operate as a lien thereon but which tax is not yet payable, and that there are no unredeemed tax sales and no tax deeds outstanding against such lands conveyed to the United States.

15. *Publication of Notice.*—The publication notice must give the name of the State making application, the serial number and date of the application, act under which application is filed, describe both the offered and selected lands in terms of legal subdivisions of the public land surveys, and state that the purpose of the notice is to allow all persons claiming the selected lands or having bona fide objections to such exchange an opportunity to file their protests or other objections in the district land office, or in the General Land Office, together with evidence that a copy of such protest or objection has been served upon the State. Such notice must be published at the expense of the State once a week for four consecutive weeks in some designated newspaper of general circulation in the county or counties in which may be situated the lands offered to the United States, and in the same manner in some like newspaper published in any county in which may be situated any lands to be selected in exchange. In the event the newspaper is a daily, the publication should be made in the Wednesday issue thereof. A similar notice will be posted in the district land office during the required period of publication. Such notice for publication will be sent by the General Land Office to the register for forwarding by him to the applicant with instructions for publication in the newspaper or newspapers designated, but where there is no United States land office in the State applying for the exchange, the notice will be sent direct to the State with instructions for publication in the newspaper designated. Proof of publication of notice shall consist of an affidavit by the publisher, or foreman, or other proper employee of the newspaper, showing the dates of publication, and attaching thereto a copy of the notice as published. The register shall transmit such

evidence of publication to this office with his report as to whether or not protests or contests have been filed against the proposed exchange, and shall certify as to the posting of notice in his office.

16. *Deed of Conveyance.*—The deed of conveyance to the United States must be executed, acknowledged, and duly recorded in accordance with the laws of the State making the exchange, and must be accompanied by a certificate of the proper State officer showing that the officer executing the conveyance was authorized to do so under the State law. The deed should recite that it is made "for and in consideration of the exchange of certain lands, as authorized by section 8 of the act of June 28, 1934 (48 Stat. 1269)."

17. *Abstract of Title.*—The abstract of title must show that the title memoranda contained therein are a full, true and complete abstract of all matters of record or on file in the office of the recorder of deeds and in the offices of the clerks of courts of record of that jurisdiction, including all conveyances, mortgages, pending suits, judgments, liens, *lis pendens* or other encumbrances or instruments which are required by law to be filed with the recording officer and which appear in the records of the offices of the clerks of courts of record affecting in any manner whatsoever the title to the land to be conveyed to the United States. The abstract of title may be prepared and certified by the recorder of deeds or other proper officer under his official seal, or it may be prepared and authenticated by an abstracter or by an abstract company, approved by the General Land Office, in accordance with section 42 of the mining regulations of April 11, 1922 (49 L. D. 15, 69).

18. *Taxes.*—In case the land conveyed to the United States has been held in private ownership and taxes have been assessed or levied thereon, and such taxes are not due and payable until some future date, the State, in addition to the certificate above required relative to taxes and tax assessments, may furnish a bond with qualified corporate surety for the sum of twice the amount of taxes paid on the land for the previous year in order to indemnify the United States against loss for the tax as assessed or levied but not yet due and payable. In lieu of the bond the State may submit a sum similar to that required in the bond, and if and when proper evidence is furnished showing the taxes on the land conveyed have been paid in full, the said sum will be returned to the State.

19. *Action by General Land Office.*—The publication of notice, conveyance, abstract of title, and other evidence required of the State will, upon receipt in the General Land Office, be examined, and if found regular and in conformity with law, and there are no objections, title will be accepted to the offered land and patent will issue for the land selected in exchange.

Should the report from the Director of the Division of Investigations, upon field investigation, disclose inequalities of value, the Commissioner of the General Land Office will advise the State and afford opportunity for adjustment so as to bring the exchange within the provisions of the law.

Notices of additional requirements, rejection 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. Protests against exchanges should be filed in the district land office, from where they will be transmitted to the General Land Office for consideration and disposal.

Should the application for exchange be finally rejected or the selection canceled for any reason, abstract of title will be returned to the State, and the State will be advised of its right to apply for a quitclaim deed under existing law for the land conveyed to the United States.

An application for exchange will be noted "suspended" by the register, and unless disallowed, the lands applied for in exchange will be segregated upon the records of the district land office and General Land Office, and will not be subject to other appropriation, application, selection, or filing.

20. *State School Lands.*—It is provided in section 1 of the act that—

Nothing in this Act shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands, and which is maintained pursuant to such law except as otherwise expressly provided in this Act, nor to affect any land heretofore or hereafter surveyed which, except for the provisions of this Act, would be a part of any grant to any State, nor as limiting or restricting the power or authority of any State as to matters within its jurisdiction.

The words "Nothing in this Act shall be construed in any way * * * to affect any land heretofore or hereafter surveyed which, except for the provisions of this Act, would be a part of any grant to any State" were obviously intended to preserve school sections, both surveyed and unsurveyed, included within the boundaries of a grazing district established under the provisions of the Taylor Grazing Act, in exactly the same status for the purpose of any grant to any State as the lands would have had had the Taylor Grazing Act not been passed and had the lands not been included in the grazing district.

It follows, therefore, that neither surveyed nor unsurveyed school sections within the boundaries of a grazing district may for that reason only be offered as a basis for an equal area indemnity selection under the act of February 28, 1891 (26 Stat. 796). It also

follows that the inclusion of unsurveyed school sections within a grazing district will not prevent the title to such lands from vesting in the State upon the acceptance of the plat of survey thereof by the Commissioner of the General Land Office.

Granted school sections owned by a State within or without the boundaries of a grazing district may be assigned by the State as a basis for an equal value exchange, as provided in section 8 of the Taylor Grazing Act.

FRED W. JOHNSON, *Commissioner.*

Approved:

T. A. WALTERS,

First Assistant Secretary.

EXECUTIVE WITHDRAWAL ORDER OF NOVEMBER 26, 1934, AS AFFECTING TAYLOR GRAZING ACT AND OTHER PRIOR LEGISLATION

Opinion, February 8, 1935

WITHDRAWAL OF PUBLIC LANDS—EXECUTIVE ORDER OF NOVEMBER 26, 1934—OPERATION.

While the Executive order of November 26, 1934, temporarily withdrawing particular areas of public lands from certain forms of disposition, contains an excepting provision which operates to save preexisting valid appropriations, reservations or withdrawals during the period of their existence, such order nevertheless attaches to these lands as a secondary claim, becoming effective upon the termination of the prior claim.

WITHDRAWAL OF PUBLIC LANDS—EXECUTIVE ORDER OF NOVEMBER 26, 1934—ESTABLISHMENT OF TAYLOR GRAZING DISTRICT PERMITTED ON WITHDRAWN LANDS.

A grazing district under the Taylor Grazing Act may be established on land withdrawn under the terms of the Executive order of November 26, 1934, since the order does not, directly or by implication, prohibit the establishment of such districts, the withdrawal being from "settlement, location, sale or entry."

WITHDRAWAL OF PUBLIC LANDS—TAYLOR GRAZING ACT, SEC. 15—LEASING OF ISOLATED OR DISCONNECTED TRACTS—EFFECT OF EXECUTIVE ORDER.

The authority conferred upon the Secretary of the Interior by section 15 of the Taylor Grazing Act to lease isolated or disconnected tracts of public land is limited to "vacant, unappropriated, and unreserved lands", and, having become reserved by the operation of the Executive withdrawal order of November 26, 1934, may not be leased so long as that order remains in force.

WITHDRAWAL OF PUBLIC LANDS—EXECUTIVE ORDER OF NOVEMBER 26, 1934—EXCHANGE OF LANDS UNDER SEC. 8, TAYLOR GRAZING ACT—EFFECT OF ORDER.

So long as the withdrawal provided for by the Executive order of November 26, 1934, is operative on a tract of public land, said land is not the subject of exchange under section 8 of the Taylor Grazing Act, since such

disposition may well be regarded as within the category of a location or entry, both of which are prohibited by the Executive order.

WITHDRAWAL OF PUBLIC LANDS—EXECUTIVE ORDER OF NOVEMBER 26, 1934—SALE OF LANDS PROHIBITED.

Sale of public lands being in terms forbidden by the Executive withdrawal of November 26, 1934, isolated and disconnected tracts thereof may not be sold at public auction under authority of section 14 of the Taylor Grazing Act.

WITHDRAWAL OF PUBLIC LANDS—EXECUTIVE ORDER OF NOVEMBER 26, 1934—“EXISTING VALID RIGHTS.”

In the determination of what are “existing valid rights,” as used in the excepting clause of the Executive order of November 26, 1934, the circumstances of each particular case must be considered, a precise and general definition not being practicable.

WITHDRAWAL OF PUBLIC LANDS—EXECUTIVE ORDER OF NOVEMBER 26, 1934—SCOPE OF EXCEPTING CLAUSE.

The saving clause of the Executive order of November 26, 1934, which excepted from the operation of the withdrawal “existing valid rights,” held to include (1) valid entries; (2) prior valid applications for entry, selection, or location, substantially complete at date of the withdrawal; (3) claims under the Color of Title Act of December 22, 1928, where bona fide and substantial rights thereunder existed; (4) permits and leases under the Mineral Leasing Act of February 25, 1920.

MARGOLD, *Solicitor*:

You [the Secretary of the Interior] have requested my opinion on six questions which were propounded by the Commissioner of the General Land Office involving the effect of the general withdrawal of lands by Executive order of November 26, 1934, No. 6910.

For ready reference, the said order is quoted in full, viz:

WHEREAS, the act of June 28, 1934 (ch. 865, 48 Stat. 1269), provides, among other things, for the prevention of injury to the public grazing lands by overgrazing and soil deterioration; provides for the orderly use, improvement and development of such lands; and provides for the stabilization of the livestock industry dependent upon the public range; and

WHEREAS, in furtherance of its purposes, said act provides for the creation of grazing districts to include an aggregate area of not more than eighty million acres of vacant, unreserved and unappropriated lands from any part of the public domain of the United States; provides for the exchange of State owned and privately owned lands for unreserved, surveyed public lands of the United States; provides for the sale of isolated or disconnected tracts of the public domain; and provides for the leasing for grazing purposes of isolated or disconnected tracts of vacant, unreserved and unappropriated lands of the public domain; and

WHEREAS, said act provides that the President of the United States may order that unappropriated public lands be placed under national forest administration if, in his opinion, the land be best adapted thereto; and

WHEREAS, said act provides for the use of public land for the conservation or propagation of wild life; and

WHEREAS, I find and declare that it is necessary to classify all of the vacant, unreserved and unappropriated lands of the public domain within certain States for the purpose of effective administration of the provisions of said act;

Now, THEREFORE, by virtue of and pursuant to the authority vested in me by the act of June 25, 1910 (ch. 421, 36 Stat. 847), as amended by the act of August 24, 1912 (ch. 369, 37 Stat. 497), and subject to the conditions therein expressed, it is ordered that all of the vacant, unreserved, and unappropriated public land in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, and Wyoming be, and it hereby is, temporarily withdrawn from settlement, location, sale or entry, and reserved for classification, and pending determination of the most useful purpose to which such land may be put in consideration of the provisions of said act of June 28, 1934, and for conservation and development of natural resources.

The withdrawal hereby effected is subject to existing valid rights.

This order shall continue in full force and effect unless and until revoked by the President or by act of Congress.

The questions are as follows:

1. Does the Executive order apply to lands included in outstanding entries or other appropriations under the public land laws or withdrawals or reservations existing at the date the order was signed but which thereafter might, through the termination of such appropriations, withdrawals, and reservations, otherwise become public lands of the United States?
2. Can lands not now withdrawn pursuant to public notices that have already issued of hearings looking to the establishment of grazing districts in accordance with the provisions of Section 1 of the Taylor Grazing Act be included in a grazing district or an addition thereto notwithstanding the said Executive withdrawal?
3. Can isolated and disconnected tracts of public lands not suitable for inclusion in grazing districts be leased for grazing purposes pursuant to section 15 of the Taylor Grazing Act notwithstanding the said Executive withdrawal?
4. Can public lands be exchanged for private lands or State-owned lands under authority of section 8 of the Taylor Grazing Act notwithstanding the said Executive withdrawal?
5. Can isolated and disconnected tracts of public lands not exceeding 760 acres be sold at public auction under authority of section 14 of said Taylor Grazing Act notwithstanding the said Executive withdrawal?
6. What constitutes an "existing valid right", referred to in that portion of the Executive order reading "the withdrawal hereby effected is subject to existing valid rights"?

The questions will be answered in the order stated.

I

In my opinion the Executive order applies to lands which, at the date of its issuance, were covered by outstanding entries or other appropriations under the public-land laws or by withdrawals or reservations, and takes effect as to such lands whenever they become a part of the public lands of the United States by reason of the

termination of the outstanding appropriation, withdrawal, or reservation.

Unquestionably, the President, acting under the authority granted him in the act of June 25, 1910 (36 Stat. 847), as amended, could withdraw land which is already appropriated, reserved, or withdrawn. Such a withdrawal, however, could take effect as to land already appropriated, reserved, or withdrawn, only upon the valid extinguishment of the prior claim or withdrawal. Compare 5 L. D. 49; 10 L. D. 144; 15 L. D. 2; 32 L. D. 395; 50 L. D. 262. In such a case the Executive withdrawal acts as a claim to the land secondary to that which already exists. As such, it lies dormant until the extinguishment of the prior claim, at which time it can and does actively attach to the land.

It is, of course, not necessary for the President to exercise his powers to the fullest extent; and, in a given case he may desire to exclude from a withdrawal all lands theretofore appropriated, reserved, or withdrawn. A determination of the intention of the President is dependent upon the terms of the order itself; and where an intention not to include such land is expressed, the withdrawal would not attach to the theretofore withdrawn lands or other lands excluded from the scope of the order. Compare 29 L. D. 533; 30 L. D. 515.

The Executive order here in question purports to withdraw "all of the vacant, unreserved, and unappropriated public land", in certain enumerated States. This withdrawal clause is not wholly free from ambiguity. It might indicate an intention to have the order cover only such lands as were vacant, unreserved, and unappropriated at the moment the order was signed. On the other hand, it might be held that the order was intended to attach actively to all vacant, unreserved, and unappropriated lands, and hence to cover all lands which might become vacant, unreserved, and unappropriated during the life of the order.

I believe that the withdrawal clause, contained in the Executive order of November 26, 1934, properly should be construed in the latter sense. This conclusion is fortified by the express provision in the order that "the withdrawal hereby effected is subject to existing valid rights." There would be no necessity for such a provision unless the withdrawal embraced appropriated lands. If it did not, there could be no "existing valid rights" requiring protection.

Consequently, considering the Executive order as a whole, I hold that while it operates to save valid appropriations, reservations, or withdrawals during the period of their existence, it actually attaches to those lands as a secondary claim and becomes effective upon the termination of the prior claim.

Why then the Exec Order No. 7045 of 5-20-35?
 43 CFR 1949 ed, 207, 14
 60 F. D. 198

II

That Executive order of November 26, 1934, withdrew the lands therein described "from settlement, location, sale, or entry" and reserved them "for classification, and pending determination of the most useful purpose to which such lands may be put in consideration of the provisions of the said act of June 28, 1934, and for conservation and development of natural resources."

The question is raised whether a grazing district can be established and superimposed on land withdrawn under that order. In my opinion it can. There is nothing in the terms of the order which directly or by implication prohibits the establishment of grazing districts. The withdrawal is from "settlement, location, sale, or entry"; the establishment of a grazing district is not one of those prohibited things. On the other hand, section 1 of the Taylor Grazing Act (48 Stat. 1269) specifically permits, with certain exceptions not pertinent here, inclusion of withdrawn or reserved lands in grazing districts if there be obtained the approval of the head of the Department having jurisdiction of those lands. In these circumstances there can be no doubt that a grazing district may be established on lands withdrawn by the order of November 26, 1934.

No difficulty will be experienced in obtaining the necessary approval for the inclusion of those lands within a grazing district, inasmuch as the Department of the Interior is in this instance the agency having jurisdiction over the lands withdrawn.

III

Question three is whether isolated and disconnected tracts of public lands not suitable for inclusion in grazing districts may be leased for grazing purposes pursuant to section 15 of the Taylor Grazing Act, notwithstanding the said Executive order. My answer is in the negative. That authority extends only to "vacant, unappropriated, and *unreserved* lands." Having been reserved by the said Executive order, they may not be leased for that purpose so long as the order remains in force. The remedy is to have the order revoked as to particular tracts where such leasing is desired, or, which would perhaps be more expedient, have the order so amended as to permit such leases to be made for lands otherwise withdrawn by the order.

IV

Question four relates to exchanges under section 8 of the Taylor Grazing Act involving lands withdrawn by the said Executive order.

I am of the opinion that such exchanges may not be allowed so long as the lands remain thus withdrawn. An appropriation of this kind may well be regarded as within the category of a location or entry, and thus prohibited by the terms of the order of withdrawal. See 48 L. D. 380. The situation may be satisfactorily met in the manner suggested in the answer to question three.

V

Clearly, question five is to be answered in the negative. "Sales" are expressly prohibited by the order.

VI

It is hardly practicable to give a precise and general definition of the meaning of "existing valid rights", as used in the saving clause of the said Executive order. The circumstances of each particular case will have to be considered in applying that provision. It is not a new expression, and it has been construed and applied in formal adjudications of the Department. It was contained in Executive order of December 8, 1924, which withdrew all islands off the coast or in the coastal waters of the State of Florida, and also in Executive order of July 3, 1925, withdrawing the mainland within three miles of the coast in certain States. In the case of *Williams v. Brenning* (51 L. D. 225), it was said that these withdrawals were designed to prevent the initiation of new claims and not the destruction of rights theretofore fairly earned. And it was held therein that where a party had prosecuted a contest against a homestead entry and had done all that the law required to earn a preferred right of entry, such right was saved by the terms of the withdrawal orders, even though the contested entry had not been actually canceled and the preferred right, therefore, had not been awarded prior to the date of withdrawal. It was pointed out that the said withdrawals were not absolute and unconditional, but saved valid existing rights, and were to be distinguished from instances where the withdrawal does not make such exception.

Of course, all valid entries are protected, and I believe also that all prior valid applications for entry, selection, or location, which were substantially complete at the date of the withdrawal should be considered as constituting valid existing rights within the meaning of the saving clause of the withdrawal order. Claims under the color of title act of December 22, 1928 (45 Stat. 1069), should likewise be regarded as valid existing rights when bona fide and substantial rights thereunder existed at the date of the withdrawal. I believe this protective provision should be generously applied. The public interest in particular tracts within the confines of the broad expanse

thus withdrawn is too inconsequential to justify the striking down of individual rights through technical construction or harsh application of the protective provision of the order.

In order that this opinion may be more comprehensive, it is deemed pertinent to add, although the precise question was not submitted, that permits and leases may be granted under the Mineral Leasing Act of February 25, 1920 (41 Stat. 437), for the withdrawn lands, because that act is operative within reserved areas, with certain specified exceptions, and for the further reason that the Taylor Grazing Act in section 6 thereof expressly disclaims the purpose of interfering with such use.

Approved:

HAROLD L. ICKES,
Secretary of the Interior.

EXECUTIVE WITHDRAWAL ORDER OF NOVEMBER 26, 1934, AS AFFECTING MINERAL PERMITS AND LEASES AND RIGHTS OF WAY—"VACANT, UNRESERVED, AND UNAPPROPRIATED PUBLIC LAND" CONSTRUED

Opinion, February 20, 1935

EXECUTIVE WITHDRAWAL OF NOVEMBER 26, 1934—PERMITS AND LEASES UNDER MINERAL LEASING ACT.

The Executive withdrawal order of November 26, 1934, does not prevent the granting of permits and leases under the Mineral Leasing Act of February 25, 1920, since that act, with certain specified exceptions, is operative within reserved areas, and for the further reason that the Taylor Grazing Act expressly disclaims the purpose of interfering with such use. Nor does the Executive order affect rights of way or other rights granted within reserved areas, provided the use for which the right is granted shall not be inconsistent with the purpose of the reservation.

EXECUTIVE WITHDRAWAL OF NOVEMBER 26, 1934—MINERAL LANDS—SURFACE RIGHTS—EXCEPTIONS.

Lands the surface of which is open to entry under the act of June 22, 1910, or the act of July 17, 1914, the mineral deposits defined therein being reserved to the United States, unless otherwise reserved, are to be construed as reserved only to the extent of the defined minerals and unreserved insofar as the surface is concerned. Lands having this status at the date of the Executive order of November 26, 1934, were reserved by that order, and are not now open to entry, except where valid rights existed at the date of the order, which rights must be protected.

EXECUTIVE WITHDRAWAL OF NOVEMBER 26, 1934—POWER SITE RESERVATIONS—WHEN WITHDRAWAL ATTACHES.

The purpose of the power site reservations as such was not abrogated or in any way interfered with by the Executive withdrawal of November 26, 1934, and so long as lands remain in unconditional withdrawals for power

sites under the Federal Water Power Act they are not subject to entry. In the event a restoration under section 24 of the act was made prior to the date of the Executive withdrawal, and the restored land not entered in the meantime, the Executive withdrawal, with its qualifications, attached.

EXECUTIVE WITHDRAWAL OF NOVEMBER 26, 1934—LANDS RESTORED FROM POWER SITE WITHDRAWAL—UNCONDITIONAL AND QUALIFIED RESTORATIONS.

Power site lands restored unconditionally to entry, etc., or in a manner other than that provided by section 24 of the Federal Water Power Act, prior to the Executive withdrawal of November 26, 1934, would be subject to

that withdrawal.
See bottom of 10. 213
MARGOLD, Solicitor.

My opinion has been requested on certain questions submitted by the Director of the Geological Survey in his letter of December 11, 1934, reading as follows:

Reference is made to Executive order of November 26, 1934, withdrawing "all of the vacant, unreserved, and unappropriated public land" in certain States for public purposes stated in the order. Two questions of administration under this order have arisen on which a ruling is desired:

1. Is the withdrawal to be construed as prohibiting the allowance of applications for mineral permit or lease under the leasing law or for rights of way under a number of laws or, in general, for any rights under an act which specifically authorizes the granting of rights on reserved lands?

2. Is the language "vacant, unreserved, and unappropriated public land" to be construed with the meaning of all public land insofar as vacant, unreserved, and unappropriated or is the withdrawal order to be construed as affecting only public lands that are wholly free from any sort of reservation and appropriation and are, therefore, completely vacant?

This second question relates to that great body of lands that are reserved or appropriated for certain purposes but are vacant, unreserved, and unappropriated for certain other purposes. For example, approximately 10 million acres are appropriated by permit or lease for oil and gas and about 800,000 acres are appropriated by permit, license, or lease for coal under the mineral leasing law, but most of these areas have remained open for entry, at least until November 26, for many other purposes.

About 8 million acres are included in power-site reserves, a considerable portion of which is, or may be, subject to entry under the provisions of section 24 of the Federal Water Power Act. More than 27 million acres are withdrawn for classification as to coal, while oil, oil shale, phosphate, and potash withdrawals aggregate more than 22 million acres. Such lands are not wholly unreserved but, if unaffected by the withdrawal of November 26, would remain open for surface entry under the provisions of the act of June 22, 1910 (36 Stat. 583), or the act of July 17, 1914 (38 Stat. 509).

1. In my opinion approved February 8, 1935, it was held that the said withdrawal will not prevent the granting of permits and leases under the Mineral Leasing Act of February 25, 1920 (41 Stat. 417), because that act is operative within reserved areas, with certain specified exceptions, and for the further reason that the Taylor Grazing Act, in section 6 thereof, expressly disclaims the purpose of inter-

fering with such use. This ruling is equally applicable with respect to such rights of way as may be granted within reserved areas. It should be observed, however, that the authority to grant rights of way, or other rights, within reserved areas, obtains only on condition that the use for which the right is granted shall not be inconsistent with the purpose of the reservation.

2. Question 2 relates, mainly, to those great bodies of lands the surface of which was open to entry under the act of June 22, 1910 (36 Stat. 583), or the act of July 17, 1914 (38 Stat. 509), the mineral deposits defined therein being reserved to the United States. I am clearly of the opinion that such lands, where not otherwise reserved, are to be considered as reserved only as regards the defined minerals, and are unreserved insofar as the surface is concerned, being open to entry in the manner provided by the statutes above mentioned and certain other amendatory acts. Lands having that status at the date of the Executive order of November 26, 1934, were reserved by that order, and are not now open to entry, except for the protection of valid rights existing at the date of the order.

It is more difficult to determine the effect of the said Executive order with respect to lands included in power site reserves. It is clear, however, that the purpose of the power site reservations, as such, was not abrogated or in any way interfered with by the withdrawal of November 26, 1934, and so long as lands remain in unconditional withdrawals for power sites under the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), they are not subject to entry. It is provided, however, by section 24 of that act that such lands may be restored to entry under the public land laws in case the Federal Power Commission shall determine that the value of any such lands for power purposes will not be injured or destroyed thereby, conditioned upon a reservation to the United States, or its permittees or licensees, of the right to enter upon, occupy, and use any part or all of said lands necessary for the purposes of the Federal Water Power Act. Where such a restoration had been made prior to the date of the Executive order of November 26, 1934, and the land had not been entered, it is my opinion that the said withdrawal attached so as to prevent entry thereafter, except for the protection of a valid right existing at the date of the order. As regards power site lands which had not been restored in the modified form, or unconditionally, prior to November 26, 1934, the withdrawal order of that date would attach and place the lands subject to that withdrawal. In this connection see my said opinion approved under date of February 8, 1935.

Approved:

T. A. WALTERS,

First Assistant Secretary.

STANDARD PIPE LINE COMPANY

Decided February 21, 1935

RIGHTS OF WAY OVER PUBLIC LANDS—PIPE LINE—SEC. 28, ACT OF FEBRUARY 25, 1920—APPLICATION—STIPULATION—WORDS AND PHRASES.

A stipulation required of applicants for rights of way for pipe lines over public lands, embodied in regulations promulgated under authority of section 28 of the Act of February 25, 1920, included the following: "and further expressly consents and agrees * * * that the use of the pipe line for the transportation of oil or gas shall be limited to oil or gas produced in conformity with State and/or Federal laws, * * * and further expressly consents and agrees to purchase and/or transport oil or gas available on Government lands," etc. *Held:* If the applicant is merely a carrier, and not a purchaser as well, the stipulations apply to it as a carrier only, and if it carries oil but not gas the applicant is affected only as a carrier of oil, the language of each term of the stipulation being in the disjunctive, and not intended to have the effect of changing the business of a pipe line right-of-way grantee.

WALTERS, *First Assistant Secretary:*

By decision of October 3, 1934, the Commissioner of the General Land Office required the Standard Pipe Line Company to execute and file stipulations, as specified by the Department in its decision of May 16, 1934 (54 I. D. 465), in the case of Montana-Dakota Utilities Company, Pierre 025995, as a prerequisite to approval of its right-of-way application for a pipe line, under section 28 of the Act of February 25, 1920 (41 Stat. 437). The penalty for failure to comply was rejection of the application.

The applicant company, by its attorneys, has appealed, alleging that the Commissioner erred in requiring the company to agree to purchase gas and/or oil, because it is a carrier engaged in transportation of oil and is not a purchaser of either oil or gas; erred in requiring the company to agree "to purchase and/or transport oil or gas", because it is a carrier of oil only and cannot therefore agree to carry gas; and erred in applying said decision of May 16, 1934, because the Montana-Dakota Utilities Company was engaged in the purchase, transportation, and resale of gas and dominated the available markets, whereas the Standard Pipe Line Company is merely a carrier of oil and is only one of several pipe line companies having lines which reach and serve the fields involved.

The pertinent part of the stipulations is as follows:

* * * and further expressly consents and agrees that its pipe line shall be constructed, operated, and maintained as a common carrier and that the use of the pipe line for the transportation of oil or gas shall be limited to oil or gas produced in conformity with State and/or Federal laws, including laws prohibiting waste and any applicable code of fair competition adopted under the National Industrial Recovery Act; and further expressly consents and agrees to purchase and/or transport oil or gas available on Government lands in the vicinity of its pipe line or gathering branches without discrimi-

nation as between Government lands and lands of others and in such ratable proportions as may be satisfactory to the Secretary of the Interior. [Emphasis added.]

It will be noted that the disjunctive is always used and not the conjunctive alone—"oil or gas", "purchase and/or transport oil or gas." If the appellant company is merely a *carrier*, and not a *purchaser* as well, the stipulations apply to it only as a carrier; and if it carries *oil* but not *gas*, the stipulations are so stated in the disjunctive that the appellant company is only affected as a carrier of oil. The stipulations are not intended, and will not be construed, to have the effect of changing the business of a pipe line right of way grantee. There is nothing to indicate that the appellant company's business will be injuriously affected by the required stipulations.

In the case of *Bobrow v. U. S. Casualty Co.* (246 N. Y. S. 363), the court said:

The intention is that, when the expression "and/or" is used in a contract, the one word or the other may be taken accordingly as the one or the other will best effect the purpose of the parties as gathered from the contract taken as a whole. In other words, such an expression in a contract amounts in effect to a direction to those charged with construing the contract to give it such interpretation as will best accord with the equity of the situation, and for that purpose to use either "and" or "or" and be held down to neither.

The decision appealed from is

Affirmed.

HARLAN D. HEIST

Decided February 21, 1935

OFFICER OF THE UNITED STATES.

One not appointed to a position by the President, a court of law, or the head of a Federal department, and whose employment does not embrace the ideas of tenure and duration, is not an officer of the United States.

ATTORNEYS, AGENTS, ETC.—PRACTICE BEFORE FEDERAL DEPARTMENTS—HOME OWNERS' LOAN CORPORATION—ACT OF MARCH 4, 1909.

One who acts as local attorney for the Home Owners' Loan Corporation, created by section 4 (a) of the Act of June 13, 1933, not being "the head of a department or other officer or clerk in the employ of the United States," within the meaning of the Act of March 4, 1909 (35 Stat. 1109), is not barred, by reason of acting as such attorney, from admission to practice before a Federal department.

ATTORNEYS, AGENTS, ETC.—HOME OWNERS' LOAN CORPORATION—SEC. 4, ACT OF JUNE 13, 1933—CLAIMS AGAINST THE UNITED STATES—DEPARTMENT REGULATIONS OF SEPTEMBER 27, 1917.

The position of local attorney for the Home Owners' Loan Corporation is a "place of trust or profit" under the Government of the United States, the

corporation having been created specifically as "an instrumentality of the United States" by section 4 of the Act of June 13, 1933. Accordingly, one occupying this position, although not barred from admission to practice before the Department of the Interior, is inhibited by section 8 of Department regulations of September 27, 1917, from acting as agent or attorney for the claimant in any case *against the United States*.

ATTORNEYS, AGENTS, ETC.—PRACTICE BEFORE THE DEPARTMENT OF THE INTERIOR—CLAIMS NOT INHIBITED.

Many cases before the Department of the Interior are not against the United States, as, for instance, an appearance for the purpose of amending a homestead entry, an application to purchase land under the Timber and Stone Act, or the contest of a homestead entry by a private individual.

ATTORNEYS, AGENTS, ETC.—FORMER INSTRUCTIONS AND DECISION OVERRULED IN PART.

Instructions of April 4, 1931 (53 I. D. 347), and case of *William C. Holland* (M. 27696, decided April 26, 1934), overruled in so far as in conflict.

WALTERS, *First Assistant Secretary*:

Harlan D. Heist has applied for admission to practice as an attorney before the Department and its bureaus. His application is governed by the rules and regulations prescribed by the Secretary (46 L. D. 206) pursuant to section 5 of the Act of July 4, 1884 (23 Stat. 101). It is affected, moreover, by Federal criminal statutes, for Heist should not be admitted to practice if his appearance before the Department would necessarily violate such statutes. These regulations and laws are couched in narrow and technical language and should be interpreted accordingly.

It is not denied that Heist has furnished all the documents and information required, and that his application is entirely satisfactory except for one matter. The only controversy arises from the fact that he is local attorney (in Lincoln County, Idaho) for the Home Owners' Loan Corporation.

I

The Act of March 4, 1909 (Ch. 321, Sec. 113, 35 Stat. 1109), provides:

Whoever, being * * * the head of a department, or other *officer or clerk in the employ of the United States*, shall, directly or indirectly, receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever, shall be fined not more than ten thousand dollars and imprisoned not more than two years; and shall moreover, thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States. [Emphasis supplied.]

Although the United States is not a party to all proceedings before the Department, it is certainly interested in them, directly or indirectly. Thus the case of *United States v. Long* (184 Fed. 184, 186) held it a violation of Section 1782 of the Revised Statutes, from which the statute quoted is derived, for a land office clerk to agree to accept compensation for furnishing information concerning the status of land to one who desired to purchase it under the Timber and Stone Act. The court said:

An application for the purchase of land from the government under the timber and stone act is, in effect, the inauguration of a proceeding through which to acquire the land from the government, and in which the government is an interested party. It is an interested party in two aspects: First, in its governmental aspect, to see that the laws are enforced and obeyed; and second, in its proprietary right, as the owner of the land the title to which is sought to be acquired from it. But, were the application to purchase land from the government not the inauguration of a proceeding, it is a matter or thing at least, in which the government is an interested party. * * *

United States v. Booth (148 Fed. 112) is to the same effect. See also *Burton v. United States* (202 U. S. 334, 370).

If, therefore, Heist were "the head of a department, or other officer or clerk in the employ of the United States" he could receive no compensation for his services in practicing before the Department, and he would derive no practical benefit from his enrollment as an attorney. It would be proper, therefore, to refuse to admit him. *Loren Ray Pierce* (49 L. D. 500). He is not, however, within the scope of the statute. It is obvious that he is neither a "head of a department" nor a "clerk", and under the decision of *United States v. Germaine* (99 U. S. 508), it is impossible to hold that he is an "officer." That case held that a surgeon appointed by the Commissioner of Pensions was not an "officer of the United States", because he had not been appointed by any of the methods which the Constitution authorizes for the appointment of "officers." The opinion stated (p. 509):

The counsel for defendant insists that art. 2, sect. 2, of the Constitution, prescribing how officers of the United States shall be appointed, is decisive of the case before us. It declares that "the President shall nominate, and by and with the advice and consent of the Senate shall appoint, ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for and which shall be established by law. But the Congress may, by law, vest the appointment of such inferior officers as they may think proper, in the President alone, in the courts of law, or in the heads of departments."

The argument is that provision is here made for the appointment of all officers of the United States, and that defendant, not being appointed in either of the modes here mentioned, is not an officer, though he may be an agent or employe working for the government and paid by it, as nine-tenths of the persons rendering service to the government undoubtedly are, without thereby becoming its officers.

That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt. This Constitution is the supreme law of the land, and no act of Congress is of any validity which does not rest on authority conferred by that instrument. It is, therefore, not to be supposed that Congress, when enacting a criminal law for the punishment of officers of the United States, intended to punish any one not appointed in one of those modes. If the punishment were designed for others than officers as defined by the Constitution, words to that effect would be used, as servant, agent, person in the service or employment of the government; and this has been done where it was so intended, as in the sixteenth section of the act of 1846, concerning embezzlement, by which any officer or agent of the United States, and all persons participating in the act, are made liable. 9 Stat. 59.

* * * * *

The association of the words "heads of departments" with the President and the courts of law strongly implies that something different is meant from the inferior commissioners and bureau officers, who are themselves the mere aids and subordinates of the heads of the departments.

* * * * *

United States v. Hartwell (6 Wall. 385) is not, as supposed, in conflict with these views. It is clearly stated and relied on in the opinion that Hartwell's appointment was approved by the Assistant Secretary of the Treasury as acting head of that department, and he was, therefore, an officer of the United States.

If we look to the nature of defendant's employment, we think it equally clear that he is not an officer. In that case, the court said, the term embraces the ideas of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional or temporary. In the case before us, the duties are *not* continuing and permanent, and they *are* occasional and intermittent. The surgeon is only to act when called on by the Commissioner of Pensions in some special case, as when some pensioner or claimant of a pension presents himself for examination. He may make fifty of these examinations in a year, or none. He is required to keep no place of business for the public use.

* * * * *

If Congress had passed a law requiring the commissioner to appoint a man to furnish each agency with fuel at a price per ton fixed by law high enough to secure the delivery of the coal, he would have as much claim to be an officer of the United States as the surgeons appointed under this statute.

We answer that the defendant is not an officer of the United States, and that judgment on the demurrer must be entered in his favor. * * *

Heist was not appointed by the President, a court of law, or the head of a department, nor does his employment embrace the ideas of tenure and duration which the Supreme Court says are implied in the term "officer." He was appointed under Section 4 (j) of the Act of June 13, 1933 (48 Stat. 129), by the Home Owners' Loan Corporation, which was created by Section 4 (a) of the same act. The Home Owners' Loan Corporation is not a department. 25 Ops. Atty. Gen. 6; 26 Ops. Atty. Gen. 209; 22 Ops. Atty. Gen. 62. It is not even under the jurisdiction of a department. Act of July 22, 1932, Section 17 (47 Stat. 736). Heist's duties as local attorney, moreover,

are of an intermittent nature and comparable to those of the surgeon in the *Germaine* case.

The Attorney General, moreover, has interpreted the *Germaine* decision as applying to the very statute from which the act in question is derived, in the case of an assistant attorney for the District of Columbia practicing before the Department of the Interior. 18 Ops. Atty. Gen. 161. He found it impossible to distinguish between the phrases "officer of the United States" and "officer * * * in the employ of the United States." It is my opinion, therefore, that the statute under consideration does not apply to Heist, and that it does not bar him from admission to practice.

II

The Act of March 4, 1909, Section 109 (35 Stat. 1107), provides:

Whoever, being an officer of the United States, or a person holding any place of trust or profit, or discharging any official function under, or in connection with, any executive department of the Government of the United States, or under the Senate or House of Representatives of the United States, shall act as an agent or attorney for prosecuting any claim against the United States, or, in any manner, or by any means, otherwise than in discharge of his proper official duties, shall aid or assist in the prosecution or support of any such claim, or receive any gratuity, or any share of or interest in any claim from any claimant against the United States, with intent to aid or assist, or in consideration of having aided or assisted, in the prosecution of such claim, shall be fined not more than five thousand dollars, or imprisoned not more than one year, or both. * * *

The prohibition contained in this statute, also, does not apply to Heist, for under the reasoning developed above he is neither "an officer of the United States" nor connected with any executive department.

III

Section 8 of the rules and regulations (46 L. D. 206) 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*; * * * [Emphasis supplied.]

The regulations quoted do refer to Heist, for he holds a "place of trust or profit under the Government of the United States." Although the Home Owners' Loan Corporation is not an "executive department", yet it was created specifically as "an instrumentality of the United States." Section 4 of the Act of June 13, 1933, *supra*. His employment, moreover, involves both trust and profit. The exact question was correctly decided by the Department in the case of *William C. Holland*, M. 27696, April 26, 1934. That decision

is supported by the opinion of the Attorney General relating to the office of counsel for the Spanish Claims Commission (23 Ops. Atty. Gen. 533), and also by the departmental instructions of April 4, 1931, relating to the position of deputy surveyor (53 I. D. 347).

Although the regulations apply to Heist, they do not disqualify him from practicing before the Department. They merely prohibit him from appearing as attorney "for the claimant in *any case against the United States.*" This phrase is to be contrasted with the broader phrase discussed above:

* * * any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested * * *.

Other portions of the rules and regulations relate generally to admission to practice, but Section 8 applies only to appearance in certain cases. It is as if an "officer of the United States" were applying for admission to practice before any State or Federal court. By the Act of March 4, 1909, Section 109, he would be prohibited from prosecuting any claim against the United States, yet it could not be argued that he would be barred from admission.

Many of the cases before the Department are not against the United States. Thus in *W. D. Harlan* (17 L. D. 216) it was held that Section 190 of the Revised Statutes, which prohibits certain governmental employees from appearing as attorneys "for prosecuting any claim against the United States", does not apply to an appearance for the purpose of amending a homestead entry. The opinion stated (p. 217):

The proper solution of the question presented in the appeal of Harlan depends upon the meaning of the words "prosecuting any claim against the United States."

The litigation between citizens seeking to acquire title to public lands, under the homestead and other laws, is in no sense a claim against the United States, nor is an *ex-parte* proceeding, such as that begun by Fox, for whom Harlan proposed to appear as attorney, a "claim *against* the United States." The citizen in his relation to the government, while availing himself of the benefit of the land laws, is simply exercising a right conferred upon him by the voluntary act of the government. In so far as the great mass of land cases are concerned, it is an indifferent matter to the government who prevails, except in that broad and comprehensive sense in which it is interested in the maintenance of law and order.

Mr. Fox is not "prosecuting a claim against the United States", he is simply endeavoring to avail himself of the benevolence of the government. This view appears to be conclusive of Harlan's right to appear as his counsel. If, therefore, the case of Fox is not a proceeding *against* the United States, Harlan is not disqualified to appear as his attorney, no matter what meaning may be given to the word claim as used in the statute.

See also *Yeater v. Prince* (33 L. D. 137), which held that a contest by a private individual against another person's homestead entry was not within the scope of Section 190 of the Revised Statutes.

Similarly the case of *United States v. Byron* (223 Fed. 798) held that an application to purchase lands under the Timber and Stone Act (Act of June 3, 1878, Ch. 151, 20 Stat. 89) was not a claim against the United States. The court said (p. 800):

A claim, within the meaning of this statute, is the demand of something from the United States on the ground of right, as the assertion of a right to the title, possession, or ownership of property, or the affirming of a debt, obligation, or the like, and to constitute the crime charged there must be such an account or claim existing or pending, and the false writing must be presented in support of or in relation thereto. Such seems to be the adjudged cases in which the statute has been enforced as far as I am able to ascertain. Thus in *United States v. Staats*, 8 How. 40, 12 L. Ed. 979, and *United States v. Bickford*, 4 Blatchf. 339, Fed. Cas. No. 14591, the false writings were submitted in support of applications for a pension and for a bounty land warrant due as a matter of right under a law of the United States to certain qualified persons for military service. In *United States v. Davis*, 231 U. S. 183, 34 Sup. Ct. 112, 58 L. Ed. 177, the false writing was presented in support of an application for a soldier's additional homestead under a statute of the United States. In each of these cases a right or claim against the United States was vested in certain persons by virtue of a law thereof, and the false writings were submitted in support of such claims.

Jones v. United States (35 Fed. 561), on the other hand, held that a suit to compel the issuance of a patent, after the requirements of the Timber and Stone Act had been satisfied and the purchase price had been paid, was a "suit against the Government of the United States."

Heist, therefore, should be admitted to practice, but as long as he holds a place of trust or profit under the Government he should not appear "for the claimant in any case against the United States." It is not the purpose of this decision to define accurately the meaning of that phrase as employed in Section 8 of the rules and regulations. Each case will have to be decided according to its facts. It is clear, however, that the term includes more than just money claims, for it is contrasted in the same section with the phrase "money demand against the United States." The opinion, moreover, in *United States v. Byron*, quoted *supra*, indicates the general standard which should be adopted. And the decisions of *United States v. Staats* (8 How. 40), *United States v. Bickford* (4 Blatchf. 339), *United States v. Davis* (231 U. S. 183), and *Jones v. United States*, *supra*, furnish examples of cases which fall within the prohibition.

The decision of *William C. Holland*, M. 27696, decided April 26, 1934, in so far as it is contrary to this decision, is hereby overruled. Notice should be sent to Holland, therefore, and he should be allowed to renew his application.

Similarly the reasoning contained in the instructions of April 4, 1931, in so far as it is inconsistent with that expressed herein, is

repudiated. The factual situation dealt with in those instructions, however, is distinguishable, and the conclusion is supported by Section 452 of the Revised Statutes.

The application is allowed.

MINING IN PAPAGO INDIAN RESERVATION

INSTRUCTIONS

[Circular No. 1347]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 27, 1935.

REGISTER, PHOENIX, ARIZONA:

Section 3 of the Act of June 18, 1934 (48 Stat. 984), contains the following proviso relating to the Papago Indian Reservation:

Provided further, That the order of the Department of the Interior, signed, dated, and approved by Honorable Ray Lyman Wilbur, as Secretary of the Interior, on October 28, 1932, temporarily withdrawing the lands of the Papago Indian Reservation in Arizona from all forms of mineral entry or claim under the public land mining laws, is hereby revoked and rescinded, and the lands of said Papago Indian Reservation are hereby restored to exploration and location, under the existing mining laws of the United States, in accordance with the express terms and provisions declared and set forth in the Executive orders establishing said Papago Indian Reservation: *Provided further*, That damages shall be paid to the Papago Tribe for loss of any improvements on any land located for mining in such a sum as may be determined by the Secretary of the Interior but not to exceed the cost of said improvements: *Provided further*, That a yearly rental not to exceed five cents per acre shall be paid to the Papago Tribe for loss of the use or occupancy of any land withdrawn by the requirements of mining operations, and payments derived from damages or rentals shall be deposited in the Treasury of the United States to the credit of the Papago Tribe: *Provided further*, That in the event any person or persons, partnership, corporation, or association, desires a mineral patent, according to the mining laws of the United States, he or they shall first deposit in the Treasury of the United States to the credit of the Papago Tribe the sum of \$1.00 per acre in lieu of annual rental, as hereinbefore provided, to compensate for the loss or occupancy of the lands withdrawn by the requirements of mining operations: *Provided further*, That patentee shall also pay into the Treasury of the United States to the credit of the Papago Tribe damages for the loss of improvements not heretofore paid in such a sum as may be determined by the Secretary of the Interior, but not to exceed the cost thereof; the payment of \$1.00 per acre for surface use to be refunded to patentee in the event that patent is not acquired.

Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes; and nothing contained herein, except as expressly provided, shall be construed as authority for the Secretary of the Interior, or any other person, to issue or promulgate a rule or regulation in conflict with

the Executive order of February 1, 1917, creating the Papago Indian Reservation in Arizona or the Act of February 21, 1931 (46 Stat. 1202).

The Act of June 18, 1934, revokes Departmental order of October 28, 1932, which temporarily withdrew from all forms of mineral entry or claim the lands within the Papago Indian Reservation and restores, as of the date of the act, such lands to exploration, location, and purchase under the existing mining laws of the United States.

The procedure in the location of mining claims, performance of annual labor, and the prosecution of patent proceedings therefor shall be the same as provided by the United States mining laws and regulations thereunder (Circular No. 430) with the additional requirements hereinafter prescribed.

In addition to complying with the existing laws and regulations governing the recording of mining locations with the proper local recording officer, the locator of a mining claim within the Papago Indian Reservation shall furnish to the superintendent of the reservation, within 90 days of such location, a copy of the location notice, together with satisfactory evidence that he has deposited in the Treasury of the United States to the credit of the Papago Tribe a sum amounting to 5 cents for each acre and 5 cents for each fractional part of an acre embraced in the location as yearly rental. Failure to make the required annual rental payment in advance each year until an application for patent has been filed for the claim shall be deemed sufficient grounds for invalidating the claim. Satisfactory evidence of the payment of annual rental must be filed with the superintendent of the reservation each year on or prior to the anniversary date of the mining location.

Where a mining claim is located within the reservation, the locator shall pay into the Treasury of the United States to the credit of the Papago Tribe damages for the loss of any improvements on the land in such a sum as may be determined by the Secretary of the Interior, but not to exceed the cost of said improvements. The value of such improvements may be fixed by the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, and payment in accordance with such determination shall be made within one year from date thereof.

At the time of filing with the register an application for mineral patent for lands within the Papago Indian Reservation the applicant shall furnish, in addition to the showing required under the general mining laws, satisfactory evidence that he has deposited with the Treasury of the United States to the credit of the Papago Tribe a sum equal to \$1 for each acre and \$1 for each fractional part of an acre embraced in the application for patent in lieu of annual rental, together with evidence that the annual rentals have been paid each year and that damages for loss of improvements, if any, have been paid.

Upon the filing in the office of the register of an application for patent for land within the reservation, together with the evidence required in the preceding paragraph, the register will, if no reason appears for rejecting the application, proceed to publish a notice as provided for by the mining regulations. The register will forward copies of the notice of application for patent to the superintendent of the reservation and to the Special Agent in Charge at Albuquerque, New Mexico, endorsing thereon "within Papago Indian Reservation", requesting both to report in accordance with the instructions of December 5, 1916 (45 L. D. 539).

The act provides that in case patent is not acquired the sum deposited in lieu of annual rentals shall be refunded. Where patent is not acquired, such sums due as annual rentals but not paid during the period of patent application shall be deducted from the sum deposited in lieu of annual rental. Applications for refund shall be filed in the office of the register and should follow the general procedure in applications for repayment (Circular No. 513).

Mining locations in the Papago Indian Reservation made subsequent to the date of the act and prior hereto may be validated upon full compliance with the foregoing provisions within 90 days of the approval of these regulations.

The term "locator" wherever used in these regulations shall include and mean his successors, assigns, grantees, heirs, and all others claiming under or through him.

You will give to the regulations the widest publicity possible without expense to the Government.

ANTOINETTE FUNK,
Acting Commissioner.

I concur:

JOHN COLLIER,

Commissioner of Indian Affairs.

Approved:

T. A. WALTERS,

First Assistant Secretary.

**ASSIGNMENT OF DUTIES TO THE GENERAL LAND OFFICE IN
CONNECTION WITH ADMINISTRATION OF THE TAYLOR
GRAZING ACT—DEPARTMENTAL ORDER NO. 884**

DEPARTMENT OF THE INTERIOR,

DIVISION OF GRAZING,

Washington, D. C., March 6, 1935.

THE SECRETARY OF THE INTERIOR:

Pursuant to Departmental Order No. 884, dated January 6, 1935, I request that you approve the performance by the General Land

Office of the following functions in connection with the administration of the Taylor Grazing Law:

(1) Act as office for filing and record for all applications under the Taylor law, such as permits, leases, sales, exchange, or other filings.

(2) List all applications in accordance with regular serial system of the General Land Office and appropriately record same.

(3) Maintain a complete and independent file of grazing permit applications available for reference by the Division of Grazing in each land office, separated by districts.

(4) Detail to the Division of Grazing in Washington, temporarily, as needed, clerical assistance competent to prepare orders creating grazing districts.

(5) Act as the office for collection of all fees and as the fiscal and accounting agency for examination of accounts for disbursement of funds appropriated by the Congress for grazing administration.

(6) Make available in each local land office, office facilities and temporary clerical assistance which may be needed for activities of the Division of Grazing and otherwise cooperate with the Division of Grazing, provided such detail or cooperation will not seriously impair the regular functional activities of such local land office.

(7) Promulgate all regulations issued under the terms of the Taylor Grazing Law.

(8) Proceed with the preparation for public distribution of base maps on a suitable scale for each grazing district that may be established, and also prepare overprints for such maps showing in different colors the public lands within each district, all outstanding reservations, and all filings of record.

(9) Compile a tabulation of all applications for grazing permits by grazing districts, on a form to be provided, and take such action as may be appropriate to obtain completed applications.

F. R. CARPENTER,
Director of Grazing.

I concur:

FRED W. JOHNSON,
Commissioner, General Land Office.

Approved:

HAROLD L. ICKES,
Secretary of the Interior.

**"EXISTING VALID RIGHTS" IN WITHDRAWAL ORDER OF
NOVEMBER 26, 1934, IN AID OF TAYLOR GRAZING ACT,
CONSTRUED**

INSTRUCTIONS

[Circular No. 1348*]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., March 7, 1935.

REGISTERS, UNITED STATES LAND OFFICES:

In response to an inquiry concerning the effect of the Executive order of November 26, 1934, withdrawing public lands in aid of the Taylor Grazing Act, on contests filed prior thereto, the Department, on February 19, 1935, said:

The Executive order states that: "The withdrawal hereby effected is subject to existing valid rights."

In the case of *Williams v. Brening* (51 L. D. 225), it was held, in connection with a similar withdrawal of December 8, 1924, involving lands off the coast of Florida, that the saving clause of the order protected, upon cancellation of the entry as the result of a contest, the preference right of the contestant which had been earned, although not actually awarded, prior to the withdrawal.

The contest was initiated and is being prosecuted as provided by law and in accordance with departmental regulations. The law provides that if a contestant is successful he shall be allowed thirty days from notice of cancellation of the contested entry to enter the land. There is here a right to carry the proceedings, which were begun prior to the withdrawal, to a conclusion, and if the contestant shall be successful he will be entitled to the statutory reward.

Undoubtedly the President could have made an absolute and unconditional withdrawal, but he did not do so. With reference to the expression, "existing valid rights", as used in the saving clause of the Executive order, the Secretary of the Interior has said (Solicitor's Opinion dated February 8, 1935, 55 I. D. 205):

"I believe this protective provision should be generously applied. The public interest in particular tracts within the confines of the broad expanse thus withdrawn is too inconsequential to justify the striking down of individual rights through technical construction or harsh application of the protective provision of the order."

If, after a hearing, or by default, judgment is rendered in favor of the contestant, he will be allowed a preference right to enter the land on cancellation of the present entry.

You will govern yourselves according to the foregoing and if any entry has been canceled since November 26, 1934, as the result of a contest initiated prior to that date, and no other obstacle to exercise of the preference right existed, you will now notify the successful

* See Circular No. 1352, at p. 244.

contestant that he will be allowed thirty days within which to exercise his preference right of entry, notwithstanding notice, if any, which may have heretofore issued advising him that his preference right would be held in abeyance pending revocation or modification of the withdrawal.

FRED W. JOHNSON, *Commissioner*.

DISPOSAL AND LEASING OF LANDS IN ALASKA

INSTRUCTIONS

[Circular No. 1349]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 9, 1935.

PUBLIC LANDS

1. *Areas.*—Most of the land in Alaska is unsurveyed. The total area of the territory is 378,165,760 acres, of which about 30,000,000 acres are included in national forests and other reservations. Approximately 1,991,518 acres have been surveyed under the rectangular system and as special surveys by metes and bounds.

2. *Record status of land.*—Information as to the record status of any particular tract of land may be obtained from the district land office for the district in which the land is situated. The district land offices in Alaska are located at Anchorage, Fairbanks, and Nome. The district land officers are authorized to make and sell plats showing the entered land only in any township at \$1.00 for each plat. The records of the district land offices are open to public inspection when not needed for official purposes.

HOMESTEADS

3. *Land available.*—All unappropriated and unreserved public land in Alaska adaptable to any agricultural use, not mineral or saline in character, not occupied for the purpose of trade or business, and not within the limits of an incorporated city or town, is subject to homestead settlement and, when, surveyed, to homestead entry.

4. *Qualifications required.*—In order to make an original homestead settlement or entry in Alaska, the applicant must be twenty-one years of age or the head of a family, a citizen of the United States, or have declared his intention to become such a citizen and not the owner of more than 160 acres of land in the United States, except that a homestead entry made in the United States outside of Alaska is not a disqualification. A married woman is not qualified

to make homestead entry if she is residing with her husband and he is the head and main support of the family.

5. *Settlement.*—Homestead settlement may be made on either surveyed or unsurveyed public land. A settler on unsurveyed land in Alaska should mark the boundaries of his claim by permanent monuments at each corner. He should also post notice on the ground showing his name, date of settlement, and a description of the claim by reference to natural objects or permanent monuments which will serve to identify it. To secure the land against adverse claim, notice of location must be recorded with the United States Commissioner of the proper recording district within ninety days after date of settlement. Settlement on any part of a surveyed quarter section subject to homestead entry gives the right to enter all of that quarter section. If the lands desired form a part of more than one technical quarter section the settler should place improvements on each smallest legal subdivision.

6. *Entry.*—Where settlement is made on surveyed land, the settler should make entry at the proper district land office within three months after date of settlement. If on unsurveyed land, entry should be made within three months after filing of the plat of survey in the district land office. A blank form on which entry must be made may be obtained by addressing the district land office.

7. *Fees and commissions.*—A homestead applicant must pay a fee of \$5.00 if the area applied for is less than eighty-one acres, or \$10.00 if eighty-one acres or more, and in addition at the time of entry and final proof a commission must be paid of \$1.50 for each forty acre tract entered. The claimant must pay the cost of advertising his proof notice and a testimony fee of fifteen cents for each 100 words reduced to writing in the proof.

8. *Area and shape of the claims.*—Homestead claims in Alaska are restricted to 160 acres except settlements made before July 8, 1916, which may include 320 acres. A settlement claim on unsurveyed land must be made in rectangular form, not more than one mile long, with side lines due north and south, the four corners being marked on the ground by permanent monuments, except where by reason of local or topographical conditions it is not feasible or economical to include in a rectangular form with cardinal boundaries the lands desired, in which case departure may be made from such restriction, but all claims must be compact and approximately rectangular in form and marked upon the ground by permanent monuments at each corner. A settlement claim on surveyed land may include only legal subdivisions which are contiguous.

9. *Residence, cultivation, and habitable house.*—Residence must be established within six months after date of entry, unless an extension of time is allowed and must be continued for three years unless the

entry is commuted. Where for climatic reasons or on account of sickness or other unavoidable cause residence cannot be established within six months after date of entry, additional time, not exceeding six months, may be granted. Application for such extension must be made in affidavit form corroborated by the affidavits of two persons acquainted with the facts.

During each year beginning with the establishment of residence, a settler or entryman may absent himself from the land for not more than two periods aggregating as much as five months. The claimant should notify the register of the land office of the date when he leaves the land and the date when he returns.

A settler or entryman who has established actual residence on the land may be granted a leave of absence therefrom for one year or less in cases where total or partial failure or destruction of crops, sickness, or other unavoidable casualty has prevented the claimant from supporting himself and those dependent on him by the cultivation of the land. Application for such leave must be made on a form which may be obtained from the register.

Where climatic conditions make residence on a settlement claim or entry for seven months in each year a hardship, the term of residence, on application by the claimant, may be reduced to six months in each year over a period of four years or to five months in each year over a period of five years.

During the second year an entryman is required to cultivate not less than one-sixteenth of the area entered, and during the third year and until the submission of proof, not less than one-eighth of the area.

A reduction in the cultivation requirements may be granted on proper application, where cultivation of the required amount is not practicable because of the character of the land or where the entryman meets with misfortune after establishing residence, which renders him reasonably unable to cultivate the required area. No reduction will be made in the required area of cultivation on account of the expense in removing the standing timber from the land.

A homestead settler or entryman must have a habitable house on the land when proof is made.

Proof must be submitted within five years from the date of entry. Credit may be allowed for residence and cultivation before the date of entry, if the land was subject to appropriation by the claimant. In order to make acceptable three-year proof, the claimant must show three years' residence and cultivation on the land and that he has placed a habitable house thereon. No payment for the land is required where such proof is made. An original entry, not in a national forest, may be commuted by showing fourteen months' substantially continuous residence, the cultivation of not

less than one-sixteen of the area, and that a habitable house has been placed on the land. Where commutation proof is submitted the claimant must make payment for the land at the rate of \$1.25 per acre. Periods of residence may be added together in making commutation proof, if before and after an absence under a leave of absence regularly granted or an absence not exceeding five months of which the register was notified.

10. *Homestead entry in national forests.*—Homestead entries may be made in national forests only after lands desired have been listed by the Secretary of Agriculture as agricultural in character and an order has been issued by the Secretary of the Interior opening the land to settlement and entry. Information as to the boundaries of the forests and the methods of applying for listing may be obtained by addressing the Forester, Washington, D. C., or the United States District Forester, Juneau, Alaska. Homestead entries in national forests may be completed after three years' residence and cultivation. Such entries are not subject to commutation.

11. *Credit for military or naval service.*—Any officer, soldier, seaman, or marine who served not less than ninety days in the Army or Navy of the United States during the Civil War, the Spanish-American War, the Philippine Insurrection, the Mexican border operations, or the war with Germany, or any person who rendered thirty days' or more military service in the Indian wars from January 1, 1817, to December 31, 1898, who was honorably discharged, and who makes homestead entry, is entitled to have a period equal to the term of his service in the Army or Navy, not exceeding two years, deducted from the three years' residence and cultivation required under the homestead laws. Soldiers and sailors are entitled to the same homestead and preference rights in Alaska as are accorded such persons in connection with homestead entries in the United States outside of Alaska.

12. *Homestead entry on coal, oil, or gas lands.*—Where homestead entry is made in Alaska for land classified or known to be valuable for coal, oil, or gas or embraced in a coal, oil, or gas prospecting permit, or coal lease, the entryman must consent to a reservation of the mineral deposits to the United States, together with the right to prospect for, mine, and remove the same. An application to make entry of land embraced in an oil or gas lease will be rejected, subject to appeal.

13. *Surveys.*—If the public land surveys have not been extended over the land included in a settlement claim, the settler after complying with the terms of the homestead law, may submit to the register a showing in affidavit form, as to such compliance, corroborated by the affidavits of two witnesses, and if such evidence satisfactorily shows that the settler is in a position to submit three-year proof,

instructions will issue not later than the next surveying season for the survey of the land, without expense to the settler. A claimant who desires to secure earlier action may do so by having a survey made at his own expense. The public survey office in Alaska is situated at Juneau.

OTHER LAWS RELATING TO THE DISPOSAL AND LEASING OF PUBLIC LANDS IN ALASKA

14. *Trade and manufacturing sites.*—Any citizen of the United States twenty-one years of age, or any association of such citizens or any corporation organized under the laws of the United States or of any State or Territory, in possession of and occupying public lands in Alaska in good faith for the purpose of trade, manufacturing, or other productive industry, under certain conditions, may purchase one claim not exceeding 80 acres of nonmineral land at \$2.50 per acre.

15. *Five-acre tracts.*—Any citizen of the United States twenty-one years of age, whose employer is engaged in trade, manufacturing, or other productive industry in Alaska, or who is himself engaged in such business, may purchase one claim, not exceeding five acres, of nonmineral land in the Territory at \$2.50 per acre, but for not less than a minimum of \$10.00. An applicant for such tract is required to pay the cost of the survey.

Any citizen of the United States after occupying land in Alaska as a homestead or headquarters in a habitable house not less than five months each year for three years, may purchase such tract, not exceeding five acres, if nonmineral in character, at \$2.50 per acre, but for not less than a minimum of \$10.00. Such applicant is not required to pay the cost of the survey.

No person will be permitted to purchase more than one five-acre tract, except upon a showing of good faith and necessity satisfactory to the Secretary of the Interior.

16. *Soldiers' additional entries.*—Title may be secured to nonmineral land in Alaska by the location of soldiers' additional rights thereon. These rights are based on homestead entries for less than 160 acres made by certain veterans of the Civil War prior to June 22, 1874. Such veterans were given the right to enter an additional quantity of land which, with that previously entered, would not aggregate more than 160 acres. In some cases the rights, which are assignable, have been obtained by and are held for sale by dealers in land scrip.

17. *Grazing leases.*—Leases for grazing purposes may be issued for terms of not exceeding twenty years, for such areas of unreserved public lands as may be authorized by the Secretary of the Interior.

The grazing fees are fixed with due regard to the economic value of the grazing privilege.

18. *Fur farm leases.*—Leases for fur farming purposes may be issued for periods of not exceeding ten years. In the discretion of the Secretary of the Interior, a lease may cover an entire island provided the area of said island does not exceed 30 square miles. Not more than 640 acres may be included in a lease on the mainland or on an island having an area of more than 30 square miles. Each lessee must pay a minimum annual rental of \$5.00 for a tract of not more than ten acres, of \$25.00, if the tract is over ten acres and does not exceed 640 acres, and of \$50.00, if the tract exceeds 640 acres. A lower minimum rental may be fixed in particular cases upon a satisfactory showing. A maximum annual rental must be paid equal to a royalty of one percent on the gross returns derived from the sale of live animals and pelts, if the amount thereof exceeds the minimum rental mentioned.

19. *Timber on public lands.*—Timber on the vacant and unreserved public land may be sold at a reasonable stumpage value to individuals, associations, or corporations, and dead or down timber, or timber seriously or permanently damaged by forest fires may be sold to the highest bidder under sealed bids. Actual settlers, residents, individual miners, and prospectors for minerals may each cut not exceeding 100,000 feet, board measure, or 200 cords, in any one calendar year for firewood, fencing, buildings, mining, prospecting, and for domestic use, but must notify the clerk in charge of the branch office of the Division of Investigations, at Anchorage, by registered letter, of their intention to procure the timber.

20. *Timber in national forests.*—Inquiries relative to the cutting of timber in national forests in Alaska should be addressed to the Forester, Forest Service, Washington, D. C., or to the United States District Forester, Juneau, Alaska.

21. *Rights of way.*—Rights of way or sites may be granted on public lands in Alaska, under certain conditions, for railroads, station and terminal grounds, tramways, reservoirs, ditches, canals, pipe lines, flumes, telephone and telegraph lines, and plants for the generation of electrical energy by steam and for transmission lines to convey such power.

22. *Electrical projects.*—Applications for lands for electrical projects involving the generation of electrical energy by water power or the conveyance of such power should be filed with the Federal Power Commission, Washington, D. C.

23. *Town sites.*—There are various town sites in Alaska in which undisposed of lots may be purchased at public or private sale. Some sales are made by the register and some by a townsite trustee. Further information may be obtained from the register.

24. *Mineral locations and entries.*—Deposits of minerals other than coal, phosphate, oil, oil shale, gas, sodium, and potash in the public lands and national forests of Alaska are subject to location and may be purchased under the general mining laws of the United States at \$2.50 per acre for placer claims and at \$5.00 per acre for lode claims, by citizens of the United States or those who have declared their intentions to become such citizens. A lode claim is limited in area to a tract not exceeding 1,500 feet in length, by 600 feet in width. A placer location may not exceed twenty acres in area for an individual location, forty acres for an association of two or more persons, sixty acres for an association of three or more persons, and so on up to 160 acres for an association of eight or more persons. The law imposes no limit as to the number of lode and placer locations which may be made by a single individual, association, or corporation.

25. *Coal.*—The Secretary of the Interior is authorized to survey the public lands in Alaska known to be valuable for their deposits of coal and to divide the unreserved coal lands and coal deposits into leasing blocks or tracts of forty acres each, or multiples thereof, in such form as will permit the most economical mining of the coal therein, not exceeding 2,560 acres in any block, and to offer such blocks for lease.

A lease may be issued for a period of not more than fifty years, subject to renewal on such terms and conditions as the law at the time of renewal may authorize, and it confers upon the lessee the exclusive right to mine and dispose of all the coal and associated minerals in the tract leased. He must covenant to invest in actual mining operations upon the land not less than \$100.00 for each acre involved, of which amount not less than one-fifth must be expended during the first year of the lease and a like sum in each of the next succeeding four years.

The Secretary of the Interior is authorized to issue coal prospecting permits to applicants qualified to hold coal leases where prospecting or exploratory work is necessary to determine the existence or workability of coal deposits in an unclaimed, undeveloped area in Alaska. Permits are issued for terms of not exceeding four years and may not include more than 2,560 acres. If within the life of the permit, the permittee shows that the land contains coal in commercial quantity, he is entitled to a lease of the land.

Limited licenses or permits are issued, granting the right to prospect for, mine, and dispose of coal belonging to the United States, on specified tracts not exceeding ten acres, and for not more than an area reasonably sufficient to supply the quantity of coal needed, to any one person or association of persons in any one coal field for

periods of two years without payment of royalty for the coal mined or for the land occupied.

26. *Oil and gas.*—Deposits of oil and gas may be prospected for under permits and mined under leases issued by the Secretary of the Interior. Lands valuable for one of these minerals may be leased and prospecting permits for areas not exceeding 2,560 acres may be issued to citizens of the United States, associations of such citizens, or corporations organized under the laws of the United States or any State or Territory thereof. Applications for permits must be filed in the proper district land office. Permits are issued for a period of four years, the permittee being required, within two years, to install upon the land a drilling outfit and commence actual drilling operations; within three years from the date of the permit he must drill one or more wells not less than six inches in diameter to a depth of at least 500 feet, and within four years drill to an aggregate depth of not less than 2,000 feet, unless oil or gas be sooner discovered. Upon discovery, the permittee is entitled to a lease for one-fourth of the land, without payment of royalty for the first five years, and thereafter to pay a royalty of five percent; also a preference right to lease the remaining area embraced in the permit. Lands containing valuable deposits of oil or gas and not included in permits or preference-right claims are leased by public auction to the highest bidder.

27. *Sodium, potash, phosphate, and oil shale.*—The Secretary of the Interior, in his discretion, is authorized to issue prospecting permits for sodium and potash and leases of sodium, potash, phosphate, and oil shale deposits.

28. *Shore space restrictions.*—On the shores of all navigable waters in Alaska, a space of eighty rods is reserved between claims, except homestead entries in national forests and mining claims. In the case of soldiers' additional entries, eighty rods is reserved between claims along navigable or other waters. The shore space reserve extends eighty rods from the shore line. Homestead entries, except such entries in national forests, may not extend more than 160 rods along the shore of any navigable water and trade and manufacturing sites may not abut more than eighty rods of navigable water. However, the Secretary of the Interior, in his discretion, is authorized to waive such restrictions.

29. *Landing and wharf permits.*—The Secretary of the Interior is authorized to grant the use of the reserved shore space lands for landing and wharf purposes. The use of the lands is limited to landings and wharves and all rates of toll to be paid by the public must be submitted for approval of the Secretary of the Interior.

30. *Agriculture.*—A publication entitled "Information for Prospective Settlers in Alaska", Circular No. 1, and other information

relating to agriculture in Alaska may be obtained by addressing the Secretary of Agriculture, Washington, D. C., or by applying to the Alaska Agricultural Experiment Station at College, Alaska.

31. *The Alaska Railroad.*—The Alaska Railroad maintains an office at 333 North Michigan Avenue, Chicago, Illinois, for the purpose of cooperating with and supplying reliable information to the traveling public, railroad representatives, and travel offices. Information may also be obtained from the office of said railroad at 441 Federal Building, Seattle, Washington, or the office at Anchorage, Alaska. Information as to agricultural opportunities along the Alaska Railroad may also be obtained by addressing the Secretary of the Interior, Washington, D. C.

32. *Further information.*—Further information relative to the public land laws and regulations governing the disposal of public lands, timber, and mineral in Alaska will be furnished, on request, by the Commissioner of the General Land Office, Washington, D. C., or by any of the United States district land offices in Alaska.

FRED W. JOHNSON,
Commissioner, General Land Office.

MINING CLAIMS ON THE PUBLIC DOMAIN

[Circular No. 1278, revised March 12, 1935]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 12, 1935.

The purpose of this circular is to furnish brief information pertinent to the location and purchase of mining claims under the United States mining laws.

1. *Initiation of rights to mineral land.*—Rights to mineral lands, owned by the United States, are initiated by prospecting for minerals thereon, and, upon the discovery of mineral, by locating the lands upon which discovery has been made. A location is made by staking the corners of the claim, posting notice of location thereon (see 10), and complying with the State laws, regarding the recording of the location in the county recorder's office, discovery work, etc.

2. *State mining laws.*—As supplemental to the United States mining laws there are State statutes relative to location, manner of recording of mining claims, etc., in the State, which should also be observed in the location of mining claims. Information as to State laws can be obtained locally or from State officials.

3. *Lands subject to location and purchase.*—Vacant public surveyed or unsurveyed lands are open to prospecting, and upon dis-

covery of mineral, to location and purchase, as are also lands in national forests in the public-land States (forest regulations must be observed), lands entered or patented under the stock-raising homestead law (title to minerals only can be acquired), lands entered under other agricultural laws but not perfected, where prospecting can be done peaceably, and lands within the railroad grants for which patents have not issued.

4. *Status of lands.*—Information as to whether any particular tract of land is shown by the records to be vacant and open to prospecting may be obtained from the register of the land district in which the tract is situated. Since location notices of mining claims are filed in the office of the county recorder, ordinarily no information regarding unpatented mining claims is obtainable from the district land office or the General Land Office unless application for patent has been filed.

5. *Minerals subject to location.*—Whatever is recognized as a mineral by the standard authorities, whether metallic or other substance, when found in public lands in quantity and quality sufficient to render the lands valuable on account thereof, is treated as coming within the purview of the mining laws. Deposits of coal, oil, gas, oil shale, sodium, phosphate, potash, and in Louisiana and New Mexico sulphur, belonging to the United States, can be acquired under the mineral leasing laws, and are not subject to location and purchase under the United States mining laws.

6. *Mining locations—Areas.*—Lode locations for minerals discovered in lode or vein formation may not exceed in length 1,500 feet along the vein and in width 300 feet on each side of the middle of the vein, the end lines of the location to be parallel to each other. Placer locations, which include all minerals not occurring in vein or lode formation, may be for areas of not more than 20 acres for each locator, no claim to exceed 160 acres made by not less than eight locators. Placer locations must conform to the public surveys wherever practicable.

7. *Who may make locations.*—Citizens of the United States, or those who have declared their intention to become such, including minors who have reached the age of discretion and corporations organized under the laws of any State. Agents may make locations for qualified locators.

8. *Number of locations.*—The United States mining laws do not limit the number of locations that can be made by an individual or association.

9. *Valid locations—Discovery after conveyance.*—A location is not valid until an actual discovery of mineral is made within the limits

thereof. A placer location of more than 20 acres, made by two or more locators and conveyed to a less number before discovery is made, is valid to the extent of 20 acres only for each owner at date of discovery.

10. *Locations to be marked on ground—Notice.*—Except placer claims described by legal subdivision, all mining claims must be distinctly marked on the ground so that their boundaries may be readily traced, and all notices must contain the name or names of the locators, the date of location and such a description of the claim by reference to some natural object or permanent monument as will serve to identify the claim.

11. *Locations on streams and bodies of water.*—Beds of navigable waters are subject to the laws of the State in which they are situated and are not locatable under the United States mining laws. Title to the beds of meandered nonnavigable streams is in the riparian owner. The beds of unmeandered, nonnavigable streams are subject to location under the United States mining laws if they are unoccupied, as are also the beds of meandered nonnavigable streams when the abutting upland is unappropriated.

12. *Maintenance—Annual assessment work—Adverse claim—Jurisdiction.*—The right of possession to a valid mining claim is maintained by the expenditure annually of at least \$100 in labor or improvements of a mining nature on the claim, the first annual assessment period commencing at 12 o'clock noon on the first day of July succeeding the date of location. Failure to perform the assessment work for any year will subject the claim to relocation, unless work for the benefit of the claim is resumed before a relocation is made. The determination of the question of the right of possession between rival or adverse claimants to the same mineral land is committed exclusively to the court. (See 18.) However, failure to perform the annual assessment work on a mining claim in Alaska works a forfeiture of the claim, and resumption of work on the claim will not prevent relocation.

13. *Expenditures on claim for patent purposes—Lode—Placer—Millsite.*—Five hundred dollars in labor or improvements of a mining nature, must be expended upon or for the benefit of each lode or placer claim, and compliance with the United States mining laws made otherwise, to entitle the claimant to prosecute patent proceedings therefor. Such expenditures must be completed prior to the expiration of the period during which notice of the patent proceedings is published. Patent expenditures on a millsite are not required, but it must be shown that the millsite is used or occupied for mining or milling purposes at the time an application for patent therefor is filed.

14. *Patent not necessary.*—One may develop, mine, and dispose of mineral in a valid mining location without obtaining a patent, but possessory right must be maintained by the performance of annual assessment work on the claim in order to prevent its relocation by another.

15. *Procedure to obtain patent to mining claims.*—The owner or owners of a valid mining location, or group of locations, on which not less than \$500 has been expended on or for the benefit of each claim, may institute patent proceedings therefor in the district land office. Information as to patent procedure can be obtained from the register of the local land office or from the General Land Office. In general, a survey must be applied for unless the claim is a placer claim located by legal subdivisions, the application for survey to be made to the Public Survey Office in the State wherein the claim is situated. Applications for patent are filed in the district land office. A notice of the application is required to be posted on the land prior to filing the application and to be published by the register after the application is filed.

16. *Blank forms.*—No set form of location notices nor of the papers filed in patent proceedings for mining claims is required and no blank forms are furnished by the General Land Office, or by the district land offices for use in mineral cases. Forms containing essentials are printed by local private parties or concerns. The registers of the local land offices can usually advise you where such forms may be obtained.

17. *Common improvements.*—An improvement, made upon one of a group of contiguous claims (cornering is not contiguity) owned in common, may be applied to such claims of the group, in existence at the time the improvement is made, shown to be benefited thereby.

18. *Adverse claims.*—An adverse claim may be filed during the period of publication of notice of an application for patent (or within eight months after the expiration of the publication period in Alaska), by one claiming a possessory right under another mining location to all or some portion of the land applied for, and must show fully the nature, boundaries, and extent of the area in conflict, to be followed, within thirty days after filing (sixty days in Alaska), by suit in a court of competent jurisdiction. If suit is filed, all proceedings on the application, except the filing of the affidavits of continuous posting and publication of the notice of the application, are stayed to await the outcome of the court proceedings.

19. *Co-owners.*—A co-owner not named in the application for patent cannot assert his rights by filing an adverse claim, a protest being proper to cause his alleged rights to be considered when

the case is adjudicated. If a co-owner fails to do his proper proportion of annual assessment work on a claim, or fails to contribute his proportion of the cost thereof, the co-owners who have caused the work to be done during any assessment period may, at the expiration of the assessment year, give such delinquent co-owner personal notice in writing, or notice by publication in a newspaper published nearest the claim for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing, or 180 days after the first newspaper publication such delinquent should fail to contribute his proportion of the expense required, his interest in the claim becomes the property of his co-owners who have made the expenditure.

20. *Lode in placer.*—If a placer mining applicant fails to state that there is a known lode within the boundaries of the claim, it is taken as a conclusive declaration that he has no right of possession thereto. If no such vein or lode be known the placer patent will convey all valuable mineral and other deposits within the boundaries of the claim. A known lode not included in an application for patent to the claim may be applied for even after issuance of patent to the placer mining claim. Where a placer mining claimant makes application for a placer containing within its boundaries a lode claim owned by him the lode must be surveyed, the lode being paid for on the basis of \$5 per acre and the remaining portions of the placer at the rate of \$2.50 per acre.

21. *The United States Mining Laws.*—The United States mining laws are applicable to the following States and Territories: Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Louisiana, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

22. *National Parks and Monuments.*—With the exception of Mt. McKinley National Park, in Alaska, and Death Valley National Monument, in California, mining locations may not be made on lands in national parks and monuments after their establishment.

23. *Withdrawals.*—Withdrawals usually bar location under the mining laws, but withdrawals made under the Act of June 25, 1910 (36 Stat., 847), as amended by the Act of August 24, 1912 (37 Stat., 497), permit locations of the withdrawn lands containing metaliferous minerals. Lands withdrawn for water power purposes are not subject to location unless first restored under the provisions of section 24 of the Federal Water Power Act.

24. *Minerals in Indian lands.*—In general, the mineral deposits in Indian reservations are subject to leasing and are under the administration of the Office of Indian Affairs.

25. *Mineral land in agricultural entries—Protest—Contest.*—Where lands known to be valuable for minerals are embraced in an agricultural filing, other than a stock-raising homestead filing, a mineral claimant may initiate a contest thereagainst by filing a protest sworn to and in duplicate, in the local land office, alleging sufficient facts, which, if proven, will establish the mineral character of the land, and warrant cancellation of the agricultural filing. The protest must be corroborated by one or more witnesses having knowledge of the facts alleged. In the case of stock-raising homestead entries, a mineral claimant, whose location antedates the homestead filing, must protest such filing in order to protect his title to the surface of his mining claim.

26. *Cost of patent proceedings for mining claims.*—With the exception of the fixed charges, such as the fee for filing an application for patent, which is \$10, the purchase price of lands in lode claims and millsites at \$5 per acre, and \$5 for each fractional part of an acre, and \$2.50 per acre or fraction of an acre for placer lands, unless otherwise provided by law as to certain lands, no estimate can be furnished as to what it will cost to procure a patent. The cost of publication, survey, and abstract of title depends upon the services rendered and vary in each case.

FRED W. JOHNSON, *Commissioner.*

**PUBLIC SALE APPLICATION—SECTION 2455, REVISED STATUTES,
AS AMENDED—PROCEDURE**

[Circular No. 1350]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., March 14, 1935.

REGISTERS AND SPECIAL AGENTS IN CHARGE:

For your information and guidance in the adjudication of public sale applications under Section 2455, Revised Statutes, as amended, I quote below letter of instructions of the Department dated March 7, 1935, to the Commissioner of the General Land Office:

MY DEAR MR. COMMISSIONER: I have before me your letter of February 23 (1591131 "C" AZ), requesting instructions as to the effect of the Executive orders of November 26, 1934, and February 5, 1935, upon applications for the sale of isolated tracts under Section 2455, R. S., which were pending on the dates of such orders.

Under regulations existing prior to November 23, 1934, such applications did not segregate the land involved. See paragraph 9 of the regulations approved April 7, 1928 (Circular No. 684, 52 L. D. 340). Under the revised regulations of November 23, 1934 (Circular No. 684), under Sec. 14 of the Taylor Grazing

Act of June 28, 1934 (48 Stat. 1269), isolated tract applications "segregate the lands applied for from other disposition under the public land laws."

It is clear that the segregative effect to be given to such applications, as contemplated in the amended regulations, is merely to give the applications priority over subsequent filings or applications under the public land laws. The Government's power and right to withdraw lands from entry, sale, or other disposition is not affected by the pendency of such applications. They are not "existing valid rights" which are excepted from the orders of withdrawal.

You are instructed to reject isolated tract applications which were merely filed prior to November 26, 1934, or February 5, 1935.

Very truly yours,

T. A. WALTERS,
First Assistant Secretary.

Registers will be governed by the concluding paragraph of the instructions in their adjudication of isolated tract applications and the Special Agents in Charge will return to the registers for appropriate action all such applications pending in their office for appraisal of the lands involved.

FRED W. JOHNSON, *Commissioner.*

JAMES P. BALKWILL

Opinion, March 19, 1935

RECLAMATION HOMESTEAD—WATER USERS' ASSOCIATIONS—PATENT—ACREAGE LIMITATION—PURCHASE AT TAX SALE—ASSIGNMENT.

A water users' association may receive patent from the United States to one reclamation homestead, conformed to a farm unit, if it shows that it does so for security purposes only and that it owns no other units on which construction charges remain unpaid. It may, however, bid in at tax sale unlimited acreage, but will be required within a reasonable time thereafter to assign the interests so acquired to persons qualified to receive patent thereto under the terms and conditions of the Reclamation Act and the governing regulations.

MARGOLD, Solicitor:

On September 20, 1913, the General Land Office accepted final homestead proof submitted by James P. Balkwill in support of reclamation homestead entry Denver 035757, which entry was later conformed to farm unit "F" or the N $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 15, T. 9 S., R. 103 W., 6th P. M.

September 20, 1913, final homestead proof submitted by Clyde L. Balkwill in support of reclamation homestead entry Denver 035879 was accepted by the General Land Office, which entry was conformed to farm unit "M" or the S $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 15, T. 9 S., R. 103 W.

On March 24, 1923, the General Land Office accepted final homestead proof submitted by William R. Price on reclamation homestead entry Denver 036190, embracing farm unit "E" or the NE $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, S $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 7, T. 9 S., R. 103 W.

On February 28, 1934, W. S. Meek, treasurer of Mesa County, Colorado, purported to convey all of the above-described lands to the Grand Valley Water Users Association, a corporation organized under the laws of Colorado. The deed recites in substance that the lands were subject to taxation for the year 1929; that the taxes so assessed remained due and unpaid when on December 8, 1930, the treasurer of Mesa County sold the land to Mesa County. On October 24, 1933, the county assigned the certificates of sale to the Grand Valley Water Users Association, which paid the tax assessments and after the statutory period of redemption had expired, upon demand, the deeds were executed to the association.

The association is a corporation whose stockholders are the landowners in the project. It assesses the owners for construction charges due to the United States, retaining a lien against the land of those who fail to pay current charges as in this case. The United States also has a lien on the land for construction charges to become due in the future, there being unpaid charges applicable to the land here in question. See superintendent's letter of January 16, 1935. The association now seeks to have final patents covering the entries issued to it so that it may better protect its lien for delinquent assessments.

I am of the opinion that the association may receive a patent to one farm unit if it shows that it does so only for security purposes and if it shows that it owns no other units on which building charges remain unpaid. The association may, however, bid in at tax sales for unlimited acreage and reassign interests so acquired, within a reasonable time, to persons who are qualified to receive patents.

The taxes were assessed by Mesa County, and the land was sold for nonpayment thereof, pursuant to the authority granted by the Act of April 21, 1928 (45 Stat. 439), as amended by the Act of June 13, 1930. (46 Stat. 581). Under the tax deeds so issued, the Water Users Association acquired the rights "of an assignee under the provisions of the Act of June 23, 1910, as amended." These rights are necessarily limited and qualified in the same manner as the rights of other assignees under that act. In this respect the Act of June 23, 1910, provides:

That all assignments made under the provisions of this act shall be subject to the limitations, charges, terms, and conditions of the reclamation act (36 Stat. 592).

The pertinent limitations on rights of assignees referred to in this act are found in section 5 of the Act of June 17, 1902 (32 Stat. 388), wherein it provides that water rights shall not be sold to any

owner of private lands within a project for more than 160 acres, and in the Act of August 9, 1912 (37 Stat. 265), wherein it provides that no person shall *at one time or in any manner* own or hold irrigable land for which entry or water right application has been made in excess of one farm unit, or in any event, in excess of 160 acres where final payment in full of all instalments of building and betterment charges on account of such land has not been made. See also section 13 of the Act of August 13, 1914 (38 Stat. 686), and section 46 of the Act of May 25, 1926 (44 Stat. 636).

In construing the rights of assignees under the Act of June 23, 1910, and in view of the foregoing limitations, the Department has held that to receive patents they must show that they are qualified to receive and hold a water right (50 L. D. 268). Further, the Department has ruled, as a matter of policy, that water applications will not be accepted from corporations (42 L. D. 250, 253). Although the reason motivating such a ruling was that it was believed that the Reclamation Act was meant to benefit families and persons rather than corporate entities, there is no *legal* objection to the acquisition of a water right by a corporation if it is not otherwise disqualified by reason of ownership of other lands on which there exist unpaid betterment and building charges (42 L. D. 253). In line with this decision, it has been held as an exception to the rule against the sale of water rights to corporations, that a corporation may apply for a patent and a water right as the assignee of an entryman where it did so only for the purpose of protecting its security in a loan transaction and with the intention of reselling the property at more propitious times. *Great Western Insurance Company*, decided February 8, 1932 (A. 16335).

The purpose of the association in the present case is similar to that of the insurance company in that it has paid charges due on the land in question and now wishes to protect its lien for such charges by holding the property until it can be put on a paying basis and then to resell it. Such procedure is undoubtedly desirable, but it cannot be accomplished where it will result in ownership by the association of water rights in excess of one farm unit on which construction charges remain unpaid, because the association has no greater rights under the Act of June 23, 1910, than do other assignees. The net result of the *Great Western Insurance Company* case, *supra*, is to permit the association in this case to acquire a patent to one farm unit as an exception to the rule against the sale of water rights to corporations, where it does so for security purposes only.

While the association is limited in its right to receive patents, this does not prevent it from bidding at tax sales for unlimited acreage for the purpose of protecting its lien and with the intent of reassign-

ing such interest to qualified persons. *Glen L. Kimmell* (53 I. D. 658). That case was decided under the Act of August 11, 1916 (39 Stat. 506), a statute very similar to that under which the association is now claiming its right. It was held there, as a matter of policy, that in no event should patents issue to irrigation districts, but that such districts could acquire an equitable interest by the purchase at tax sales in unlimited acreage with the privilege of assigning such interest within a reasonable time to persons qualified to accept patents. The same rule with respect to the right of assignment appears to apply in this case. Accordingly, the association will have the privilege of acquiring a patent to one farm unit provided it shows that it is acquiring the patent solely to protect its lien and shows that it owns no other units on which building charges remain unpaid. As to other units, the association should have a reasonable time from the promulgation of this opinion to assign them to persons qualified to receive patents.

Approved:

T. A. WALTERS, *First Assistant Secretary.*

**PREFERENCE RIGHT OF ENTRY OF SUCCESSFUL CONTESTANTS—
EFFECT OF GENERAL WITHDRAWAL ORDERS OF NOVEMBER
26, 1934, AND FEBRUARY 5, 1935—INFORMATION TO BE GIVEN
APPLICANTS TO CONTEST**

[Circular No. 1352]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 26, 1935.

REGISTERS, UNITED STATES LAND OFFICES:

Reference is made to office circular 1348, dated March 7, 1935, containing instructions as to the effect of the general withdrawal orders of November 26, 1934, and February 5, 1935, on successful contestants' preference right of entry in those cases where the contests were initiated prior to the dates of the withdrawal orders.

In connection with applications to contest, filed subsequent to the withdrawal orders, the successful contestant's preference right of entry cannot be exercised until the status of the land has been changed so as to permit entry. Such being the case, it is considered only fair that each contestant should be advised at the time application to contest is filed, that because of the withdrawal orders, if his contest terminates successfully, his earned preference right will have to be suspended because of the status of the land.

FRED W. JOHNSON, *Commissioner.*

STATE OF ARIZONA

Decided April 4, 1935

SCHOOL LAND—INDEMNITY SELECTION—CERTIFICATE OF NONENCUMBRANCE—
EXECUTIVE ORDER OF NOVEMBER 26, 1934—CURABLE DEFECT.

The Executive order of November 26, 1934, does not operate to withdraw from entry, etc., land within an indemnity school land selection in support of which there has been a failure to supply the required certificate of nonencumbrance, such failure being a curable defect and not *ipso facto* working a cancellation or forfeiture, the Land Department not being required by law to cancel such selection without affording opportunity to supply the certificate by granting additional time.

SCHOOL LAND—INDEMNITY SELECTION—CERTIFICATE OF NONENCUMBRANCE—
EXECUTIVE ORDER OF NOVEMBER 26, 1934.

In the absence of other objection, a reasonable period of additional time for the filing of nonencumbrance certificates as to base lands may be allowed, notwithstanding the withdrawal order of November 26, 1934.

SOLICITOR'S OPINION, CASES, ETC., CITED AND DISTINGUISHED.

Solicitor's opinion of February 8, 1935, 55 I. D. 205, cited and approved; cases of *Conrad Kohrs* (51 L. D. 270), and *State of Florida* (52 L. D. 421), distinguished; paragraph 7 of Regulations of June 23, 1910 (39 L. D. 39), discussed.

WALTERS, *First Assistant Secretary*:

By decision of January 16, 1935, the Commissioner of the General Land Office held for cancellation indemnity school land selection list Phoenix 074776 of the State of Arizona, allowed May 9, 1934, on the ground that no certificate of nonencumbrance as to the base land had been filed and that because the selection list was thus incomplete the withdrawal made by Executive order of November 26, 1934, intervened and prevented completion of the selections. In support of his decision the Commissioner cited the provisions of paragraph 7 of the regulations of June 23, 1910 (39 L. D. 39), and the cases of *Conrad Kohrs* (51 L. D. 270) and *State of Florida* (52 L. D. 421).

The State of Arizona has appealed and has furnished nonencumbrance certificates.

Paragraph 7 of the regulations cited reads in part as follows:

Within three months after the filing of any such list of selections, the State, or Territory, must, in addition, file a certificate from the recorder of deeds, or official custodian of the records of transfers of real estate, in the proper county, or from a reliable and responsible abstractor, or abstract company, that no instrument purporting to convey, or in any way encumber, the title to any of said lands used as bases, is of record, or on file, in the office of such custodian, and upon report of the local officers of the failure of the State to file such certificate within the required time, any selection upon such base lands may be canceled without previous notice.

The Department has invariably adhered to the rule of long standing that an allowed indemnity school land selection has the same segregative effect as a homestead or other entry under the general land laws, as against all subsequent claims presented. (27 L. D. 475; 32 L. D. 565; 33 D. D. 161; 34 L. D. 12; 39 L. D. 377; 46 L. 222.)

Although the cited paragraph 7 of the regulations of 1910 provides that a selection *may* be canceled for failure to furnish a nonencumbrance certificate within three months from the time of filing the selection list, there is no cancelation or forfeiture by operation of law, and the Land Department is not legally required to cancel such selection without opportunity for the furnishing and acceptance of such certificate.

This is certainly nothing more than a curable defect. While it may be well to fix a time limit generally to be observed, no rigid adherence to such rule is mandatory.

The selection list had the force and effect of an entry. It was so far completed that if upon notice that a nonencumbrance certificate was required, the State should furnish the same, nothing more would be required from the State.

The case differs widely from the cases cited in the Commissioner's decision and it is not necessary to hold that said cases govern here. In interpretation of the Executive order of withdrawal dated November 26, 1934, the Secretary of the Interior has held (Solicitor's opinion of February 8, 1935, 55 I. D. 205):

Of course, all valid entries are protected, and I believe also that all prior valid applications for entry, selection, or location, which were substantially complete at the date of the withdrawal should be considered as constituting valid existing rights within the meaning of the saving clause of the withdrawal order. Claims under the color of title act of December 22, 1928 (45 Stat. 1069), should likewise be regarded as valid existing rights when bona fide and substantial rights thereunder existed at the date of the withdrawal. I believe this protective provision should be generously applied. The public interest in particular tracts within the confines of the broad expanse thus withdrawn, is too inconsequential to justify the striking down of individual rights through technical construction or harsh application of the protective provision of the order.

A reasonable period of additional time for the filing of nonencumbrance certificates as to base lands may be allowed in this case, and in other similar cases, in the absence of other objection, notwithstanding the withdrawal order.

The decision appealed from is reversed and the General Land Office will adjudicate the selection list in connection with such certificates, filed or to be filed.

Reversed.

EXECUTIVE WITHDRAWALS OF NOVEMBER 26, 1934, AND FEBRUARY 5, 1935, WITHOUT APPLICATION TO LANDS WITHDRAWN UNDER THE RECLAMATION LAWS

[Circular No. 1351]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 21, 1935.

REGISTERS, UNITED STATES LAND OFFICES:

March 4, 1935, the Commissioner of the Bureau of Reclamation called the attention of this office to the fact that one of the registers of the local land offices had recently rejected an application to make a reclamation homestead entry for a farm unit established for land within a Federal project, because of the Executive order issued November 26, 1934.

Section 3 of the Reclamation Act of June 17, 1902 (32 Stat. 388), provides for the withdrawal of vacant, unreserved, and unappropriated public lands for the purpose of making surveys and irrigation investigations to determine the feasibility of irrigation and reclamation of such withdrawn lands. A portion of reclamation withdrawn lands may be utilized by the Bureau of Reclamation for the construction and maintenance of irrigation works and a portion may be platted to farm units and receive water for irrigation from such irrigation works. Lands so reserved are not subject to entry until the feasibility of irrigation is determined and the lands have been classified as productive agricultural land and a farm unit is established therefor and public notice issues announcing the availability of water for irrigation purposes pursuant to the Reclamation law. Thereafter the lands may be entered under the homestead laws only by persons who, pursuant to subsection "C" of the Act of December 5, 1924 (43 Stat. 701), have satisfied an examining board appointed for the project that they are possessed of such qualifications as to industry, experience, character, good health, vigor, and capital as are considered necessary to give reasonable assurance of success on the project, and are otherwise qualified to make homestead entry.

By Executive order of November 26, 1934, under authority 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 the conditions expressed in said acts, and to existing valid rights, it was ordered that all of the vacant, unreserved, and unappropriated public land in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, and Wyoming be, and the same thereby was, temporarily withdrawn from settlement, location, sale, or entry, and reserved for classification, and

pending determination of the most useful purpose to which such land may be put in consideration of the provisions of the Act of June 28, 1934 (48 Stat. 1269), and for conservation and development of natural resources, and by Executive Order No. 6964, of February 5, 1935, a similar withdrawal was made under the above mentioned acts as to public land in Alabama, Arkansas, Florida, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, Oklahoma, Washington, and Wisconsin, pending determination of the most useful purpose to which said lands may be put in furtherance of certain projects known as "The Land Program, Federal Emergency Relief Administration", and also for the conservation and development of natural resources.

The Department and the courts have held that lands withdrawn pursuant to the Reclamation law are not *unreserved* but are *reserved* (38 L. D. 349; 167 Fed. 881). It has further been held that the withdrawal of lands under the Reclamation law is legislative in its effect and the use of such withdrawn lands in connection with a Federal reclamation project is a public use (41 L. D. 627). By office decision dated December 13, 1934, approved by the Department, it was held that unless and until public lands withdrawn by the Department pursuant to the Reclamation Act of June 17, 1902, *supra*, are restored or eliminated by the Department from such reclamation withdrawal, the lands are, except as otherwise provided in said Executive order of November 26, 1934, excepted therefrom.

You are therefore instructed that lands withdrawn in connection with Federal irrigation projects pursuant to the Reclamation Act of June 17, 1902 (32 Stat. 388), are reserved lands, and as such are not while thus reserved affected by said Executive orders of November 26, 1934, and February 5, 1935. Applications filed to make entry for lands otherwise subject to entry under the Reclamation Homestead Law may be allowed upon a proper showing and in the absence of any objection of record, notwithstanding the Executive orders of November 26, 1934, and February 5, 1935.

You will recall and vacate any decision you may have rendered rejecting an application to make reclamation homestead entry, based upon the sole ground of said Executive orders of November 26, 1934, and February 5, 1935, and be governed by these instructions with respect to similar applications hereafter filed.

FRED W. JOHNSON, *Commissioner*.

Approved:

T. A. WALTERS,

First Assistant Secretary.

STATE OF ARIZONA

Decided April 4, 1935

WITHDRAWAL ORDER OF NOVEMBER 26, 1934—AUTHORITY OF THE PRESIDENT—
PUBLIC LANDS.

The Executive order of withdrawal of November 26, 1934, was made by virtue of and pursuant to the authority vested in the President by the Act of June 25, 1910 (36 Stat. 847), as amended by the Act of August 24, 1912 (37 Stat. 497), which amended act authorizes him to withdraw temporarily from settlement, location, sale, or entry any of the public lands of the United States; and lands belonging to the United States do not cease to be a part of the public domain until a vested right thereto is acquired or patent is issued.

SCHOOL LAND—INDEMNITY SELECTION—SEGREGATIVE EFFECT.

The effect of filing and allowance of a school land indemnity selection is to segregate the land selected, even though it may thereafter be found that there are defects which render cancelation necessary; and such a selection, even though erroneously received, segregates the land so that no other application therefor may be received or rights initiated by its tender.

SCHOOL LAND—INDEMNITY SELECTION—DEFECTIVE BASE—WITHDRAWAL ORDER
OF NOVEMBER 26, 1934.

Failure of a State to complete the selection of indemnity school lands, due to tendering defective base, is a curable defect, and in such cases the withdrawal order of November 26, 1934, does not operate to prevent the completion of the selection, said order expressly saving existing valid rights.

WALTERS, *First Assistant Secretary*:

By decision of November 2, 1934, the Commissioner of the General Land Office held for cancelation as to the SE $\frac{1}{4}$ NE $\frac{1}{4}$, N $\frac{1}{2}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 14, T. 16 N., R. 20 E., G. & S. R. M., Arizona, an indemnity school land selection list of the State of Arizona, filed December 15, 1932, on the ground that part of the base offered for the SE $\frac{1}{4}$ NE $\frac{1}{4}$, all of the base offered for the NE $\frac{1}{4}$ NW $\frac{1}{4}$ and the NW $\frac{1}{4}$ NW $\frac{1}{4}$, and part of the base offered for the SW $\frac{1}{4}$ NW $\frac{1}{4}$, had already been used as base for the selection of other land. The right to apply for amendment through the offer of sufficient valid base was extended.

On December 13, 1934, the State filed an application for amendment offering new base to the extent necessary. By decision of January 16, 1935, the Commissioner again held the list for cancelation to the extent of the selections first hereinbefore described and rejected the application for amendment on the ground that the selected land had been withdrawn by Executive order of November 26, 1934. Citing the cases of *Conrad Kohrs* (51 L. D. 270) and *State of Florida* (52 L. D. 421), the Commissioner held that because the selections of the tracts involved had not been completed at the time of the withdrawal the list was not subject to amendment.

The State, by its Land Commissioner, has appealed. It is contended that the Executive order in question did not extend to or include lands in process of selection, whether the selections were complete or incomplete; that an implied contract exists after approval of an application to select in the district land office; that in the ordinary procedure, in the absence of any intervening withdrawal, the State is permitted to correct errors or substitute base, predicating such action upon the original application filed in the district land office; that a right must then and there have attached, so that the withdrawal of vacant and unappropriated lands will have no effect; that while the withdrawal order is of a temporary nature it will have the effect, if the decision appealed from prevails, of denying all selective rights of the State while the order is in force; that it is not proper to deny applications when the State is defenseless, whereas if action had been promptly taken the requirements could have been met before any withdrawal; that an obligation beyond strict legal interpretation rests upon the Department in the fulfillment of land grants to the States; and that after calling upon the State to amend it is contrary to law, retroactive, and chaotic in effect to order cancelation of the selection list.

The authority of the President to withdraw the land involved cannot be doubted. The withdrawal order of November 26, 1934, was made by virtue of and pursuant to the authority vested in the President of the Act of June 25, 1910 (36 Stat. 847), as amended by the Act of August 24, 1912 (37 Stat. 497), which amended act authorizes him to withdraw temporarily from settlement, location, sale, or entry any of the public lands of the United States. Lands belonging to the United States do not cease to be a part of the public domain until a vested right is acquired or patent is issued. *Shiver v. United States* (159 U. S. 491); *Stone v. United States* (167 U. S. 178); *United States v. Fickett* (205 Fed. 134).

The Executive order of November 26, 1934, provides that all of the vacant, unreserved, and unappropriated public land in Arizona, and other States, is temporarily withdrawn from settlement, location, sale, or entry, and reserved for classification subject to existing valid rights. The question now presented for determination is whether said order operates to exclude from its effect indemnity school land selections by the State of Arizona which were incomplete and defective on November 26, 1934, for want of valid base lands.

In looking to Departmental decisions for precedents and guidance it is found there is no line of decisions, no specific decision, and no principle which can be regarded as wholly decisive. A discussion of Departmental rulings may be helpful.

The selection list was allowed and approved on December 15, 1932, the date of its filing. The effect of such filing and allowance is to segregate the land selected, even though it may thereafter be found that there are defects which render cancelation necessary. In the case of *Santa Fe Pacific R. R. Co. v. State of California* (34 L. D. 12) it was held that a school land indemnity selection, even though erroneously received, segregated the land so that no other application therefor could be received. The Department said:

Good administration requires that, pending the disposition of a selection, even though erroneously received, no other application including any portion of the land embraced in said selection should be accepted, nor should any rights be considered initiated by the tender of any such application.

This ruling has been followed consistently. In *State of New Mexico* (46 L. D. 217) the following language was used:

The Department has invariably adhered to the rule of long standing that a selection, regular on its face when filed, such as the one under consideration, has the same segregative effect as a homestead or other entry under the general land laws, as against all subsequent claims presented, other than those asserted by the Government, thus withdrawing the land in the meantime from appropriation by later applications. (See 27 L. D. 475; 32 L. D. 565; 33 L. D. 161; 34 L. D. 12; 39 L. D. 377.)

See also the case of *J. G. Hofmann* (53 I. D. 254).

It is thus clear that the earlier decisions to the effect that indemnity selections defective for want of proper base cannot be amended so as to defeat intervening claims, and that amendments by the substitution of proper base take effect only from the date of curing the defect, cannot be held as governing, inasmuch as there can be no intervening claims. See 6 L. D. 699; 15 L. D. 549; 27 L. D. 644. The ruling in *Robinson v. Lundrigan* (227 U. S. 173) is not contrary to this view because in that case there was merely an *application* and not an *entry* involved.

The matter of an intervening withdrawal by the Government is somewhat different. In the cited case of *Conrad Kohrs*, the Department held that an incomplete *application* under the exchange provisions of the Act of June 4, 1897 (30 Stat. 11, 36), and the Act of March 3, 1905 (33 Stat. 1264), even though ordinarily subject to the rules relative to curing defects, was not a "valid existing right" within the meaning of the Executive order of July 3, 1925, withdrawing certain lands and islands in the States of Alabama, Florida, and Mississippi. As has been shown, this case can be distinguished by reason of the difference between *application* and *entry*.

In the cited case of *State of Florida* the same withdrawal as in the *Kohrs* case was involved and an indemnity school selection list was held for cancelation. The Department said:

In the instant case the base tendered by the State was fatally defective or adjudged to be bad, and the selection cannot be amended so as to defeat an

intervening withdrawal or claim. The case is governed by the ruling in the case of *Fred A. Kribs* (43 L. D. 146), which is in harmony with the principle announced by the Supreme Court of the United States in *Robinson v. Lundrigan* (227 U. S. 173).

The *Kribs* case involved an *application* to make a lieu selection under the Act of June 4, 1897, *supra*, which was defective for want of valid base. It is not shown that the application had the effect of an entry. An intervening withdrawal for forestry purposes was held to prevent amendment. The case of *State of California* (40 L. D. 301) was cited. That case involved an indemnity school land selection list and it was held:

A withdrawal of land by the Government for public use has the same effect as an intervening adverse claim and defeats the application to amend. As this land had been classified as oil land, and was reserved by Executive order, it ceased to be subject to disposal under the agricultural land laws.

But the Department has also taken a somewhat different view. In the case of *State of California* (39 L. D. 158) it was held (syl-labus):

Where a State makes indemnity selection in lieu of school sections returned as mineral at the time of survey, and is unable to establish the mineral character of the base lands, it should be permitted, inasmuch as the selections were *prima facie* valid when made, to assign other valid bases to support the selections, notwithstanding the selected lands may have since been included within a national forest.

In this connection see instructions of May 20, 1920 (47 L. D. 398).

It is to be noted that the case of *State of California* (40 L. D. 301) cannot properly be cited in support of the principle that an indemnity school land selection list cannot be amended by the substitution of valid base for invalid base in the face of a withdrawal, because there the land selected had been classified as mineral before equitable or legal title had passed, and under these circumstances no amendment of base could have been of help to the selection list. There was then (in 1911) no law providing for reservation of mineral deposits, other than coal, to the United States.

In *May v. State of Washington* (39 L. D. 377) it was held that amendment of an indemnity school land selection list by the substitution of valid base should be allowed in the face of an intervening homestead application and protest. It was said:

The regulations respecting the selection of school indemnity lands, as amended by the order of May 24, 1910, provide that where, through mistake or inadvertence, defective base is assigned in support of a selection, and proper care has been exercised by the officers of the State in making the selection, the State should be allowed an opportunity of amending its application by the substitution of good and sufficient base. It is shown by the affidavit of the State Commissioner of Public Lands, filed in this case, that the assigning of invalid base for the selection under consideration was due to inadvertence

and mistake by the clerical force in the office of the State's Public Land Commissioner, owing partially to the fact that the State's records have not heretofore been kept in an accurate and proper manner; that a new method is being devised whereby all mistakes may be discovered and corrected as soon as possible; and, finally, that the tender of invalid base was not made for the purpose of imposing upon the government of the United States by the making of selections which could not finally be approved, but that the State has been and is acting in entire good faith in the matter and in the honest endeavor to expedite the selection of lands granted to it by Congress.

It should be borne in mind that the present situation is unusual and without precedent. The Executive order of November 26, 1934, temporarily withdraws all vacant, unreserved, and unappropriated public land in Arizona, and other States, from settlement, location, sale, or entry, but is subject to existing valid rights. The Department is informed that the State of Arizona has numerous indemnity school land selection lists pending which were filed prior to November 26, 1934; that in many cases applications for amendment through the substitution of base lands have been filed since the date of the withdrawal order; and that the Commissioner has felt himself bound by the decisions of the Department to hold in all cases that the withdrawal barred amendment and even the completion of selection lists by the acceptance of certificates of non-encumbrance of the base lands where such certificates were not filed within three months after the filing of the selection lists.

If the decision appealed from is sustained, the State will be wholly deprived of the land which has been granted to it, at least temporarily. The lands which are offered as bases for selections have been disposed of by the Government or may never become available to the State for other reasons. The law provides that indemnity lands may be taken for the school sections lost, but through the withdrawal of all public lands, there is no indemnity land to be obtained.

In interpretation of this withdrawal order, in the Solicitor's opinion approved by the Secretary of the Interior, February 8, 1935, it is stated:

Of course, all valid entries are protected, and I believe also that all prior valid applications for entry, selection, or location, which were substantially complete at the date of the withdrawal should be considered as constituting valid existing rights within the meaning of the saving clause of the withdrawal order. Claims under the color of title act of December 22, 1928 (45 Stat. 1069), should likewise be regarded as valid existing rights when bona fide and substantial rights thereunder existed at the date of the withdrawal. I believe this protective provision should be generously applied. The public interest in particular tracts within the confines of the broad expanse thus withdrawn, is too inconsequential to justify the striking down of individual rights through technical construction or harsh application of the protective provision of the order.

Although it has been said that, in curing a defective base for an indemnity school land selection by amendment, the rights acquired thereby take effect only from the date when the defect is cured, it is not entirely clear how such a principle is applied. The selection is not regarded as void, because when amendment is allowed no new selection list is required to be filed, no new filing fee is required, it is not necessary that any new publication of notice be made, and no new nonmineral and nonoccupancy affidavit for the selected lands is required. In effect, then, there is the equivalent of an existing entry, which bars the acceptance of any other filing for the selected land. And the withdrawal in question may properly be interpreted as protecting such selection lists. This does not mean that all other withdrawal orders must be so construed, or that this decision overrules the decisions cited in the Commissioner's decision. It is noted that in this case the privilege of amendment had been accorded prior to the date of the withdrawal order. As the selection list in question is still of record as to the selections described, it has the force and effect of an entry, and amendment of base may be allowed.

The decision appealed from is

Reversed.

SOUTHERN PACIFIC LAND COMPANY

Decided April 22, 1935

MINING CLAIM—LODE APPLICATION—DEPICTION OF LINES OVER PATENTED LAND— EXPRESSLY EXCLUDED FROM APPLICATION—EFFECT.

The depiction of certain lines of a lode mining location over patented land on an official plat of mineral survey filed with an application for patent to the location, where the patented land is expressly excluded from the application, does not create a cloud on the patentee's title.

WALTERS, *First Assistant Secretary*:

The Southern Pacific Land Company has appealed from a decision of the Commissioner of the General Land Office dated November 8, 1934, dismissing its protest against mineral application, Sacramento 029312, M. S. 6145, made by Soren J. Eriksen for the Hawk Eye Quartz Mining Claim.

Mineral Survey 6145 shows a part of the west and north lines of the Hawk Eye claim laid over land in lot 8, Sec. 9, T. 45 N., R. 7 W., M. D. M. Lot 8 aforesaid was patented April 12, 1898, to the Central Pacific Railroad Company as part of an odd-numbered section which passed, under the grant of July 25, 1866 (14 Stat. 239), to its predecessor in interest, the California and Oregon Railroad Company. The Southern Pacific Land Company now claims title to this tract.

In the description of the Hawk Eye claim, as appearing in the published notice of application for patent and in the final certificate issued December 7, 1934, all portions of the ground embraced in lot 8, aforesaid, are expressly excluded from the application and entry respectively. Nevertheless, the protestant insists that the mineral survey is erroneous and void by reason of the extension of the lines and establishment of monuments of the claim upon said lot 8, and is an invasion of its property rights, and the mineral claimant should be required "to amend his location and survey by excluding therefrom that part thereof intruding into patented lot 8, or to substitute a new survey, limited to public lands, and amend his proceedings to acquire title to mineral lands to conform to such amended or substituted survey." The present survey and proceedings are declared to be a cloud on the protestant's title.

The Commissioner denied the protest on the authority of *Alice Lode Mining Claim* (30 L. D. 481) and *Mono Fraction Lode Mining Claim* (31 L. D. 121). In the case of the *Alice Lode* it was held:

The location lines of a lode mining claim may be laid within, upon, or across the surface of patented agricultural land for the purpose of claiming the free and unappropriated ground within such lines and the veins apexing in such ground, and of defining and securing extra lateral underground rights upon all such veins, where such lines (a) are established openly and peaceably and (b) do not embrace any larger surface, claimed and unclaimed, than the law permits.

This rule is similar to that prescribed in *Hidee Gold Mining Company* (30 L. D. 420), holding that the location lines of a lode claim, under the same conditions, may be laid over prior patented mining claims, and both rules are but an extension of the doctrine announced in *Del Monte Mining and Milling Company v. Last Chance Mining and Milling Company* (171 U. S. 55, 84), that the lines of junior lode claims may be laid over senior unpatented locations.

The application of the rule in the *Del Monte* case by the Department to locations made on patented agricultural claims has been followed in the courts of California and Colorado, and no conflicting ruling so far as the Department is aware has been made. See *Lindley on Mines*, Sec. 363a, where the rule is commended and discussed.

The cases cited and discussed in appellant's brief do not show the existence of an established practice to the contrary with respect to the recognition of lode claims whose lines are laid over patented lands. Appellant refers to the decision in *Grassy Gulch Placer* (30 L. D. 191), which held that there is no authority for placing the lines of placer locations within, upon, or across other claims embracing lands that had been patented or regularly entered. It will be observed, however, that in subsequent cases of *Mary Darling* (31 L. D. 64), *Rialto No. 2 Placer Mining Claims* (34 L. D. 44); and *Laughing*

Water Placer (34 L. D. 56), placer claims were allowed for a subdivision less what had been theretofore conveyed to others. The rule now followed is that stated in *Snowflake Placer* (37 L. D. 250), which permits locations of irregular-shaped tracts to be made, conforming to the boundaries of other claims, which eliminates the necessity of making locations in rectangular form for the purpose of securing the odd fractions not included in the boundaries of previous locations. But it has been recognized by the courts and the Department that the reasons which sanction the placing of lines of lode locations over those of a prior claim have no application to the location of placer claims. *Stenfjeld v. Espe* (171 Fed. 825, 828). See also Lindley on Mines, Section 448b.

The other Departmental decisions cited by appellant do not sustain its position and are clearly inapposite. In the *Robbins* case (42 L. D. 481) it was held that land patented under the Timber and Stone law was not subject to mineral entry. In the *Eyraud* case (45 L. D. 212) and the *Gould* case (51 L. D. 131) it was held that the mineral claimant could eliminate from his entry lands within the lines of a location embraced in the prior grant of a railroad right of way. In the *Bullington* case (51 L. D. 604) it was held that in the patent application the railroad right of way to the extent of conflict with the location should be eliminated from the claim. In the *Birch* case (53 L. D. 339, 340) the doctrine was reaffirmed that lands within the public grant of railroad right of way are not subject to location and entry under the mining law. All of these cases involved the question whether the land embraced in a patent or right of way grant could or should be included by description in a subsequent mineral entry.

In the present case the land patented to the railroad company is expressly excluded from the entry, and the Department is unable to see that the depiction of the lines of the location on the land owned by appellant on the official plat of mineral survey, in view of this express exclusion, creates even a semblance of claim by the mineral claimant to the land thus excluded. The appellant speaks of this location of the Hawk Eye claim as a segregation of the land within the claim from the remainder of Lot 8. There is no such segregation effected, and no reason to suppose that any erroneous segregation by another plat will be attempted.

The recitation of certain actions in three instances by the Commissioner of the General Land Office, set forth in appellant's brief, supplies no precedent for the action it requests. Examination of these cases shows that there were erroneous segregations made of mining claims from the remainder of certain subdivisions theretofore patented to the railroad company and resultant lottings of the remaining lands in such subdivisions. Upon attention being called

to the prior patent calling for the whole of the subdivision, such segregation plats were either canceled or supplemental plats prepared and accepted for the purpose of restoring the original subdivisions. In these cases there was mistaken survey procedure taken purporting to show that the railroad's title extended to less than the whole subdivision patented. In the present case no such thing is done.

The Commissioner's decision was right and is

Affirmed.

REGULATIONS TO GOVERN FILING OF APPLICATIONS FOR HOMESTEAD ENTRY UNDER SECTION 7, TAYLOR GRAZING ACT

[Circular No. 1353]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 16, 1935.

REGISTERS, UNITED STATES LAND OFFICES:

Section 7 of the act of June 28, 1934 (48 Stat. 1269), provides:

That the Secretary is hereby authorized, in his discretion, to examine and classify any lands within such grazing districts which are more valuable and suitable for the production of agricultural crops than native grasses and forage plants, and to open such lands to homestead entry in tracts not exceeding three hundred and twenty acres in area. Such lands shall not be subject to settlement or occupation as homesteads until after same have been classified and opened to entry after notice to the permittee by the Secretary of the Interior, and the lands shall remain a part of the grazing district until patents are issued therefor, the homesteader to be, after his entry is allowed, entitled to the possession and use thereof: *Provided*, That upon the application of any person qualified to make homestead entry under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract not exceeding three hundred and twenty acres in any grazing district to be classified, and such application shall entitle the applicant to a preference right to enter such lands when opened to entry as herein provided.

Any of the public lands within grazing districts which are more valuable and suitable for the production of agricultural crops than native grasses and forage plants may be classified and opened to homestead entry by the Secretary of the Interior after due notice to any permittee or permittees entitled to participate in the grazing use of the land.

Any person qualified to make an original or additional entry under either the General or Enlarged Homestead Law may file in the district land office his application to make homestead entry for con-

tiguous subdivisions of land which he is qualified to enter, together with the necessary filing fee and commissions, and the affidavits required by Circulars 1066 and 1231. The entire amount paid will be carried in the "unearned money" account and will be repaid by the register of the district land office if the application be not allowed. A qualified person may apply to enter as much as 160 acres under Sec. 2289 of the Revised Statutes or the General Homestead Law, or 320 acres under the Enlarged Homestead laws. All homestead applications hereunder must be accompanied by the applicant's petition in the form of an affidavit executed in duplicate and corroborated by at least two witnesses who are familiar with the character of the land. No blank forms of such affidavits or petitions are issued by this office, but for convenience in filing it is desired that they be prepared on sheets not over $8\frac{1}{2}$ x 11 inches in size. The petition should set forth in detail the character of each subdivision included in the application to make entry under this act and, if application is for an additional entry under the Enlarged Homestead Act, also of each subdivision in the original homestead entry. Petitions which are defective will be returned to the applicant for correction, or he may be required to furnish supplemental evidence concerning matters not discussed or which have not been described in sufficient detail. The petition should make full disclosures as to any water holes, springs or water supply developed or improved by the holder of any grazing permit or his predecessor in interest.

If the applicant seeks to make entry of nonirrigable land under the Enlarged Homestead Law and all or part of the land has not been designated under that law, the petition must set forth fully the conditions governing the irrigability of the land. If any part or parts thereof are irrigated, their location, area, source of water supply, and other pertinent facts should be stated. If any part or parts thereof are under constructed or proposed irrigation ditches or canals, or adjacent thereto, the relation of the same and the reasons for applicant's belief that the lands are not irrigable therefrom should be explained. The relation of the tract to surface streams or springs rising on or flowing across them or in their vicinity should be indicated. If such sources of water supply are inadequate for the irrigation of the applicant's lands, or are not available to him, full particulars should be given. The location and depth of wells, elevation of water plane relative to the surface, and other pertinent facts which will disclose the quantity and quality of the water supply, obtainable from either ordinary or artesian wells on the land, should be given. If there are no wells thereon such information should be furnished as to any other wells in that vicinity, and the possibility of irrigating the tract involved from

underground sources should be fully discussed. If any attempts have been made to irrigate and reclaim the tract, or if it has been included in a desert-land entry, the reasons for lack of success should be stated. Care should be exercised in the preparation of the petition, as inaccuracies and omissions will tend to retard action and may lead to rejection of the application.

In all cases of applications to make homestead entries of lands inside the grazing district, accompanied by the petition in duplicate for classification and opening of the land to homestead entry, such applications should be received, assigned a serial number, and noted upon your records, and one copy of the petition for classification and opening will be sent promptly to the Director, Division of Grazing, and the original papers will be sent to the General Land Office with your report of action taken. The Director, Division of Grazing, will cause proper notice to be given of the filing of such applications and petitions for classification to the grazing permittee or permittees or the proper officer of groups, associations, and corporations exercising privileges in the district. The Director of Grazing will make his reports and recommendations to the Commissioner of the General Land Office. If he recommends favorable action thereon, the Director of Grazing shall fix a date before which the land shall not be opened and subject to entry.

Where the Director of Grazing advises this office that he is unable to recommend classification of the land or some part thereof as subject to designation and opening to entry under the homestead laws, this office will, through the proper district land office, furnish the applicant with notice of the report and allow him 30 days from receipt thereof within which to file response. At the applicant's option he may either appeal from the finding to the Secretary of the Interior, alleging errors of law, or he may present further showing as to the facts by affidavit, accompanied by such evidence as is desired tending to disprove the adverse conclusion reached. Such appeal or response to adverse action of the Director of Grazing will be forwarded by you to this office. If the evidence submitted warrants it, favorable action may be recommended, or if the conclusion be still adverse, it will be transmitted to the Secretary of the Interior with report. The case will thereafter be considered as having the status of an appeal pending before the Secretary's office. In cases where the applicant fails to furnish a showing or to appeal from the order of this office requiring him to furnish it within the 30 days allowed, or where the Secretary refuses to classify and open the land, final action will be taken, and the case closed by this office. You will allow no such application until instructed to do so by this office.

The filing of an application for classification and opening of the land, accompanied by application to make homestead entry, does not give the applicant the right to occupy or settle upon the land applied for. If the lands are found to be more valuable for the growing of agricultural crops and are opened to homestead entry and the application to make entry has been allowed, the homestead entryman will have the right to take possession and use the land for the purpose of complying with the requirements of the homestead law, but the lands remain a part of the grazing district until the homestead claimant has fully met the requirements of the law and patent has issued to him.

Lands classified as subject to homestead entry under section 7 of the Act of June 28, 1934, shall be open to entry: *First*, by the qualified homestead applicant on whose application the lands were classified; *Second*, by qualified ex-service men of the War with Germany entitled to exercise preference rights conferred by Public Resolution No. 85, approved June 12, 1930 (46 Stat. 580); and, *Third*, by the general public. If entry by a person on whose application the lands were classified is allowed, other applications should be promptly rejected. Of the applicants for classification, only the one upon whose request the tract was classified secures the preference right. Other applicants for classification of the same tract acquire no right by virtue of their applications. While the preference right period of ex-service men of the War with Germany begins 90 days prior to the date of the opening of the lands to homestead entry, filings may be presented during the 20 days preceding such preference right period; that is, from the 110th day to the 90th day prior to the date of the opening, and such filings will be treated as simultaneously filed at 9 A. M. on the 90th day prior to the date of opening, in the manner provided by Circular No. 324, approved May 22, 1914 (43 L. D. 254). The filings of the successful ex-service applicant may therefore be allowed only in event the preference right application is not allowable on or after the date of the opening. Applications may be filed by the general public within 20 days prior to the date of opening, and treated as simultaneously filed at 9 A. M. on the date of the opening. Later applications should be received and suspended pending action on the prior application. If withdrawal of an application under Sec. 7 of the act of June 28, 1934, be filed, you will promptly notify this office thereof, inviting special attention to the pendency of the petition for classification and opening and you will close the case on your records. Prior to final action on his application, the applicant's homestead right will be in abeyance, and he will not be entitled to exercise

same elsewhere, nor will he be permitted to have two applications under this section of the act pending at the same time.

FRED W. JOHNSON, *Commissioner*.

I concur:

JOHN F. DEEDS,

Acting Director of Grazing.

Approved:

T. A. WALTERS,

First Assistant Secretary.

AMENDMENT OF EXECUTIVE ORDER NO. 6910, OF NOVEMBER 26,
1934, WITHDRAWING PUBLIC LANDS IN CERTAIN STATES

EXECUTIVE ORDER

WHEREAS Executive Order No. 6910, of November 26, 1934,* provides in part:

"it is ordered that all of the vacant, unreserved and unappropriated public land in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah and Wyoming be, and it hereby is, temporarily withdrawn from settlement, location, sale or entry, and reserved for classification, and pending determination of the most useful purpose to which such land may be put in consideration of the provisions of said act of June 28, 1934, and for conservation and development of natural resources"; and

WHEREAS it is doubtful whether the said Executive order applies to tracts subsequently released from prior entry, selection, claim, withdrawal, or reservation; and

WHEREAS in the administration of the said act of June 28, 1934 (48 Stat. 1269), it has been found expedient and necessary to permit consummation of exchanges of lands pursuant to the provisions of section 8 of the act:

Now, THEREFORE, by virtue of and pursuant to the authority vested in me by the act of June 25, 1910 (ch. 421, 36 Stat. 847), as amended by the act of August 24, 1912 (ch. 369, 37 Stat. 497), and by the said act of June 28, 1934, the said Executive Order No. 6910, of November 26, 1934, is hereby amended so as (1) to make it applicable to all lands within the States mentioned therein upon the cancelation or release of prior entries, selections, or claims, or upon the revocation of prior withdrawals unless expressly otherwise provided in the order of revocation; and (2) to authorize the Secretary of the Interior, in his discretion and in harmony with the purposes of the said act of June 28, 1934, to accept title to base lands in exchange

* See 54 I. D. 539.

for other lands subject to such exchange under the terms of the said act.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
May 20, 1935.

**MODIFICATION OF EXECUTIVE ORDER NO. 6957, OF FEBRUARY 4,
1935, WITHDRAWING PUBLIC LANDS**

EXECUTIVE ORDER

ALASKA

By virtue of and pursuant to the authority vested in me by the act of June 25, 1910 (ch. 421, 36 Stat. 847), as amended by the act of August 24, 1912 (ch. 369, 37 Stat. 497), it is ordered that Executive Order No. 6957, of February 4, 1935, withdrawing certain public lands in Alaska, be, and it is hereby, modified so as to permit settlement upon the said lands.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
May 20, 1935.

DEPOSITING PUBLIC MONEYS

[Circular No. 1354]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 31, 1935.

REGISTERS, UNITED STATES LAND OFFICES:

Whenever there is no general United States depository in the same town with a fiscal officer it is necessary for him to transmit all cash received to the Federal Reserve Bank of the district or the nearest branch bank, and the Comptroller General has prescribed the purchase of post office money orders as the means of transmittal. Payment of the fees may be made direct to the postmaster on Form 1034 or by reimbursement to the fiscal officer on the same form. The former method will generally require special instructions from the Postmaster General and the latter seems the more practicable. Therefore those registers who have no local depository available will follow the instructions below quoted from Comptroller General's decision A-44007 of May 11, 1935:

If the purchase of money orders is infrequent and the employee is willing to advance his personal funds for the payment of the fee, he may claim reim-

bursement therefor on Standard Form No. 1034, on which will be listed in the blank space provided for "Articles or Services" each money order purchase according to date, money order number, and amount, and in the "Amount" column will be entered the amount of each money order fee. The receipts issued with the money orders will be attached to the original voucher in support thereof.

ANTOINETTE FUNK,
Assistant Commissioner.

**DETERMINATION OF HEIRS AND APPROVAL OF WILLS OF INDIANS
EXCEPT MEMBERS OF THE FIVE CIVILIZED TRIBES AND THE
OSAGES**

[REGULATIONS]

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, D. C., May 31, 1935.

DETERMINATION OF HEIRS

Section 1 of Act of Congress approved June 25, 1910 Section 1 of Act of June 25, 1910.
(36 Stat. 855), provides in part:

That when an Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee-simple patent, without having made a will disposing of said allotment as herein-after provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive.

SECTION 1. There shall be appointed as many examiners of inheritance as may be needed, at such compensation as may be authorized by the Secretary of the Interior. Examiners of inheritance.

SEC. 2. Examiners may be allowed clerical and such other assistance as the Secretary of the Interior deems necessary to expedite business. Clerical assistance.

SEC. 3. The Secretary of the Interior shall divide the Indian country into probate districts and shall assign to each district an examiner of inheritance with the necessary clerical and other assistance. Probate division.

SEC. 4. In the absence of an examiner of inheritance, the superintendent or other officer in charge, or some clerk designated by the Secretary of the Interior to act as special examiner of inheritance, may issue notices of such hearing, take the necessary testimony, and prepare Action in absence of examiner.

the record for final action. All such reports shall be submitted through the examiner of inheritance for that district, for approval by him and submission to the Washington office.

Expedition of cases.

SEC. 5. It is imperative that all heirship cases be disposed of as rapidly as possible and the examiner of inheritance, upon assuming his duties at a particular agency, shall proceed to hold hearings in the pending cases and submit the records, together with recommendations, to the Washington office, as soon as possible after such hearings.

In order to expedite the hearing of cases, it shall be the duty of the superintendent in charge of any allotted reservation, as soon as he is informed of the death of an allottee or other Indian possessed of trust property within the agency, to cause to be prepared an inventory showing in detail the estate of the decedent (original allotment, inherited estate, and personal property, including trust funds), and also a certificate of appraisal thereof, and statement as to reimbursable claims and whether or not decedent left a will, all of which shall be retained in decedent's file at agency headquarters for use of the examiner of inheritance. This does not relieve the examiner of responsibility for a correct inventory and valuation.

Notice of hearing.

SEC. 6. Having selected an estate for an early hearing, the examiner of inheritance shall post for 20 days in five or more conspicuous places on the reservation or in the vicinity of the place of hearing, notices of time and place that he will take testimony to determine the legal heirs of the deceased Indian (naming him), and calling upon all persons interested to attend the hearing.

Examination of records.

SEC. 7. Prior to the hearing the examiner shall carefully inspect the allotment, census, annuity rolls, and any other records on file at the agency, and obtain all other information which may enable him to make a prima facie list of the heirs of such deceased Indians, but only in contested cases or in cases involving material conflict between the records and the evidence shall it be necessary for the examiner of inheritance to prepare and forward with his report exact copies of such census, annuity rolls, or other records.

Personal or mail service on interested parties.

SEC. 8. A written notice of the proposed hearing, giving full information as to the estate, names of alleged claimants, time and place of hearing, shall be served per-

sonally on each claimant, or presumptive heir, living on the reservation, if he can be found; and on those living off the reservation by mail, addressed to them at their last known place of residence, when their rights are clearly shown. The notices shall be so given by either ordinary or registered mail as in the discretion of the examiner the circumstances may require, and an acknowledgment of personal service signed by such presumptive heir shall in all instances be sufficient. In all contested cases service of notice on heirs living off the reservation must be shown before hearing had. Such notices must be sent a sufficient time in advance of the date of hearing to enable the claimants to attend.

SEC. 9. A copy of each notice to a claimant or presumptive heir endorsed by the person serving the same on the party to whom addressed that a copy of the within notice was delivered to him personally at the place named and on day stated; or an affidavit or copy of the notice endorsed by the claimant or presumptive heir that service was accepted on the day and at the place stated; or an affidavit by the person mailing the notice that a copy of said notice was mailed to the interested party at his last known post-office address, postage prepaid, or a registry receipt card must be filed with the record of every case.

Proof of service especially important.

SEC. 10. Unless a full 20-day notice has been given, no hearing shall be held except by special permission of the Commissioner of Indian Affairs: *Provided, however,* That in cases involving no contest the parties in interest may appear before the examiner and waive their right to said 20-day notice, and the examiner, in that event, is authorized to proceed with the taking of testimony; the same to be withheld until the time of hearing, when it shall be read aloud to permit any interested persons present to offer any objections thereto. In case no objections are offered at the hearing the examiner will proceed to hear the case in the usual manner.

Full notice must be given.

SEC. 11. To determine the heirs of fourth-section allottees, or of Indians whose trust or restricted property is not within the limits of any reservation, the examiner of inheritance shall designate as the place of holding his hearings some central point easily accessible to as large a group of claimants as possible, and shall adhere to the rules governing such hearings on the reservation. He

Hearings outside of an Indian reservation.

will be allowed all reasonable expenses in procuring the necessary quarters for such purpose.

Minors represented at hearings.

SEC. 12. Minors in interest must be represented at the hearings by a natural guardian or by a guardian *ad litem*, appointed by the examiner.

Care of personal property pending administration.

SEC. 13. When an Indian of any allotted reservation dies leaving personal trust property, other than money, and leaving more than one heir at law, but no will, the superintendent shall authorize and instruct some competent person to take possession of such property. If the same consists of nonperishable goods, it shall be stored in a secure place under lock. If perishable, the goods shall be sold at public auction, under official supervision, to the highest bidder, and the proceeds deposited to the credit of the estate. If such personal property consists of livestock, it may be left in the possession of a member of decedent's family or other trustworthy person, under arrangement whereby such person may have the use thereof during the time it remains in his possession, such as the privilege of working horses or milking cows, in exchange for care and herding. If such arrangements cannot be made for livestock, the same shall be sold at public auction, under official supervision, and the proceeds deposited to the credit of the estate. If the heirs as found cannot agree upon a proper division of such personal property, it shall be sold at public auction and the proceeds distributed in accordance with the law of descent. Any expense attaching to the rounding up of stock or the preservation of such property shall be paid from the receipts of such sale or, if no sale is made, shall be a proper charge against the estate.

The provisions of this section shall apply to Indians holding a homestead allotment upon the public domain or an interest therein.

Wills of personal property.

SEC. 14. The next above regulation (sec. 13) shall apply to personal property bequeathed by will but not specifically to individuals. The word "heirs" shall be construed to include legatees and beneficiaries. When personal property is bequeathed to an individual, such legatee may be given possession thereof upon the death of the testator, upon his signing an agreement to return such property or the appraised value thereof in the event the will is disapproved. The superintendent may, in his discretion, require a bond. The same rule may be followed where decedent leaves but one probable heir.

SEC. 15. Parties interested in any probate case before an examiner of inheritance may appear by attorney. Attorneys.

SEC. 16. Whenever objection is made by an attorney to a question or answer, the objection shall be noted on the record by the examiner of inheritance. Objections, how noted.

SEC. 17. Attorneys must appear before the examiner of inheritance, the Indian Office, or the Department of the Interior, by a power of attorney from their respective clients and must be licensed attorneys admitted to practice. Qualifications.

The fact that an attorney is permitted to practice in the local courts of the State where the hearing is being held, shall be taken as prima facie evidence that he is a duly licensed attorney.

Attorneys appearing in probate matters will be required to adhere to the rules of evidence of the State in which the evidence is taken, in presenting their cases. Procedure.

SEC. 18. Attorneys may also appear before the Indian Office or the Department and submit written arguments or briefs on behalf of their clients. Where there are two or more parties with conflicting interests represented by counsel, the attorney upon whom the burden of proof may fall will be allowed a reasonable time, not to exceed 30 days following the conclusion of the hearing, in which to file his brief and serve a copy on opposing counsel or litigant. The latter will then be allowed not to exceed 30 days in which to file a reply brief. Upon proper showing an extension may be allowed. Attorneys may appear before the Department.

SEC. 19. The examiner shall summon all persons claimant to appear and testify at the hearings. Present at the hearing must be at least two disinterested witnesses, who are acquainted with and have direct knowledge of the family history of decedent. By personal investigation prior to the hearings he should thoroughly acquaint himself with records and as far as practicable with the kind and value of the testimony which should be taken, so that only material witnesses shall be summoned. Time limit for service of briefs.

In case the decedent is a minor, unmarried, and without issue, and the heirs are members of the immediate family of the decedent, the examiner may, in his discretion, dispense with the presence of disinterested witnesses, provided the testimony of the interested witnesses is corroborated by the records of the Department, and in such instance the examiner shall include in the record Attendance of witnesses.

Disinterested witnesses in minor's estate.

his certificate to such effect together with specific reference to the records or cases furnishing such corroboration.

Hearing and testimony.

SEC. 20. The examiner shall proceed to hear the case under such conditions as he may establish for the convenience and expedition of the case. The witnesses shall be examined on oath; their testimony shall be reduced to writing and signed at the end thereof. Any claimant may cross-examine a witness. If, in addition to oral testimony, affidavits or depositions are introduced, they must be read, and any opposing claimant may require the presence of the affiant, if practicable, either at that or a subsequent hearing, and opportunity shall be given for cross-examination or for having counter interrogatories answered. All statements, testimony, and affidavits at the hearing must be made a part of the record.

Subsequently discovered property.

SEC. 21. When subsequent to the determination of heirs by the Department, property is found which is not included in the examiner's report, this fact shall be brought to the attention of the Commissioner, together with an appraisal thereof. The superintendent will then be instructed to include this property in the original findings with instructions as to any additional fee to be charged. However, where newly discovered property takes a different line of descent from that shown by the original findings, a redetermination relative thereto must be ordered and had.

Summary distribution.

SEC. 22. When an Indian of any allotted reservation dies leaving only personal property or cash of a value less than \$250, the superintendent of the reservation where the property is found shall assemble the apparent heirs and hold an informal hearing with the view to the proper distribution thereof. A memorandum covering the hearing shall be retained in his files showing the date of death of decedent, the date of hearing, the persons notified, the persons attending, the amount on hand and the disposition thereof. In the disposition of such funds the superintendent shall have in mind the payment of funeral charges and expense of last illness, any just claims for necessities furnished decedent, and the balance, if any, should be credited to the heirs as shown.

Oaths, authority to administer.

SEC. 23. Examiners of inheritance are authorized to administer oaths in investigations committed to them.

Witnesses, care in summoning.

SEC. 24. Examiners must carefully avoid all unnecessary expenses and see that there is no excess number of

witnesses to any material fact. A careful working up of the case before the hearing will enable the examiner to handle it inexpensively as well as conclusively.

When the evidence is clear, in uncontested cases, the examiner may, in his discretion, limit the number of witnesses who are formally examined. When the case is established beyond doubt and to the satisfaction of the examiner, he may eliminate further testimony by securing a statement from additional witnesses present that the testimony as given is fully understood by them and that the same is true.

Limiting number of witnesses.

SEC. 25. In case witnesses are wanted whose testimony the examiner knows is material, and such witnesses refuse to attend, the examiner should use all possible means to procure the attendance of such witnesses, and upon persistent refusal the matter should be reported to the Indian Office.

Compulsory attendance of witnesses.

SEC. 26. Witnesses are expected to testify without compensation, but, when necessary, expenses must be paid by the party calling them. If the examiner is satisfied that material evidence from disinterested persons should be procured, any expense thereof will be paid by the superintendent from the funds of the party calling such witness. When interested parties are unable to obtain disinterested witnesses for lack of funds, the examiner may, in his discretion, allow the sum of \$2 each to pay not to exceed two disinterested witnesses, and the superintendent is authorized to pay said sums from the instant estate, immediately, if funds are available. On determination of the heirs or final action on the will, said sums will be charged against the person or persons in whose behalf said witnesses were called, unless such persons do not participate in the estate, in which event the charge will be made against the instant estate.

Witnesses' fees; who is to pay.

SEC. 27. At the conclusion of all the proceedings a prompt report must be submitted on form 5-107 and the instructions contained therein, both on sheet 1 as to "estate, so far as known, under Government control", and the instructions on the reverse side of sheet 3 must be followed; and in each instance all the information indicated in the blank concerning the immediate family of the decedent should be shown regardless of who are the heirs, except that in case the records of the Department already show such family history and relationships,

Report and its essential features.

the examiner may, in his discretion, dispense with testimony covering relationships not material to the instant estate.

Contents of record.

The record must contain: (*a*) Copy of public notices of hearing and notice to creditor claimants; (*b*) copy of notice to heir or heirs; (*c*) proof of service of notice; (*d*) testimony taken at hearing; (*e*) affidavits and depositions produced at hearing; (*f*) certified copies of marriage records and decrees of divorce, if filed; (*g*) all papers and memoranda of the hearing; (*h*) names of all persons in interest at the hearing; (*i*) statements of reasons for absence of interested parties, if obtainable; (*j*) certificate of appraisement; (*k*) statement as to whether the decedent lived on his allotment and whether any portion of same could be termed a homestead. Where a homestead right is involved, this fact should be fully set out in the finding. If the homestead is limited in value by the law of the State governing descent, an additional certificate of appraisement showing separately the value of the lands claimed as a homestead, and the improvements thereon, should be furnished; (*l*) the record must also be accompanied by the proper write-ups for the signature of the signing officers of the Indian Office and Department in accordance with established practice; (*m*) a duplicate record of the case shall be made and kept in the agency files, to which must be attached a carbon copy of the approved office recommendation and departmental finding when received; (*n*) in all cases in which the heirs of a decedent are to be determined, the examiner shall include in his report, in the Summary of Report on Heirs, the citations to the sections of the State statutes under which the determination is made.

Cases to be kept separate.

SEC. 28. To avoid confusion in the general files of the Indian Office by reason of the consolidation of several heirship cases under one file, each heirship case must be made complete within itself independent of any other such case. When the same evidence is applicable to more than one case, sufficient copies of the evidence should be made for all the cases, the correctness of the copies to be certified by the officer conducting the hearing, together with the reference to the case in which the original evidence is to be found.

Prompt report on cases.

SEC. 29. Thoroughness in completing each case is essential to careful and effective progress in the work, and a prompt report of each completed case without any de-

lay in awaiting others which may be nearly complete will expedite the work in the Indian Office and enable it to keep the calendar practically up to date. A case must be promptly forwarded as soon as it is ready for office action, except where there are related cases of the same family group, and not held until other partially completed cases are ready.

SEC. 30. Supplemental hearings should be held on heirship cases returned from the Indian Office for further evidence on material questions of fact, upon such notice as will give parties in interest opportunity to appear; in no case shall such notice be less than 5 days. This shall also apply to supplemental hearings held by the examiner prior to the submission of the case to the Indian Office. This section does not apply to cases returned for clerical corrections or for additional data, which can be supplied from the records of the agency office.

Supplemental
hearings.

SEC. 31. Any aggrieved person claiming an interest in the trust or restricted property of an Indian, who has received notice of the hearing to determine heirs or consideration of a will, or who was present at the hearing, may file a motion for rehearing within sixty (60) days from the date of notice on him of the determination of heirs or action on a will, or within such shorter period of time as the Secretary of the Interior may determine to be appropriate in any particular case. A motion so filed shall act as a supersedeas until otherwise directed by the Secretary of the Interior.

Rehearings.

Any such motion must state concisely and specifically the grounds upon which the motion for rehearing is based and be accompanied by brief and argument in support thereof.

If proper grounds are not shown the rehearing will be denied. If upon examination grounds sufficient for rehearing are shown, a rehearing will be granted and the moving party will be notified that he will be allowed fifteen days from receipt of notice within which to serve a copy of his motion, together with all argument in support thereof, on the opposite party or parties, who will be allowed thirty days thereafter in which to file and serve answer, brief, and argument. Thereafter the case will be again considered and appropriate action taken, which may consist either in adhering to the former decision

or modifying or vacating same, or the making of any further or other order deemed warranted.

Reopenings.

SEC. 32. No case in which the decision of the Secretary of the Interior approving or disapproving an Indian will, or determining the heirs of a deceased Indian, has become final, will be reopened at the petition of any person who received notice of the hearing on the determination of heirs or consideration of the will, or who was present at such hearing, and received notice of such final decision, except as provided in section 31.

Any other aggrieved person, claiming an interest in the trust or restricted estate of a deceased Indian whose heirs have been previously determined by a final decision of the Secretary of the Interior, may apply for reopening of the case by petition, in writing, addressed to the Secretary of the Interior, to be submitted through the Commissioner of Indian Affairs. All such petitions must set forth fully the alleged grounds for reopening, and when such petitions are based on alleged errors of fact, should be accompanied by affidavits or other supporting evidence. On receipt of such petition, the Commissioner of Indian Affairs, if he deems it essential, will give the previously determined heirs an opportunity to present such showing in the matter as they may care to offer. Thereafter, the petition, together with the other record in the case, will be submitted to the Secretary of the Interior with such recommendation in the premises as the Commissioner of Indian Affairs may deem appropriate. Aside from filing the papers specifically referred to, no further proceedings by the respective parties will be required prior to a determination by the Secretary of the question whether a reopening will be granted or not.

Petitions for reopening will not be considered when 10 years or longer have elapsed since the heirs were previously determined nor in those cases in which the estate of the decedent or any considerable part thereof has been disposed of under the previous finding of heirs. Claims for expenses, attorneys' fees, etc., in connection with petitions for reopening will not be considered or recognized prior to a determination of the question whether or not a reopening is to be had, and neither the estate of the decedent nor the determined heirs thereto will be subject to any expense incurred prior to allowance by the Secretary of a reopening of the case.

SEC. 33. Section 2, Act of February 11, 1913 (37 Stat. 678), provides that: "When 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 1 year after the death of the testator, to cancel the approval of the will." Consistent with the said Act of February 14, 1913, the provisions of sections thirty-two (32) and thirty-three (33) hereof, shall be applicable to all proceedings relative to applications for reopening or rehearing of cases involving the approval or disapproval of an Indian will. Rehearing on wills.

SEC. 34. After a reopening has been granted the matter will then be referred by the Commissioner of Indian Affairs to an examiner of inheritance or other field employee of the Indian Service for a hearing on such petition, due and proper notice to be given to all parties in interest, such hearing and the taking of further testimony in the case to be conducted in the same manner as provided for by these regulations in an original case. Procedure.

SEC. 35. Upon a determination of the heirs to any trust or restricted Indian property of the value of \$250 or more, or to any allotment, or, after approval by the Secretary of the Interior, of any will covering such trust or restricted property, there shall be paid by (1) such heirs, or (2) by the beneficiaries under such will, or (3) from the estate of the decedent, or (4) from the proceeds of sale of the allotment, or (5) from any trust funds belonging to the estate of the decedent, the fee provided for by existing law, which amount shall be accounted for and paid into the Treasury of the United States. Superintendents are instructed to collect the required fee immediately after the receipt of the determination of heirs, or approval of will, by the Secretary of the Interior. Fees to be paid by heirs.

If the decedent has trust funds of any description on deposit under governmental control, the superintendent will sign and approve a check for the required fee. If there are no available funds belonging to the estate but the heirs have funds to their credit, the superintendent will call upon each of said heirs to pay his proportionate part of the fee. Payment of probate fees.

Schedule of fees.

The fees to be charged and paid are as follows: On estates appraised at—

\$250 and not exceeding \$1,000.....	\$20
Over \$1,000 and less than \$2,000.....	25
\$2,000 and not exceeding \$3,000.....	30
Over \$3,000 and not exceeding \$5,000.....	50
Over \$5,000 and not exceeding \$7,500.....	65
Over \$7,500.....	75

All probate fees shall be accounted for by the disbursing officers and deposited to the credit of the United States as "Miscellaneous receipts, class 1."

Notice to creditors of estates.

SEC. 36. The notice mentioned in section 6 hereof shall also be directed "To all persons having claims or accounts against decedent", and when any such claims have been, prior to the date of hearing by the examiner, filed with the superintendent, and the claimant may be known, service of such notice of hearing shall be made upon such claimant by mail or otherwise in the discretion of the examiner of inheritance.

Filing claims.

Persons having claims against the estates of deceased Indians may file same with the superintendent at any time after the death of the decedent and up to the time of hearing by the examiner. Except for very cogent reasons no claim will be given consideration if filed after the date of such hearing.

Statute of limitations.

Claims, other than by Indians, against estates of deceased Indians, that have existed for more than the period prescribed by the State statute of limitations, will not be allowed in any case.

Indian claims against estates.

Indians may submit claims against estates of deceased Indians at the hearing and subject themselves to examination under oath relative thereto. All other claims against the estates of deceased Indians must be filed in duplicate and must be itemized and all dates given. Such claims must be supported by affidavit of the claimant or someone in his behalf, that the amount is justly due from decedent; that no payments have been made that are not credited thereon that were not in fact made; and that there are no offsets to the same to the knowledge of affiant.

Affidavit to claims.

Appearance at hearing.

Any person who has filed a claim against the estate of a deceased Indian must, if so directed by the examiner, either at the hearing or at a supplemental hearing for this purpose, present himself for examination thereon.

Claims against the estates of deceased Indians may be allowed (1) if based upon a debt contracted by the decedent and authorized during his lifetime by the superintendent, (2) if for last illness or funeral expenses in reasonable sums, (3) if just, and there is no legal bar thereto, (4) if elsewhere herein authorized and not prohibited. When claims allowed.

Except for very cogent reasons, failure to comply with the provisions of this section will bar recovery against the estate of a deceased Indian.

The examiner of inheritance may request the recommendation of the superintendent relative to all claims against estates of deceased Indians, and the superintendent's recommendation thereon must be submitted to the Washington office with the examiner's report and findings. Superintendent's recommendation.

All claims against the estates of deceased Indians shall be considered exclusively probate matters until the order determining heirs or action on the will is concluded by the Secretary of the Interior. All claims to probate division.

Sec. 37. Any attorney claiming a fee against an Indian or an Indian estate for services rendered as such in any probate proceedings shall be entitled to such compensation as his services are reasonably worth, the amount thereof to be fixed by the Secretary of the Interior. Attorney fees.

APPROVAL OF WILLS

Section 2 of the Act of June 25, 1910 (36 Stat. 855), as amended by the Act of Congress approved February 14, 1913 (37 Stat. 678-679), provides: Sec. 2, Act of June 25, 1910, as amended by Act of Feb. 14, 1913.

That any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided, however,* That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: *Provided further,* 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: *Provided further*, That the approval of the will and the death of the testator shall not operate to terminate the trust or restrictive period, but the Secretary of the Interior may, in his discretion, cause the lands to be sold and the money derived therefrom, or so much thereof as may be necessary, used for the benefit of the heir or heirs entitled thereto, remove the restrictions or cause patent in fee to be issued to the devisee or devisees, and pay the moneys to the legatee or legatees, either in whole or in part from time to time as he may deem advisable, or use it for their benefit: *Provided also*, That sections one and two of this Act shall not apply to the Five Civilized Tribes or the Osage Indians.

Section 4 of the Act of June 18, 1934, provides that:

Section 4, Act
of June 18,
1934.

Except as herein provided, no sale, devise, gift, exchange, or other transfer of restricted Indian lands or shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: *Provided, however*, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs of such member: *Provided further*, That the Secretary of the Interior may authorize voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in his judgment, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

Wills, how
filed for ap-
proval.

SEC. 38. The will of any Indian who may make such an instrument shall be filed with the superintendent. When the will is prepared by the superintendent or examiner of inheritance or other employee of the Indian Service it shall be prepared on the printed form furnished by the Indian Office. The officials shall aid and assist the Indian as far as possible in the drawing of the instrument so that it will clearly and unequivocally express his wishes and intentions. Statements, preferably under oath, by the person drawing the will and the witnesses thereto that the testator was mentally competent and that there was no evidence of fraud, duress, or undue influence in connection therewith should be attached to the instrument. Where evidence of fraud, duress, or undue influ-

ence exists a detailed statement should accompany the will setting forth the nature and extent thereof.

SEC. 39. The will should state (1) name, age, residence, and tribe of the Indian; (2) names, ages, tribe, and relationship of the devisees; (3) the specific description of the trust or restricted lands which the testator is attempting to dispose of shall be so made that the same can be identified; (4) the name of the person to whom such trust or restricted land was allotted, if known, or the legal description or other information tending to identify the same; (5) in case of personal property a description of the property bequeathed which will enable the Indian Office to identify it; (6) and signed at the end thereof by the maker in his own handwriting, if he can write, otherwise by thumb print (preferably) or by mark, and in all cases to be witnessed by two or more adult witnesses who can write. No alleged nuncupative or oral will shall be recognized or considered, nor will any rights of an executor be extended to trust property.

Wills, form of.

Before transmitting the case to the Washington office, the examiner shall identify all tracts of land mentioned in the will if any question as to the identity thereof might arise and shall indicate the legal description of the various tracts in his report, form 5-107.

SEC. 40. The above form prescribed for wills must be adhered to strictly, except when the will is filed with the examiner or other officer after the death of the testator, or is made under circumstances which make it impracticable to use the prescribed form, as in cases of extreme sickness or when delay would defeat the purpose of the maker. Examiners must endeavor in all cases where practicable to insist and see that the regular form of will is followed.

Form must be used when practicable.
Exception.

When wills are drafted for restricted Indians by superintendents or other Government employees, it is desirable that the form prescribed by the State laws be followed as nearly as possible. This would apply to the number of witnesses, attestations, etc. It should be understood, however, that failure of the Indians to conform to the State laws in this respect does not invalidate the will. In passing on the wills of deceased Indians, as to approval or disapproval, this Department is not bound by the laws of the State having jurisdiction over the estate of decedent. However, upon approval of a will

the Department, in construing the same or in interpreting the terms, will follow the laws of the State wherever applicable.

Report to accompany wills to Indian Office.

SEC. 41. The examiner, superintendent, or other officer, before submitting a will, shall inquire fully into the mental competency of the Indian; the circumstances attending the execution of the will; the influences which induced its execution; and the names of those entitled to share in the estate under the State law of descent. And when the distribution proposed by the will is contrary to the laws of the State in which the testator resides, and the estate is disposed of in whole or in part to a person or persons who would not otherwise inherit, the best available evidence should be obtained as to the reasons for such action. If the testator is living, his own affidavit as to the reasons for disinheriting the natural or lawful heirs should be obtained. The competency of all devisees and legatees to manage their own affairs should be investigated, and note should be made if any beneficiary under the will is a person not of Indian blood. The examiner or superintendent in submitting the will of a deceased Indian should make a specific recommendation as to whether the will should be approved or disapproved by the Secretary.

Validity of will; how established.

SEC. 42. No will executed in conformity with the above Act of February 14, 1913, shall be valid or have any force or effect so far as it relates to property under the control of the United States, unless and until it shall have been approved by the Secretary of the Interior, who may approve or disapprove the will after a due and proper hearing to determine the heirs to the estate of the testator or testatrix shall have been held, required notice of such hearing first having been given to all persons interested, including the presumptive legal heirs, so far as they may be ascertained, and at which hearing the circumstances attendant upon the execution of said will shall have been fully shown by proper and credible testimony, and after the legal heir or heirs have had ample opportunity to object to the will and its approval. The examiner must procure the testimony of attesting witnesses to the will or explain the absence of such testimony. When such witnesses are not available, their signatures or thumb marks, if possible, must be identified. The Commissioner of Indian Affairs or the Secretary of the Interior may require additional information to be

procured if it is deemed necessary to the proper determination of the case.

SEC. 43. Hereafter action on wills will not be had until after the death of the testator, and where a will has been executed and filed with the superintendent during the lifetime of the testator, the same should be sent to the Indian Office, which office will pass upon the *form* of the will and return the same to the superintendent with instructions to hold same until the death of the allottee, when the will should be resubmitted for consideration unless the Indian in the meantime should execute another will or otherwise revoke it.

Practice of submitting wills before death of the maker.

SEC. 44. In the case of a will to which the attesting witnesses have made affidavits at the time the will was executed, or prior to the hearing, if there is no contest, the examiner may, in his discretion, dispense with their presence. However, in all cases in which any contest develops, it is imperative that the attesting witnesses appear at the hearing, or their absence be satisfactorily explained.

Attesting witnesses.

Every Government employee who shall assist in or supervise the making of a will, must secure from the testator an affidavit setting forth, among other matters, his relationship to the devisees and whether or not they are members of the tribe having jurisdiction over the lands devised. When possible, the affidavit should also contain testator's reasons for making such devises, particularly when the immediate relatives are given little or nothing. When known, the devisees should be given their respective relationship and designated by tribe and allotment number.

Affidavits of testator.

SEC. 45. In the preparation of a will, Government employees must keep in mind, in addition to other matters, the following important details:

1. Under the Indian Reorganization Act an Indian may bequeath his personal property, save shares in a tribal corporation, to whomever he desires. His real property and shares in a tribal corporation may be given only to his heirs, to members of the tribe having jurisdiction over the property, or to the tribe or tribal corporation.

To whom devises may be made.

2. Whenever possible the interpreter at the making of a will should be a disinterested person, and the testator should be fully informed of all the property he may possess, as shown by the agency records.

Interpreters.

Fully inform testator.

Residuary clause.

3. After the making of specific devises and bequests, care should be taken to provide for the disposition of the residue. The regular form of will supplied contains a residuary clause, and should always be used whenever practicable.

No wills to be executed in blank.

4. No will shall be executed in blank. The addition of descriptions of property or names of devisees after the will is signed by the testator is not permitted. The witnesses must sign at the time same is signed by the testator. The will must be complete when it leaves the testator's presence, and additions thereafter will invalidate it.

Fees for approval of wills.

SEC. 46. For fees to be paid for the approval of wills, see section 36 of these regulations, substituting the word "beneficiary" or "beneficiaries" for "heir" or "heirs" thereon.

Excepted tribes.

SEC. 47. These regulations shall not apply to the Five Civilized Tribes nor Osage Nation in Oklahoma; nor shall they apply to any tribe organized under section 16 of the Act of June 18, 1934, insofar as the constitution, bylaws, or charter of such tribe may be inconsistent with any of the foregoing regulations.

JOHN COLLIER, *Commissioner.*

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

OIL SHALE WITHDRAWAL MODIFIED TO ALLOW SODIUM PROSPECTING PERMITS AND LEASES

[Circular No. 1220 modified]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 4, 1935.

REGISTERS, UNITED STATES LAND OFFICES:

By Executive Order (No. 7038) of May 13, 1935, Executive Order (No. 5327) of April 15, 1930, withdrawing certain lands for purposes of investigation, examination, and classification, was modified to the extent of authorizing the Secretary of the Interior to issue sodium permits and leases under the General Leasing Act of February 25, 1920 (41 Stat. 437), as amended by the Act of December 11, 1928 (45 Stat. 1019), for and of any of the lands withdrawn by said order.

Circular No. 1220 of June 9, 1930 (53 I. D. 127), is accordingly modified to conform to the later Executive order and you are authorized to accept applications for sodium prospecting permits and leases for lands withdrawn under Executive Order No. 5327.

You will make appropriate notations on your records concerning the modification.

FRED W. JOHNSON, *Commissioner.*

Approved:

T. A. WALTERS,
First Assistant Secretary.

**PUBLIC LAND WITHDRAWAL—AMENDMENT OF EXECUTIVE
ORDER OF MAY 20, 1935**

INSTRUCTIONS

[Circular No. 1357]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 8, 1935.

REGISTERS, UNITED STATES LAND OFFICES IN ARIZONA, CALIFORNIA,
COLORADO, IDAHO, MONTANA, NEVADA, NEW MEXICO, NORTH
DAKOTA, OREGON, SOUTH DAKOTA, UTAH, WYOMING:

SPECIAL AGENTS IN CHARGE, DIVISION OF INVESTIGATIONS:

Executive Order No. 6910, of November 26, 1934, provides in part:

it is ordered that all of the vacant, unreserved, and unappropriated public land in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, and Wyoming be, and it hereby is, temporarily withdrawn from settlement, location, sale, or entry, and reserved for classification, and pending determination of the most useful purpose to which such land may be put in consideration of the provisions of said act of June 28, 1934, and for conservation and development of natural resources.

Doubt having arisen as to whether said Executive order applies to lands reserved or otherwise appropriated at the date of its issuance and subsequently released from such reservation or appropriation, the President, by Executive Order No. 7048, of May 20, 1935, amended said order of November 26, 1934, so as (1) to make it applicable to all lands within the States mentioned therein upon the cancelation or release of prior entries, selections, or claims, or upon the revocation of prior withdrawals unless expressly otherwise provided in the order of revocation; and (2) to authorize the Secretary of the Interior, in his discretion and in harmony with the purposes of the said Act of June 28, 1934, to accept title to base lands in ex-

change for other lands subject to such exchange under the terms of the said act.

Therefore, the Executive order of November 26, 1934, applies to all lands in the States mentioned therein released subsequent to that date from a prior entry, selection, claim, or withdrawal, unless the revocation of the withdrawal expressly provides otherwise.

Executive order of May 20, 1935, also permits the exchange of lands under the provisions of section 8 of said Act of June 28, 1934.

FRED W. JOHNSON, *Commissioner*.

Approved:

T. A. WALTERS,

First Assistant Secretary.

ALLOTMENTS OF PUBLIC LANDS IN ALASKA TO INDIANS AND ESKIMOS

[Circular No. 1359]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 22, 1935.

REGISTER, ANCHORAGE, ALASKA;

REGISTERS AND RECEIVERS, FAIRBANKS AND NOME, ALASKA:

1. *Provision for allotment.*—The Act of May 17, 1906 (34 Stat. 197), authorizes the Secretary of the Interior to allot not to exceed 160 acres of nonmineral land in Alaska to certain Indians or Eskimos of full or mixed blood, who reside in and are natives of the Territory.

2. *Execution and filing of application.*—An application for allotment must be made on form 4-021. The application must be sworn to by the applicant and corroborated by the affidavits of two persons having knowledge of the facts, who may be Indians or Eskimos. It may be executed before the proper Register or Receiver, or any officer having a seal and authority to administer oaths. If the applicant is unable to write his name, his thumb print should be attached to the application in preference to his signature by mark, and the thumb print should be witnessed by two persons. The application must be filed in the proper district land office.

3. *Description of land in application.*—If surveyed, the land must be described in the application according to legal subdivisions of the public land surveys. If unsurveyed, it must be described as accurately as possible by metes and bounds and natural objects, and its position with reference to rivers, creeks, mountains or mountain peaks, towns, or other prominent topographic points or natural objects or monuments, giving the distance and directions with ref-

erence to any well-known trail to a town or mining camp, or to a river or mountain appearing on the map of Alaska.

4. *Marking on ground and notice of claim.*—The applicant should plainly indicate on the ground the corners of the land claimed by setting substantial posts or heaping up mounds of stones at each corner. Notice of the application should be posted on the land, describing the tract applied for in the terms employed in the application, and a copy of such notice should accompany the application.

5. *Showing required in application.*—The application, giving the name and address of the applicant, must show that the applicant is an Indian or Eskimo of full or mixed blood, who resides in and is a native of the Territory; whether the applicant is married or single; whether the applicant is 21 years of age or over; the facts constituting applicant the head of a family, if applicant is under 21 years of age, or is a married woman; that the applicant has not theretofore made application for allotment under the Act of May 17, 1906, if such is the case; and that the land applied for is not reserved by authority of Congress or embraced in any reservation made by Executive order or proclamation of the President. If the land has been occupied by the applicant the application should show when the residence commenced and the extent to which it has been maintained.

6. *Nonmineral affidavit.*—The applicant must furnish a non-mineral affidavit on the prescribed form, which is printed as a part of form 4-021. This affidavit must be made on personal knowledge and not on information and belief.

7. *Allotments in national forests.*—Allotments will not be made in national forests unless founded on occupancy of the land prior to the establishment of the particular forest, except as authorized by section 31 of the Act of June 25, 1910 (36 Stat. 855, 863), which authorizes an allotment to be made to an Indian who is occupying, living on, or has made improvements on the land included within a national forest, and for whose tribe no reservation has been made, provided the Secretary of Agriculture shall certify that the land applied for is more valuable for agricultural or grazing purposes than for the timber thereon. An application under said section 31 should be made on form 5-149, and should contain a reference to the Act of May 17, 1906.

8. *Shore space.*—An Indian allotment may not extend more than 160 rods along the shore of any navigable water, and along such water a space of 80 rods is reserved between claims. The shore space reserve extends 80 rods from the shore line. However, under the Act of June 5, 1920 (41 Stat. 1059), the shore space restriction or reservation may be waived in the discretion of the Secretary of the Interior.

9. *Action on application by Register.*—The Register will number applications for allotments in accordance with instructions in paragraphs 3 to 7, inclusive, of Circular No. 616 of August 9, 1918 (46 L. D. 513), and note same on the semi-monthly returns. He will carefully examine each application, and if he finds it complete in all respects, and no objection is shown by his records, he will allow it and will advise the applicant of the allowance by special letter, reading substantially as follows:

Your application under the Act of May 17, 1906 (34 Stat. 197), No. _____, for _____, has been placed of record in this office and forwarded to the General Land Office.

This action segregates the land from the public domain, and no other application can be allowed therefor, or settlement rights attach, during the life of this application.

If the application is incomplete or in conflict with any other application or claim of record, the Register will take such action as the facts may warrant. The application, upon allowance, will operate as a segregation of the land. Any application subsequently presented which conflicts therewith in whole or in part, should be rejected, as to the part in conflict, subject to appeal, unless rights superior to those of the Indian or Eskimo claimant are asserted under the conflicting application, in which case the Register and Receiver will transmit the records in both cases to the General Land Office with appropriate recommendations, with the semi-monthly returns.

10. *Preparation of papers and fees.*—The Register and Receiver will assist applicants in the preparation of their papers as far as possible, and as the Act of May 17, 1906, does not make any provision for the collection of fees, none will be charged.

11. *Officers to be advised by Register and other actions required.*—The Register will send a copy of the notice of allowance to the Clerk in Charge of the Branch office of the Division of Investigations at Anchorage, to the Director of Education of the Indian Service in Alaska, and to the District Cadastral Engineer of the Public Survey Office in Alaska, and will advise each of them that if any objection to the application is known when the notice of allowance is received, or if any objection to the application is found at any time prior to the completion or rejection thereof, the facts should be reported to the Register. If the said officer receives a report showing objections, he will transmit it to the General Land Office by special letter with appropriate recommendations.

Where an application subsequent to its allowance is amended, or rejected in whole or in part, the officers mentioned should be advised by the Register of such action.

The District Cadastral Engineer should note the allowance of the application in the book kept by him for that purpose, and where practicable he will note in pencil the location of the land on the district sheets of his office, the notation to remain until such time as survey may be ordered or until the application has been rejected.

12. *Indian claims and adjustment to survey.*—If in surveying any township it is found that lands therein are occupied or claimed, or have been applied for by Indians or Eskimos, the District Cadastral Engineer will advise the Register as to such claims. If, when the plat of survey is filed, it is found that any Indian or Eskimo occupants or claimants in the township have not filed applications for allotments, the Register will advise such occupants or claimants of their right to file such applications. Where application has been filed, the Register will send notice to the applicant by registered mail, requiring him to adjust his claim to the survey within 90 days from receipt of notice, and will advise him that if the adjustment is not made or an appeal filed within the time allowed, the claim will be adjusted by the Register. If no action is taken by the claimant, the Register will make the adjustment. The claim may not embrace more than 160 acres, and if possible it should be adjusted so as to embrace all subdivisions which have been used and occupied by the Indian or Eskimo, and which contain his improvements. A copy of each notice to an Indian claimant will be sent by the Register to the Director of Education of the Indian Service in Alaska, and where adjustment to survey is required, such copy will be sent by registered mail. In each case the Register will make report to the General Land Office by special letter, showing the action taken.

13. *Proof required before approval of application by Secretary of the Interior.*—An allotment application will not be submitted by the General Land Office to the Secretary of the Interior for approval until the applicant has made satisfactory proof of five years' use and occupancy of the land as an allotment. Such proof must be made in triplicate, in affidavit form, corroborated by the affidavits of two persons having knowledge of the facts, and it should be filed in the district land office. It may be sworn to before any officer having a seal and authority to administer oaths. The showing of five years' use and occupancy may be submitted with the application for allotment if the applicant has then used or occupied the land for five years, or at any time after the filing of the application when the required showing can be made. The proof should give the name of the applicant, identify the application on which it is based, and appropriately describe the land involved. It should show the periods each year applicant has resided on the land; the amount of the land cultivated each year to garden or other crops; the amount

of crops harvested each year; the number and kinds of domestic animals kept on the land by the applicant and the years they were kept there; the character and value of the improvements made by the applicant and when they were made, and the use, if any, to which the land has been put for fishing or trapping. The proof will be suspended by the Register pending the receipt of the reports hereinafter mentioned. The duplicate copy of the proof will be sent by the Register to the Clerk in Charge of the Branch Office of the Division of Investigations at Anchorage, and the triplicate copy to the Director of Education of the Indian Service in Alaska.

14. *Reports to be obtained by Register.*—The Register will request the Division of Investigations and the Director of Education of the Indian Service in Alaska to make report as to the bona fides of the claim and as to the occupation and improvement of the land by the applicant. The report of the Division of Investigations should also show whether the land applied for is nonmineral in character, whether it is within an area which is reserved because of hot or medicinal springs; whether the land is reserved for any purpose or is occupied or claimed adversely to the Indian or Eskimo; whether the land extends more than 160 rods along the shore of any navigable water, and the facts as to the use, occupation and improvement of the land by the Indian or Eskimo. If the land is affected by shore space or restriction, sufficient facts should be set forth to show whether the reservation or restriction should be waived.

15. *Action by Register on proof.*—When the above mentioned reports have been received, the Register will consider the proof in connection therewith, will attach to the proof his recommendation as to whether it should be accepted or rejected, and will transmit all papers in the case to the General Land Office with the semi-monthly returns.

16. *Action by General Land Office on proof.*—If the Commissioner of the General Land Office on examination of the proof and the reports thereon is satisfied that the applicant has used or occupied the land applied for in good faith for five years as an allotment, and no objection appears, he will recommend to the Secretary of the Interior that the allotment be approved.

Where an allotment is approved by the Secretary and where the land applied for has not been surveyed, a special survey of the claim will be ordered, except in cases where it is planned to extend the public land surveys over the land within two years following. In the event last mentioned, action will be suspended pending the extension of the public land surveys over the land, after which the applicant will be required to adjust his application thereto, as hereinabove indicated.

Upon the approval by the Secretary of the Interior of an allotment for surveyed land, or upon the adjustment of an approved allotment to a survey made subsequent to the approval of the allotment, a certificate will be issued by the Commissioner of the General Land Office showing that the land has been allotted to the Indian or Eskimo.

17. *Certificate of allotment.*—The certificate of allotment will be written in duplicate on form 4-203. The certificate will show the name and address of the applicant and the date of the approval of the application by the Secretary of the Interior; it will give a description of the land which has been allotted, and it will recite that the land shall be deemed the homestead of the allottee and his heirs in perpetuity and that it shall be inalienable and nontaxable until otherwise provided by Congress.

The original certificate will be sent by the General Land Office to the district land office for delivery to the claimant. The duplicate will be retained in the General Land Office with the record of the case as a part thereof. The General Land Office will advise the Commissioner of Indian Affairs of the issuance of the certificate and will instruct the Register to advise the Director of Education for the Indian Service in Alaska that the certificate has been issued.

18. *Land occupied by Indians or Eskimos.*—Lands occupied by Indians or Eskimos in good faith are not subject to entry or appropriation by others.

FRED W. JOHNSON, *Commissioner.*

Approved:

T. A. WALTERS,

First Assistant Secretary.

THE SHALE OIL COMPANY

Decided June 24, 1935

MINING CLAIM—VALIDITY—CANCELATION—AUTHORITY OF SECRETARY OF THE INTERIOR.

The Secretary of the Interior has authority to determine that a mining claim is invalid for lack of discovery, for fraud, or other defect, or that it is subject to cancellation for abandonment.

MINING CLAIM—OIL SHALE LANDS—ASSESSMENT WORK—DEFAULT—WHO MAY CHALLENGE FOLLING DEFAULT.

Under section 2324 of the Revised Statutes, a default in performance of annual work on a mining claim renders it subject to relocation by another claimant, but does not affect the locator's right as between him and the United States, and he is entitled to preserve his claim by resumption of work after default and before such relocation.

MINING CLAIM—GENERAL LEASING ACT—EXCEPTING CLAUSE IN SECTION 37.

The excepting clause in section 37 of the General Leasing Act, saving existing valid claims "thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws," held to preclude the United States from declaring a forfeiture of a mining claim, otherwise valid, for default in performance of assessment work.

PRIOR DECISIONS AND REGULATIONS OVERRULED.

The decisions and regulations of the Land Department, in so far as in conflict with the decision herein, overruled.¹

WALTERS, *First Assistant Secretary*:

December 30, 1929, the Shale Oil Company filed application Denver 042552, for patent to Hydrocarbon Nos. 57, 58, 59, 60, 61A, 62, 64, 66, 67, 68, 69, 70, 71, 72, 92, 93, and 121, oil shale placers in T. 5 S., R. 99 W., 6th P. M. Adverse proceedings were directed against these claims, charges, in substance, being brought that annual assessment work to the value of \$100 was not performed upon each or any one of the claims for the year ending July 1, 1929, and that work had not since been resumed. Thereafter, additional charges were brought alleging like failure to do assessment work for the years ending July 1, 1930, and July 1, 1931.

In the applicant's several responses to these charges, the jurisdiction of the Department to prefer the charges was questioned and the truth thereof denied. A hearing was held in the proceedings on the issues presented by the charges, and upon the evidence adduced thereat, the Commissioner of the General Land Office, by decision of January 4, 1934, found that for the assessment year ending July 1, 1930, but \$1,200 worth of work and improvements, as common or group development work, had been performed for the benefit of 17 claims involved. He, therefore, held the work sufficient for 12 of the claims, specifying them; and rejected the application as to Hydrocarbon Nos. 66, 68, 70, 71, and 72, and held that such claims were void, subject to the right of appeal "and to its (the applicant's) right to select other claims in lieu of those last named above, which it desires eliminated from the mineral application and held null and void."

The Commissioner overruled the contention of the applicant that he was without authority to challenge the validity of the claims on account of the failure to perform the annual assessment work, and held that such authority exists where such challenge was made prior to the resumption of work, and that upon proof of the failure to do the work, the Department had authority to reject the appli-

¹These include: *Virginia-Colorado Development Corporation* (53 I. D. 666), *Francis D. Weaver* (*Id.* 175, 179), *The Federal Shale Oil Company* (*Id.* 213); instructions of June 17, 1930 (*Id.* 131).

cation and declare a forfeiture of the claim or claims upon which or for which the required work had not been done.

In maintaining the authority of the Land Department to challenge the validity of an oil shale placer claim on account of the nonperformance of assessment work prior to resumption of work and declare it void where the failure was established, the Commissioner followed previous rulings of the Department where such authority was upheld in cases presenting the same question. See *Francis D. Weaver* (53 I. D. 175, 179); *The Federal Shale Oil Company* (53 I. D. 213); *Virginia-Colorado Development Company* (53 I. D. 666); Instructions of June 17, 1930, relating to Government proceedings against oil shale claims for default in assessment work (53 I. D. 131).

The Shale Oil Company appealed from the decision, assigning, among other grounds, that:

First: Said decision is contrary to the law in this:

(a) That the Land Department is without jurisdiction and without authority under the law, to question a placer claim owner's failure to perform assessment work for any year.

(b) That there is no authority in law or legal precedent, for the United States to be or become a contestant with respect to any failure to do annual work upon any kind or class of mining claims.

* * * * *

(f) The defendant company having applied for patent to the claims contested by the Government, and every step having been taken, except the payment of the purchase price, the Government has no authority and no jurisdiction to pass upon or try any question, except the sufficiency and validity of discovery, patent expenditures, and the regularity of the patent proceedings, and if these are found to be correct and proper, the only additional governmental function is to issue patent.

(g) The Government, represented by the Secretary of the Interior or Commissioner of the General Land Office, has no jurisdiction over the subject matter of this proceeding, has no power or authority to challenge possession of claimant by a notice of forfeiture, or by entry without process of law to deprive defendant of this property.

By letter of May 26, 1934, in reply to a request for oral argument in support of the appeal, the Department stated that the question whether the Department has authority to forfeit oil shale placer claims by reason of defaults in the performance of assessment work has recently been answered in the negative by the Court of Appeals of the District of Columbia in the case of *Ickes v. Virginia-Colorado Development Corporation*, but that a petition for certiorari had been granted by the Supreme Court, and agreed to suspend action on the appeal in the instant case pending the decision of the Supreme Court in the *Virginia-Colorado Development Corporation* case.

The Virginia-Colorado Development Corporation, in seeking to establish its claim for a patent to certain oil shale placer locations, which had been denied by the Department (53 I. D. 666) brought suit in the Supreme Court of the District of Columbia to obtain a mandatory injunction against the Secretary of the Interior, requiring him to vacate the adverse proceedings brought against such claims and his decision declaring them to be void. The plaintiff obtained a decree, which was affirmed by the Court of Appeals (69 F. (2d) 123), which in turn was affirmed by the Supreme Court on June 3, 1935 (295 U. S. 639).

The Supreme Court, advertent to the fact that the validity of the locations there involved was not questioned, except as to failure to perform assessment work, held that plaintiff (The Virginia-Colorado Development Corporation) lost no rights by failure to do the assessment work; that failure gave the Government no right of forfeiture; that the plaintiff came directly within the exception contained in Section 37 of the Leasing Act saving existing valid claims "thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws"; that the challenge to the valid existence of the claims had no proper basis; and that the Department's challenge, its adverse proceedings, and the decision set forth in the bill, went beyond the authority conferred by law.

In view of this opinion of the court, the adverse proceedings and decision of the Commissioner therein in the instant case must be held as without authority of law and void. The above-mentioned decision of the Department in the *Virginia-Colorado Development Corporation* case and the instructions of June 17, 1930, are hereby recalled and vacated. The above-mentioned decisions in the cases of *Francis D. Weaver* and *Federal Oil Shale Company* and other Departmental decisions in conflict with this decision are hereby overruled. The Commissioner's decision is reversed and the record in the case remanded with instructions to reinstate the application and entry *in toto* and dispose of the same unaffected by the default in the performance of assessment labor, and if all else is found regular, to clearlist the application for patent.

Reversed and remanded.

SUSPENSION OF ANNUAL ASSESSMENT WORK ON MINING CLAIMS

[Circular No. 1360]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 26, 1935.

REGISTERS, UNITED STATES LAND OFFICES:

For your information, and in order that you may inform inquirers relative thereto, your attention is called to the Act of June 13, 1935 (49 Stat. 337), providing for the suspension of annual assessment work on mining claims held by location in the United States, and reading as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provision of section 2324 of the Revised Statutes of the United States, which requires on each mining claim located, and until a patent has been issued therefor, not less than \$100 worth-of-labor to be performed or improvements aggregating such amount to be made each year, be, and the same is hereby, suspended as to all mining claims in the United States during the year beginning at 12 o'clock meridian July 1, 1934, and ending at 12 o'clock meridian July 1, 1935: Provided, That the provisions of this Act shall not apply in the case of any claimant not entitled to exemption from the payment of a Federal income tax for the taxable year 1934: Provided further, That every claimant of any such mining claim, in order to obtain the benefits of this Act, shall file, or cause to be filed, in the office where the location notice or certificate is recorded, on or before 12 o'clock meridian, July 1, 1935, a notice of his desire to hold said mining claim under this Act, which notice shall state that the claimant, or claimants, were entitled to exemption from the payment of a Federal income tax for the taxable year 1934: And provided further, That such suspension of assessment work shall not apply to more than six lode-mining claims held by the same person, nor to more than twelve lode-mining claims held by the same partnership, association, or corporation: And provided further, That such suspension of assessment work shall not apply to more than six placer-mining claims not to exceed one hundred and twenty acres (in all) held by the same person, nor to more than twelve placer-mining claims not to exceed two hundred and forty acres (in all) held by the same partnership, association, or corporation.

Attention is called to the fact that this act does not apply to Alaska but applies only to claimants in the United States who are exempt from the payment of a Federal income tax for the taxable year 1934, and who file on or before 12 o'clock noon July 1, 1935, in the office where the location notice or certificate is recorded, a notice of their desire to hold the claims under the act. The notice so filed should state that they were entitled to exemption from the payment of a Federal income tax for the year 1934.

It is to be observed that an individual who files such notice is not entitled to exemption from performing assessment work on more

than six lode claims nor on more than six placer claims not to exceed 120 acres (in all) and that a partnership, association, or corporation is not entitled to such exemption on more than twelve lode claims nor on more than twelve placer claims not to exceed two hundred and forty acres (in all).

FRED W. JOHNSON, *Commissioner*.

Approved:

T. A. WALTERS,

First Assistant Secretary.

**ABSENCES FROM HOMESTEAD LANDS ON ACCOUNT OF ECONOMIC
CONDITIONS—ACT OF MAY 22, 1935**

[Circular No. 1361]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., July 5, 1935.

REGISTERS, UNITED STATES LAND OFFICES:

The Act of May 22, 1935 (49 Stat. 286), entitled "An Act granting a leave of absence to settlers of homestead lands during the year 1935," reads as follows:

That any homestead settler or entryman who, during the calendar year 1935, should find it necessary, because of economic conditions, to leave his homestead to seek employment in order to obtain the necessaries of life for himself and family or to provide for the education of his children may, upon filing with the register of the district, his affidavit, supported by corroborating affidavits of two disinterested persons showing the necessity of such absence, be excused from compliance with the requirements of the homestead laws as to residence, cultivation, improvements, expenditures, or payment of purchase money, as the case may be, during all or any part of the calendar year 1935, and said entries shall not be open to contest or protest because of failure to comply with such requirements during such absence; except that the time of such absence shall not be deducted from the actual residence required by law, but a period equal to such absence shall be added to the statutory life of the entry: *Provided*, That any entryman holding an unperfected entry on ceded Indian lands may be excused from the requirements of residence upon the conditions provided herein, but shall not be entitled to extension of time for the payment of any installment of the purchase price of the land except upon proof satisfactory to the Secretary of the Interior that the entryman is acting in good faith and is financially unable to make the payments due, and upon payment of interest, in advance, at the rate of 4 per centum per annum on the principal of any unpaid purchase price from the date when such payment or payments became due to and inclusive of the date of the expiration of the period of relief granted hereunder.

Leaves of absences for all or part of the year mentioned by this act may be granted thereunder to any homestead settler or entryman

who has established actual residence upon the lands and who thereafter found it necessary because of economic conditions to leave his homestead to seek employment in order to obtain food and other necessities of life for himself and family or to provide for the education of his children.

The application for such leave of absence must be filed in the proper district land office and give the name and present address of the applicant and be sworn to by him and corroborated by the affidavits of at least two witnesses in the land district or county within which the lands claimed under the homestead laws are located, before an officer authorized to administer oaths and using a seal. It must describe the land by legal subdivisions, section, township, and range numbers, give the serial number of the entry and name of land office and show the date when residence was established thereon and how the same was maintained thereafter by giving the dates of the beginning and ending of all residence periods and of all absence periods, and the character of the improvements and cultivation performed by the applicant. It must set forth fully all the facts on which the claimant bases his right to a leave of absence, what effort was made to raise crops, giving the dates of the planting and the kind of crops planted, the purpose of his request for leave, and the period for which the leave is desired. The address of the claimant during his absence should also be supplied if possible.

The act applies to entrymen only if they have established residence upon their claims. It also applies to settlers who have not made entries. If the latter file application for leave of absence hereunder, you will assign them current serial numbers. If the settler has theretofore filed notice of his absence under the Act of July 3, 1916 (39 Stat. 341) the application under this act will be given the serial number already assigned such notice of absence.

Relief may not be granted under this act in cases where entrymen have not complied with the law sufficiently to enable them to make acceptable proof within the statutory period of the entry as extended by invoking the provisions of this act or other relief acts. The period during which a homesteader is absent from his claim, pursuant to a leave duly granted under this act, can not be counted as a part of the actual residence on the land required by law, but an equivalent period may be added to the statutory life of the entry.

If the application for relief under this act is allowed, it will operate as a stay during the period for which the leave is granted against contest based upon the charge that the entryman has failed to comply with the law in the matter of residence, cultivation, improvements, expenditures, or payments of purchase price, prior to the filing of the application for leave of absence, in the absence of fraud in procuring the same.

If the showing made is satisfactory, you will promptly forward the application to this office by special letter with notation of your allowance thereof and advise the applicant of your allowance of this application by ordinary mail. If it is not satisfactory, you will reject the application, subject to the usual right of appeal, and all appeals will be promptly forwarded to this office by special letters.

APPLICATION FOR EXTENSION OF TIME TO MAKE PAYMENT OF ANY INSTALLMENT OF THE PURCHASE PRICE ON HOMESTEAD ENTRIES OF CEDED INDIAN LANDS.

Entrymen of ceded Indian reservation lands desiring relief under this act are not entitled to an extension of time for the payment of any installment of the purchase price of the land, except upon proof, satisfactory to the Secretary of the Interior, that the entryman is acting in good faith and is financially unable to make the payments due, and upon payment of interest, in advance, at the rate of 4 per centum per annum on the principal of any unpaid purchase price from the date such payment became due to and inclusive of the expiration of the period of relief granted.

An extension may be granted either to the 1935 anniversary of the date of entry or to December 31, 1935, at the election of the claimant.

Proof as to good faith and financial inability to pay the amount due must be made by affidavit, duly corroborated by two witnesses, or by other convincing evidence. Such proof must be submitted to the proper district land office, which in turn will forward the same with recommendations to the Commissioner of the General Land Office for his consideration. The interest payment should be held by you as "unearned money" pending such consideration. If the proof is found sufficient an extension will be granted and you will be instructed to advise the claimant and to apply the money to the credit of the proper fund.

Where interest at the rate of 5 per centum, or other rate, has heretofore been paid and an extension of time for payment granted, the interest will not be recomputed at 4 per centum under the Act of May 22, 1935. Where extensions of time for payment are desired beyond December 31, 1935, and where they may be granted under existing laws upon the payment of interest in advance at the rate of 5 per centum per annum or other rate, interest will be computed under such laws from December 31, 1935, to the expiration of the period of the extension.

FRED W. JOHNSON, *Commissioner.*

Approved:

T. A. WALTERS,

First Assistant Secretary.

ALLOTMENT SELECTIONS ON THE FORT BELKNAP INDIAN RESERVATION

Opinion, July 17, 1935

INDIAN LANDS—INTERPRETATION OF STATUTES—ALLOTMENT—TRUST PATENT—WHEN RIGHT ACCRUES.

As a general rule, the courts consider an Indian allotment an assignment of the right of occupancy to an individual Indian, and under allotment laws providing for patents an allotment is made when the allottee becomes entitled to a patent as evidence of the allotment and promise of a fee title, and an allottee may become entitled to a patent even before the approval of his allotment selection whenever the applicable allotment law makes such approval mandatory after the showing of certain prescribed conditions and such conditions have been shown.

INDIAN LANDS—ALLOTMENT—WORDS AND PHRASES.

The word "allot" and its derivatives, "allottee" and "allotments", have been used in various statutes, decisions, and by the Department of the Interior in both the broader sense referring to the completed process evidenced by trust patents and in the narrower and primary sense meaning the parcelling out and assigning of a specified number of acres of land to each Indian, and because of the variety of allotment laws, a case under one is not necessarily applicable to another.

INDIAN LANDS—ALLOTMENT—RIGHT TO PATENT AND APPROVAL OF ALLOTMENT—EFFECT OF LATER LEGISLATION.

Where an act of Congress directed allotment of lands of an Indian reservation to the Indians therein, and the task of allotment selection had been completed but trust patents had not been issued as to some of the selections prior to the enactment of the act of June 18, 1934, prohibiting future allotments, the later legislation does not prohibit the trust patenting of approved allotments nor the approval and patenting of allotment selections equitably vested in the allottee.

INDIAN LANDS—ALLOTMENT SELECTIONS—CONSTRUCTION OF STATUTES.

An act of Congress (41 Stat. 1355) directed the Secretary of the Interior to prepare a final roll of the Indians of the Fort Belknap Reservation and allot the lands of said reservation *pro rata* among the Indians so enrolled. *Held*, that the Act of June 18, 1934, forbidding further allotment of lands to Indians did not have application to the cases of enrolled Indians of this reservation who had selected allotments prior to the passage of the later act but whose allotment selections were then unpatented without fault on their part.

MARGOLD, *Solicitor*:

My opinion has been requested on the question of whether, under the first section of the Wheeler-Howard Act (Act of June 18, 1934 (48 Stat. 984), 25 unpatented allotment selections on the Fort Belknap reservation can now be patented.

The allotments in question comprise five allotment selections which were included in the schedule of 1171 Fort Belknap allotments approved October 3, 1925, and 20 allotment selections originally

included in that schedule but withheld from approval. These 25 allotments were selected under the Act of March 3, 1921 (41 Stat. 1355), which directed the Secretary of the Interior to prepare a final roll of the Indians of the Fort Belknap Reservation and to allot the lands on the reservation *pro rata* among the Indians enrolled. This work was completed except for the 25 allotments before described and most of the patents were issued under date of May 24, 1927. It is clear that the failure to complete these allotments was due to no fault of the Indian allottees. The records of the Indian Office indicate no reason why four of the five approved selections were not patented and that the fifth was detained because a supplemental plat was necessary for its proper description. They further indicate that the 20 unapproved selections were withheld also because of errors in description and because of conflicts with other selections, making a number of supplemental plats necessary. It will be noted that the failure of consummation due to errors in description occurred after as well as before approval, and that in no case did approval require passing upon the applicant's qualifications or other considerations of a discretionary character.

The first section of the Wheeler-Howard Act of June 18, 1934, reads as follows:

That hereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

The question presented is whether the words "no land * * * shall be allotted in severalty to any Indian" forbid the approval and patenting of these 25 allotments selected ten years before the passage of this section. The answer is by no means clear, but by reference to other allotment statutes, to cases interpreting those statutes, particularly the words "allot" and "allotment", and to cases discussing the rights of owners of unapproved or unpatented allotment selections, and to administrative action, I have come to the conclusion that the prohibition in section 1, correctly interpreted, does not cover the trust patenting of approved selections or the approval of allotment selections equitably vested, as in this case, in the allottees, and furthermore, that a contrary interpretation would raise serious questions of constitutionality.

I

The word "allot" and its derivatives, "allottee" and "allotments", have been used in various statutes, decisions, and by the Department of the Interior in both the broader sense referring to the completed process evidenced by trust patents, and in the narrower and primary sense meaning the parcelling out and assigning of so many acres of

land to each Indian. However, these words have been regularly employed in the narrower sense in the numerous allotment statutes, in careful distinction to the patenting of the lands "allotted." Thus, the standard act, the General Allotment Act of 1887, in section 1, authorizes the President "to allot the lands * * * in severalty":

That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows: * * *

and prescribes the quantity of land to be "allotted." Section 2 provides "That all allotments set apart under the provisions of this act shall be selected by the Indians * * *." Section 3 provides "That all allotments * * * shall be made by special agents * * *." Section 4 deals with Indians making settlement on land not in a reservation and provides that they "shall be entitled upon application to the local land office * * * to have the same allotted * * * in quantities and manner as provided in this act for Indians residing upon reservations." Not until section 5 is there reference to patents, and the language indicates that in the mind of the legislature the patent was a second process entered upon after allotment was completed:

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, * * *

The language of other allotment acts is even more decisive in describing the process of "allotting" as the parcelling out by agents, in the field of surveyed land, according to certain proportions, to the qualified Indians who select the particular parcel. After this process the "allotment" is to be approved by the Secretary, and, if approved, patents shall thereupon be issued. See, particularly, Acts of March 3, 1885 (23 Stat. 340), and March 2, 1889 (25 Stat. 1012). In fact, no other word has been used to describe this initial process but the word "allot."

It will be noted that the extent of application of the first section of the Wheeler-Howard Act is identical in fact, and almost so in language, to the first section of the General Allotment Act. The intention of the 73rd Congress to forbid allotment in the field under section 1 of the 1887 act as a preliminary step in the conveyance of title is apparent on the face of the act and is a matter of general

understanding. For this reason, the word "allotted" seems peculiarly appropriately restricted to its earlier and primary connotations. Moreover, there are numerous particular acts such as those authorizing continuing allotment in the field from surplus lands on various reservations as Indians entitled thereto are born, which are clearly aimed at by the Wheeler-Howard Act. The narrower interpretation would, therefore, fill the first section with a great deal of meaning.

Many cases interpreting the word "allot" in treaties and statutes providing for allotments distinguish between "allotting" and "patenting" and speak of allotments as completed before the patents are issued. Cf. *United Peoria and Miamies* (12 L. D. 168). Because of the variety of allotment laws, a case under one is not necessarily applicable to another but may still be illustrative of the significance given to the word "allot." In *Millet v. Bilby* (110 Okla. 241, 237 Pac. 859 (1925)), the court decided that the word "allot" in the original Creek agreement was not a word of grant but of apportionment of that to which the party was entitled. Several cases consider patents as merely evidence of the completed and vested allotment—*Wood v. Gleason* (43 Okla. 9, 140 Pac. 418 (1914)); see *Oklahoma v. Texas* (258 U. S. 574, 596)—or simply "a paper or writing, improperly called a patent" designed to show that at the end of 25 years the Indian allottee or his heirs will receive the fee to the land allotted. See *United States v. Rickert* (188 U. S. 432, 436).

The legal theory behind the processes of allotment and patenting can be generalized somewhat as follows: The Indian tribe possesses in common a right of occupancy in the land within the reservation, but not the fee; the allotment process transfers conclusively this right of occupancy in the portion of the land selected by a qualified Indian to him and to his heirs, and the trust patent follows as a device preliminary to transfer of the fee from the United States to the allottee or his heirs after the extended period of preparation. Cf. *United States v. Chase* (245 U. S. 89).

The distinction between allotments and patents is well brought out where treaties have provided for allotments or assignments to the allottee and his heirs, but patents are provided for only in later acts (Cf. *United States v. Chase, supra*; *Starr v. Long Jim* (227 U. S. 613); *Friedrich v. Ducept* (46 L. D. 14); *In Re Long Jim* (32 L. D. 568; 19 Op. Atty. Gen. 225), and where acts prevent alienation of "allotments" before the patents are issued. Cf. *Stout v. Simpson* (34 Okla. 129, 124 Pac. 754 (1912)). Another case interpreted the words in the original section 6. of the 1887 act, " * * * every member * * * to whom allotments have been made shall have the benefit of * * * the laws * * * of the State * * *" as including every Indian who was entitled to ap-

proval and patenting of his selection even though such approval and patenting had not yet occurred. *State v. Norris* (37 Neb. 299, 55 N. W. 1086 (1893)).

It may be concluded from these cases that, as a general rule of interpretation, the courts consider an "allotment" as an assignment of the right of occupancy to an individual Indian; and that under allotment laws providing for patents an "allotment" is made when the allottee becomes entitled to a patent as evidence of the allotment and promise of a fee title; and that, as will be shown more fully later, an allottee may become entitled to a patent even before the approval of his allotment selection wherever the applicable allotment law makes such approval mandatory after the showing of certain prescribed conditions, and such conditions have been shown.

The Fort Belknap allotment act under which the allotments in question were selected was of relatively recent date (March 3, 1921 (41 Stat. 1355)) and possibly for that reason is less detailed than the early allotment acts, relying on accepted interpretations to fill in any gaps. It provides in section 1 for a commission to prepare a final roll of all Indians ascertained to have rights on the reservation, which roll shall be conclusive evidence of the right of any enrollee to an allotment. Section 1 then authorizes and directs the Secretary "to allot *pro rata*" among the enrollees all the land on the reservation, and ends with the ungrammatical clause "which trust patents shall be issued in the name of the allottee." Since there is no noun to which the "which" in this clause may refer, it appears that the word "for" may have been omitted from before the clause. The act does, thus, use the word "allot" to connote apportion and assign, as is indicated also in other sections of the statute.

However, section 1 of the Fort Belknap Act is notable from two other angles in that it made every enrollee conclusively entitled to an allotment, and directed the *pro rata* apportionment among the enrollees of the entire reservation (except for specified amounts of land to be reserved for certain tribal, administrative, and State uses enumerated in the rest of the act). Both points distinguish this act from the ordinary allotment acts and both have bearing upon the problem in hand. As to the first, after the Secretary has approved the roll prepared by the commission, there is no further question as to the right of an enrollee to an allotment; thus the scope of the discretion of the Secretary in approving allotment selections is limited to the determination only of whether the particular assignment was accurate, and thus the equitable position of the "allottee" before his selection is approved is greatly enhanced.

On the second point, a *pro rata* apportionment of the reservation among designated enrollees rather than the usual direction to

the Secretary to allot a certain number of acres to such Indians as he may find qualified again enhances the equitable position of the Fort Belknap allottee, since not only is he definitely entitled to a certain number of acres, but the number of acres which each Indian on the reservation receives has been determined on the basis of his participation. His right to his share is definitely fixed as of the date of the *pro rata* distribution.

Heretofore when acts have been passed which seek to modify allotment rights and privileges, these acts have been generally construed as not intended to apply where allotments had already been selected nor to affect the trust patenting of these selections. So where an Indian had made a homestead entry (treated as analogous to allotment selection) under the Act of 1875 and performed the conditions entitling him to a patent, the Act of 1884 prescribing a 25-year trust patent instead of a fee patent was held not to apply to him. *United States v. Hemmer* (241 U. S. 379); *United States v. Saunders* (96 Fed. 268) (Circ. Ct. Wash. 1899). Moreover; an Indian has greater rights in an allotment on a reservation than on the public domain. *Clark v. Benally* (51 L. D. 98). Similarly, where later acts reserved mineral rights for the tribe, this was repeatedly construed as not applying where allotment selections had already been made but had not yet been approved because of clerical errors. *Raymond Bear Hill* (52 L. D. 689); *Mineral Reservations in Trust Patents for Allotments to Fort Peck and Uncompahgre Ute Indians* (53 L. D. 538).

However, where a later act changed the form and conditions of the trust patent itself without modifying or subtracting from the rights in the allotment selections, the later act was held to apply to allotments previously selected and approved but not patented because of errors in descriptions. *Klamath Allotments* (38 L. D. 559).

From the foregoing it is apparent that the natural and reasonable interpretation of the first section of the Wheeler-Howard Act is that the act prohibits the further subdivision and assignment of tribal and surplus lands among unallotted Indians under any statute, but that it does not forbid the patenting of approved allotments nor the approval at least of those allotment selections which under the particular allotment act are equitably vested in the allottee.

II

Assuming, however, that section 1 of the Wheeler-Howard Act may be interpreted to forbid the patenting of allotments, difficult legal questions promptly arise. (1) Can the Secretary erase allotment selections, invalidate approval given, and restore the land to tribal ownership without express statutory authority, and if not, can the allotment selections remain in a twilight zone of equitable owner-

ship as at present? (2) Can allotments which have been approved be exempted from application of the first section on the ground that approval automatically entitles the allottee to a patent and equity will consider that done which ought to have been done; and if not, can the act deprive such allottee of a vested right without compensation? (3) Can allotment selections which have not been approved without good reason or because of minor clerical error, and which would have been approved nearly 10 years ago but for the negligence of the Department, be considered as if approved (and therefore entitled to patent within the terms of the second question), on the equitable principle that where a person in the prosecution of a right does everything the law requires and fails to attain the right by the misconduct or neglect of public officers, the law will protect him in his right?

(1) An allotment selection segregates the land and removes it from the tribal domain. (*Uncompahgre Ute and Fort Peck Allotments, supra; Raymond Bear Hill, supra; Friedrich v. Ducept, supra.*) The Secretary may for good reason refuse to approve an allotment selection, but he may not cancel his approval of an allotment except to correct error or to relieve fraud. Cf. *Cornelius v. Kessel* (128 U. S. 456) (public land entry). It is very doubtful whether the Secretary would be privileged to return allotment selections to tribal ownership simply on the ground that the Wheeler-Howard Act possibly forbids the trust patenting of such selections.

In this connection it should be pointed out that the Wheeler-Howard Act provides for the return to tribal ownership only of "remaining surplus land * * * heretofore opened or authorized to be opened to sale." This can have no applications to a reservation like Fort Belknap, which is without surplus land, nor in fact to any allotment selection approved or unapproved. There is some negative proof that such allotment selections were not intended to revert to tribal ownership. Moreover, the section expressly preserves "valid rights or claims of any persons to any lands so withdrawn existing on the date of withdrawal * * *." With this solicitude for claims of whites to reservation land, it is unthinkable that the legislature intended rights to allotments as near perfection and as couched in equity as these on the Fort Belknap reservation to lapse *sub silentio*.

Nor would the failure of allotments to mature into patented land cause them *ipso facto* to revert to tribal ownership. There is a half-way ground in which allotments evidently can remain indefinitely, at least as long as occupied by the grantees or their heirs. An early act entitled each Colville Indian to 640 acres of land, guaranteed and protected him in possession and ownership, and authorized the Secretary to allow selections, not mentioning patents. The Secre-

tary refused to patent a selection and Congress later passed an act authorizing the patent. (*Starr v. Long Jim, supra; In Re Long Jim, supra.*) This *Fort Belknap* case is not the only one in which trust patents have been delayed for many years. Note the facts in the *Klamath Allotment* case, *supra*.

It would appear that if trust patents are not issued on these allotments a hybrid class of holdings will be perpetuated on the Fort Belknap reservation which will serve to complicate the land reform under the prospective constitution. The unpatented allotments might be closely analogized to the assignments made by the tribe of rights of occupancy in designated sections of land, but administration would remain separate, as one assignment is derived from the Federal government and the other from the tribal government, and certain rights, for example, that of inheritance, would be more securely attached to the Federal assignment. The single practical though very real value of such a position would be the resulting inalienability of the land except to the United States, to the tribe or to a member of the tribe. *Henkel v. United States* (237 U. S. 43). See *United States v. Chase, supra*, at p. 94. However, if such a legal position were taken by the Department, it is highly probable that an allottee could successfully assert his right to a patent in a Federal court (25 U. S. C. A., sec. 345), for the interpretation of the section in question to forbid patenting of these allotments would present grave questions to the court, not only of the correctness of the interpretation but of the constitutionality of the act as interpreted. The legal considerations relevant to such constitutional questions follow.

(2) Where the Secretary has approved an allotment, the ministerial duty arises to issue a patent. With approval his discretion is ended except, of course, for such reconsideration of his approval as he may find necessary (24 L. D. 264). Since only the routine matter of issuing a patent remains, the allottee after his allotment is approved is considered as having a vested right to the allotment as against the Government. *Raymond Bear Hill* (52 L. D. 689 (1929)). (*Cf.* where a certificate of approval has issued as in the *Five Civilized Tribes* cases (*Ballinger v. United States ex rel. Frost* (216 U. S. 240)); and where right to a homestead is involved, *Stark v. Starrs* (6 Wall. 402)). And the allottee may bring mandamus to obtain the patent. See *Vachon v. Nichols-Chisolm Lumber Co.* (126 Minn. 303, 148 N. W. 288, 290 (1914)). *Cf. Lane v. Hoglund* (244 U. S. 174); *Butterworth v. United States* (112 U. S. 50); *Barney v. Dolph* (97 U. S. 652, 656).

Applying these doctrines to the Fort Belknap situation, it is apparent that the allottees whose allotments were approved have for years had a vested right to their allotments and been entitled to their

patents, which the Secretary was under duty to issue. Accordingly, the courts would probably protect the right of the allottee to the patent against any later act, either by treating the right to a patent as equivalent to a patent issued (cf. decisions on conflicting claims under homestead laws, *Barney v. Dolph*, *supra*; *Stark v. Starrs*, *supra*; *Lytle v. Arkansas* (9 How 314)), and therefore beyond the reach of the act; or by refusing to interpret section 1 of the Wheeler-Howard Act as preventing patents, in order to avoid the constitutional question; or by declaring such section unconstitutional as depriving the allottee of a property right without due process of law.

(3) Where an allotment has not been approved, on the other hand, approval and the issuance of a patent cannot be compelled by mandamus. *West v. Hitchcock* (205 U. S. 80); *United States v. Hitchcock* (190 U. S. 316). But it is recognized that an allottee acquires rights in land, with some of the incidents of ownership, when the allotting agents have set apart allotments and he has made his selection. Until that time an Indian eligible for allotment has only a floating right which is personal to himself and dies with him. *La Roque v. United States* (239 U. S. 62). See *Philomme Smith* (24 L. D. 323, 327). The owner of an allotment selection, even before its approval, has an inheritable interest (*United States v. Chase* (245 U. S. 89); *Smith v. Bonifer* (166 Fed. 846) (C. C. A. 9th, 1909)); which will be protected from the outside world (*Smith v. Bonifer*, *supra*); and which he can transfer within limits (*Henkel v. United States*, *supra*; *United States v. Chase*, *supra*); and which is sufficient to confer on him the privileges of State citizenship as granted to all "allottees" by the Act of 1887 (*State v. Norris*, *supra*). Moreover, where the Government has issued an erroneous patent for the allotment selections, the owner of such selection will be protected in his right against the adverse interests possessing the patent (*Hy-Yu-Tse-Mil-Kin v. Smith* (194 U. S. 401); *Smith v. Bonifer* (132 Fed. 889 (C. C. Ore. 1904), 166 Fed. 846 (C. C. A. 9th, 1909))), and against the Government itself. *Conway v. United States* (149 Fed. 261) (C. C. Neb. 1907). In these cases the courts lay down the principle that where an Indian has done all that is necessary and that he can do to become entitled to land, and fails to attain the right through the neglect or misconduct of public officers, the courts will protect him in such right. Again, where the claimant does all required of him, he acquires the right against the Government for the perfection of his title, and the right is to be determined as of the date it should have been perfected. *Payne v. New Mexico* (255 U. S. 367); *Raymond Bear Hill*, *supra*.

Further, where the right to the allotment has failed to become vested through the neglect of public officers to attach approval to

the selection, one court has indicated that the right to the allotment would be considered as already vested so as to be beyond the reach of a later act of Congress. *Lemieux v. United States* (15 Fed. (2d) 518, 521) (C. C. A. 8th, 1926). In the *Lemieux* case the Secretary's approval under the Act of 1887 would have had to include determination of the qualifications of the applicants, but in the Fort Belknap situation, no question of qualifications arises, since previous enrollment on the allotment list is made by statute conclusive evidence of the enrollee's right to allotment. Thus the position of the Fort Belknap allottee compels even more strongly to the conclusion suggested in the *Lemieux* case. It has also been suggested that where the Indian possesses all the qualifications entitling him to an allotment, the Secretary has no longer any discretion to refuse approval. See *State v. Norris, supra* (55 N. W., at p. 1089).

It would appear, therefore, that whether or not a constitutional question would arise if Congress prohibited the perfection of unapproved allotment selections in the ordinary case, since the right to the allotment is not yet vested in the instance of these 20 unapproved Fort Belknap selections, two factors militate against the power of Congress: One is the fact that the failure of approval before the act in question was passed is due to the negligence of the Government officers charged with the making of allotments. Equity, on these facts, would step in and protect the inchoate right as a vested right. The second is the fact that the approval required is not of a discretionary nature. Since the Secretary was under duty to correct the clerical errors, the right to the patent is nearly as strong where the allotment was not approved for such error as where it was approved but not patented for the same type of error.

This consideration of constitutional problems compels me to the conclusion that the natural and reasonable interpretation of the first section of the Wheeler-Howard Act expounded in the earlier part of this opinion should be adopted. It is axiomatic that where a statute is reasonably susceptible of two interpretations, one of which might permit successful assault upon its constitutionality, the other interpretation should be chosen. See *United States v. Delaware and Hudson Railroad Company* (213 U. S. 366, 407).

I am of the opinion, therefore, that your question should be answered in the affirmative. The first section of the Wheeler-Howard Act does not prevent the patenting or the approval and patenting of the 25 Fort Belknap allotment selections in question.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

STATE OF ARIZONA

Decided July 18, 1935

EXCHANGE OF PUBLIC LANDS—SEC. 8, TAYLOR GRAZING ACT—REVOCAION OF WITHDRAWAL—ACTION UPON APPLICATION ERRONEOUSLY TENDERED.

An application by the State of Arizona under section 8 of the Taylor Grazing Act to exchange school sections without, for lands within, a withdrawal to effect exchanges authorized by the Act of June 14, 1934 (48 Stat. 960) is not allowable, and the application may not be suspended to await revocation of the withdrawal and possible restoration to such form of disposal.

WALTERS, First Assistant Secretary:

October 30, 1934, the State of Arizona applied (List No. 075592) for an exchange of lands under section 8 of the Taylor Grazing Act, approved June 28, 1934 (48 Stat. 1269). The lands applied for are located in Secs. 23, 24, 25, 26, 27, 28, 29, 34 and 35, T. 31 N., R. 4 W., and Sec. 10, T. 23 N., R. 2 E., all in Coconino County. The lands offered in exchange are certain school sections in T. 7 N., Rs. 18 and 19 W., and T. 8 N., Rs. 10 and 11 W., all in Gila County.

On July 9, 1934, the Secretary of the Interior, under the authority of the Act of March 3, 1927 (44 Stat. 1347), temporarily withdrew all unentered, unreserved, unappropriated, and undisposed of public lands within Apache, Navajo and Coconino Counties for the purpose of retaining sufficient public land to effect the exchanges of lands authorized under the Act of June 14, 1934 (48 Stat. 960), which withdrawal remains unrevoked. Said withdrawal was made subject to all prior valid rights and claims of any persons initiated under the public land laws prior to July 9, 1934.

It suffices to say that the Act of June 14, 1934, authorized exchanges of school lands within the Navajo Reservation for public lands within the aforesaid counties, and upon the completion of such exchanges and the consolidations, it authorized the exchange of remaining school lands in the counties mentioned for public lands in said counties, but did not authorize the exchange of school lands without said counties for public lands within them.

By decision of April 2, 1935, the Commissioner of the General Land Office held the application of the State for rejection on the ground that the lands were embraced in the prior withdrawal of July 9, 1934, and were not subject to the exchange provisions of the Taylor Grazing Act. No error is seen in so holding.

The State alleges "there is an excess of available land in these counties more than sufficient for the satisfaction of exchange rights and the government at this time has satisfied considerable of the exchange rights and is aware as to where the remainder is to be placed

* * *"; that the application of the State interferes only to a minor degree with the plans and exchanges contemplated by the Indian Bureau, "and contends that the application should be allowed to remain of record until the withdrawal of July 9, 1934, is revoked, inasmuch as its purpose will soon be served" and the only result of the present order of cancelation will be to cause the State to refile thereafter.

Under the Executive order of withdrawal (No. 6910) of November 26, 1934, as amended May 20, 1935, upon the revocation of the withdrawal of July 9, 1934, the former would become applicable to the land in question "unless expressly otherwise provided in the order of revocation", and exchange of school lands for public land would be allowable. It, however, cannot be assumed that provision will not be made in the order of revocation rendering the withdrawal of November 26, 1934, inapplicable. No warrant is seen for holding in suspension the present invalid application.

The Commissioner's decision is

Affirmed.

EDWARD A. GIRARD

Decided July 23, 1935

STOCK-RAISING HOMESTEAD APPLICATION—WITHDRAWAL UNDER TAYLOR GRAZING ACT—EXECUTIVE ORDER OF NOVEMBER 26, 1934—SAVING CLAUSE.

The clause in the Executive order of November 26, 1934, which renders the public-land withdrawal provided for therein subject to "valid existing rights", includes the case of one whose application to make a stock-raising homestead entry was subsequent to the date of the order, but who, before the order became effective, purchased the improvements and relinquishment of a prior entryman, established residence on the land with his family, and has since maintained residence thereon.

WALTERS, First Assistant Secretary:

On January 2, 1935, Edward A. Girard filed a stock-raising homestead application for all of Sec. 24, T. 9 N., R. 6 W., G. & S. R. M., Arizona, together with a copy of an agreement showing that on October 1, 1934, he had agreed to purchase the improvements and the relinquishment of the entry of one Marvin H. Turner on said land, the consideration for the agreement being \$500 in cash, \$200 payable on November 1, 1934, \$200 on December 1, 1934, and the balance on or about January 2, 1935, when the relinquishment should be filed. The applicant also filed an affidavit, alleging that he established residence on the land on October 1, 1934, and had lived thereon continuously since that date; and that his improvements consisted of a four-room dwelling house 28 feet by 28 feet, a chicken house 20 feet by 60

feet, a barn and cow lot, fences and chicken equipment. The register suspended the application for action by the General Land Office but recommended allowance.

By decision of March 20, 1935, the Commissioner of the General Land Office rejected the application on the ground that the land had been withdrawn from settlement and entry on November 26, 1934. He said:

The fact that Girard settled on the land embraced in an intact entry of another, and prior to said withdrawal order of November 26, 1934, would not establish such a right as would except the land from the withdrawal order, as the former entry was not relinquished until after November 26, 1934.

The applicant has filed an informal appeal. In addition to a repetition of the facts hereinbefore stated, he says:

I applied every available dollar on the contract and by the first of the year had invested in the neighborhood of \$1,000 in said property. This represents a very important investment, in my present financial standing.

I took possession of the property on October 1, 1934, and with my wife and two children have lived here up to date. We are making a last stand against this ever pressing depression and have managed thus far to keep off relief. We need this home.

It is clear that to deprive this appellant of his home and the land involved would be an act of extreme harshness, and the Department is unwilling to affirm the Commissioner's decision unless no other action is possible.

In the withdrawal order of November 26, 1934, it is provided that—

The withdrawal hereby effected is subject to valid existing rights.

In interpretation of this part of the order the Secretary of the Interior has approved a generous principle of recognition of equitable rights set forth in the language of the Solicitor as follows (See Solicitor's Opinion approved February 8, 1935, 55 I. D. 205):

Of course, all valid entries are protected, and I believe also that all prior valid applications for entry, selection, or location, which were substantially complete at the date of the withdrawal, should be considered as constituting valid existing rights within the meaning of the saving clause of the withdrawal order. Claims under the color of title act of December 22, 1928 (45 Stat. 1069), should likewise be regarded as valid existing rights when bona fide and substantial rights thereunder existed at the date of the withdrawal. I believe this protective provision should be generously applied. The public interest in particular tracts within the confines of the broad expanse thus withdrawn is too inconsequential to justify the striking down of individual rights through technical construction or harsh application of the protective provision of the order.

In the case of *Williams v. Brening* (51 L. D. 225), the Department held that the saving clause in the Executive order of December 8, 1924, which excepted from the operation of the withdrawal

“any valid existing rights in and to” the lands on the islands off the coast or in the coastal waters of the State of Florida, withdrawn by it, protected, upon cancelation of an entry as the result of a contest, the preference rights of the contestant which had been earned, although not actually awarded prior to the withdrawal.

On March 14, 1914 (43 L. D. 187), the Department issued instructions as follows:

A contestant who settles upon the land embraced in the entry under contest and maintains residence thereon, may be credited with the full period of such residence where the contested entry is afterwards canceled and the contestant is permitted to make homestead entry.

It will thus be seen that the Department does not hold that a valid settlement cannot under any conditions be made upon land embraced in an entry intact of record. In the present case the former entryman had given up possession, having agreed that the appellant should have full ownership of the improvements on the land and a relinquishment of the entry upon payment of a specified sum of money, payable in installments. The entryman had to all intents and purposes given up the land and the entry was allowed to remain of record merely for the purpose of security for the payment of the agreed purchase price. As the former entryman acquiesced in the appellant's settlement upon the land and occupation and possession thereof and of the improvements thereon the Department has no ground for charging the appellant with trespass or for refusing to recognize that he has a valid settlement right dating from October 1, 1934, a date prior to the withdrawal order.

The decision appealed from is

Reversed.

JOHN PHOTOS

Decided July 29, 1935

AMENDMENT—STOCK-RAISING HOMESTEAD ENTRY—MISTAKE IN LAND DESCRIPTION—“VALID EXISTING RIGHT.”

The filing of an application, prior to the order of withdrawal of November 26, 1934, to amend an entry on account of mistake in the numbers of the tract entered, constitutes a “valid existing right” excepted from the order.

AMENDMENT—MISTAKE IN LAND DESCRIPTION—SETTLER—NONEFFECT OF REVOCATION OF PRIOR DESIGNATION.

Where under former existing policy, stock-raising entry was allowed for 640 acres and the entryman has made his home and a living in the stock-raising business on the land settled upon, amendment of the entry by eliminating 80 acres on one side and including 80 acres on another side of land of the same character, based on mistake in description and in order to conform to actual settlement, will not be denied because of revoca-

tion of the previous designation of the lands as of stock-raising character on the ground that the 640 acres is inadequate to provide a living for a family.

WALTERS, First Assistant Secretary:

December 29, 1930, John Photos made application, Denver 043503, to make stock-raising homestead entry for the N $\frac{1}{2}$ NW $\frac{1}{4}$ and E $\frac{1}{2}$ Sec. 15, NE $\frac{1}{4}$ Sec. 22, W $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 23, T. 3 N., R. 102 W., 6th P. M. The entry was allowed on January 20, 1932. On February 23, 1933, Photos filed application, under section 2372, Revised Statutes, as amended by the Act of February 24, 1909 (35 Stat. 645), to eliminate the W $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 23 and substitute the S $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 10 in the same township and range, followed by a petition for designation of the land as subject to the stock-raising homestead law.

On August 3, 1933, the Commissioner allowed the application conditioned upon such designation of the land by the Geological Survey. By report of July 31, 1934, the Geological Survey stated that the land was not subject to designation for the reason that "the value of the above-described land for grazing purposes is inadequate to provide a living for a family on a 640-acre homestead tract." Attention was also invited to revocation of the previous designation of the land within the entry July 10, 1934, by cancellation order No. 130.

By decision of September 20, 1934, the Commissioner held the application to amend for rejection without prejudice to the right of the applicant to submit data to overcome the adverse conclusions of the Geological Survey.

The entryman has appealed. The gist of his averments is that when he made the entry he did not know exactly where the lines of the claim were and was of the opinion that the S $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 10 was within the entry; that under this impression he built a road to his house, the part thereof on the S $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 10 being of the value of \$150; that he also placed a reservoir on this tract worth \$50; that the road is necessary to gain access to his house, and the reservoir is a permanent improvement, necessary in his stock raising operations;

That he has resided on said entry in compliance with the law and has placed valuable improvements thereon and said entry is a needed and necessary part of his livestock operations.

That he has made a living for himself and his family during the period of holding said entry and that such living has been made from his livestock which are run in connection with his homestead.

That the land in said Sec. 10 is of the same identical character as that in the balance of his application and should be designated as coming under the stock-raising homestead act.

It is believed that the entryman presents a case where amendment is allowable under the Act of February 24, 1909, due to a mistake in

expressing the numbers of the tracts sought to be entered, provided the land is subject to entry. The purpose of section 2372 Revised Statutes as amended was to make it mandatory upon the Secretary to grant such amendments as are specified therein. *Elbert L. Sibert* (40 L. D. 434); *Loyd Wilson* (48 L. D. 380). Entryman's application, which appears to be sufficient in form and substance to satisfy the conditions of the act of 1909, was filed before the withdrawal of public lands from entry by Executive order of November 26, 1934. If the land is subject to entry the entryman has "a subsisting valid right", saved by said order, to have his entry amended, as requested.

The only legal impediment to said entry is the fact that the land has not been designated under the stock-raising homestead act. In the present case the entryman, under the former policy and practice, was allowed to make entry of 640 acres, is making his home on the land, has made stock-raising improvements thereon and is making his living in the stock-raising business. His rights to the land entered are in no way affected by the revocation of the designation, and under the circumstances there is not much force to the objection of the Geological Survey to allowing the entryman to eliminate 80 acres on the west side of his entry and include 80 acres on the north side of like character, on which he has expended time and money, for the reason that 640 acres of the class of lands involved will not support a family. The allowance of the amendment under the circumstances would not prejudice the public interest, nor be heedless of the reasons that underlie the rule announced by the Geological Survey and would be of considerable advantage to the entryman. The land will therefore be considered as subject to designation as stock-raising land for the purpose of this amendment, and the Commissioner's decision is therefore

Reversed.

JAMES J. SPILLANE

Decided July 30, 1935

RIPARIAN RIGHTS—UNITED STATES SURVEYS—MEANDER LINE—BOUNDARY, WHAT CONSTITUTES.

In surveys by the United States Government, the meander lines which are run along or near the margins of streams or lakes are for the purpose of ascertaining the area of the upland, and not for the purpose of limiting the title of the grantee to such meander lines, the waters themselves constituting the real boundary.

RIPARIAN RIGHTS—TITLE TO SUBMERGED LANDS—PATENT, RESTRICTED OR UNRESTRICTED—LAW OF THE STATE.

In the case of navigable waters, the submerged lands do not belong to the Federal Government, having passed to the State upon its admission to the Union. In the case of lands bounded by nonnavigable waters, title

to the submerged lands is surrendered if the patent for the marginal uplands issues without reservation or restriction. In either case, the effect of the grant on the title to the submerged lands will depend upon the law of the State where the lands lie.

RIPARIAN RIGHTS—STATE OF MICHIGAN—EXTENT OF TITLE TO SUBMERGED LANDS—SHORE PROPRIETOR.

In the State of Michigan, in the absence of words of reservation or restriction, or unless the contrary appears, a grant of land bounded by a water-course conveys riparian rights, and the title of the riparian owner extends to the middle line of the lake or stream. The shore proprietor takes by virtue of shore ownership, and his interest in the bed of the lake or stream is acquired as appurtenant to the grant, the extent of his interest depending upon his frontage and the form, length, and breadth of the body of water upon which his land abuts.

OIL AND GAS LANDS—PROSPECTING PERMIT APPLICATION—NONNAVIGABLE LAKE.

Lands beneath the waters of a nonnavigable lake which is surrounded by tracts which have been patented by the Government are not subject to oil and gas prospecting under the terms of the Mineral Leasing Act of February 25, 1920.

WALTERS, *First Assistant Secretary*:

James J. Spillane has appealed from the decision of the Commissioner of the General Land Office, dated April 29, 1935, rejecting his two applications for oil and gas permits filed under the Mineral Leasing Act of February 25, 1920 (41 Stat. 437, 441), for certain lake-bed lands in T. 10 N., R. 5 W., Mich. M., in Montcalm County, Michigan.

It appears that all of the lands were disposed of many years ago in the sections embraced in the applications, in accordance with the survey plats, the patents describing the surveyed tracts bordering the meandered lakes. The applications were rejected on the ground that inasmuch as unrestricted patents had issued for the surveyed uplands, this Department had no further title to the water-covered areas.

The Department has carefully considered the brief filed in support of the appeal and has also heard the argument of the claimant submitted orally.

This case is controlled by principles which have become so firmly established through repeated announcements and reaffirmances by the courts and by this Department as to require citation of only a few authorities without elaborate discussion.

In analogous cases the Department has rejected similar applications for lands in the beds of meandered lakes. In doing so, the rule announced by the Supreme Court in the leading case of *Hardin v. Jordan* (140 U. S. 371) was applied. In that case the court said:

It has been the practice of the government from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of

upland granted, no charge being made for the lands under the bed of the stream, or other body of water. The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines. It has frequently been held, both by the Federal and state courts, that such meander lines are intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are thus meandered; and that the waters themselves constitute the real boundary.

That decision was rendered in 1891, and it is still recognized as a correct exposition of the common law on the subject, and applicable in the interpretation of Federal land patents. In the later case of *Hardin v. Shedd* (190 U. S. 508) the court again clearly stated its position as to the effect of Government patents for lands bordering upon either navigable or nonnavigable bodies of waters. In the case of navigable waters, the submerged lands do not belong to the Federal Government, having passed to the State upon its admission to the Union. In the case of lands bounded on nonnavigable waters, title to the submerged lands is surrendered if the patent for the marginal uplands issues without reservation or restriction. In either case, the effect of the grant on the title to the submerged lands will depend upon the law of the State where the lands lie.

This rule seems to be well established in the State of Michigan. See case of *Grand Rapids Ice and Coal Co. v. South Grand Rapids Ice and Coal Co.*, (60 N. W. 681). The decision in that case states the following principles: Unless the contrary appears, a grant of land bounded by a watercourse conveys riparian rights, and the title of the riparian owner extends to the middle line of the lake or stream; that the shore proprietor takes by virtue of shore ownership, and his interest in the bed of the stream is acquired as appurtenant to the grant, and the extent of that interest depends upon his frontage, and the form, length and breadth of the body of water upon which he abuts.

In a comparatively recent case (*Lee Wilson and Company v. United States*, 245 U. S. 24, 29), Chief Justice White summarized the prior holdings of the Supreme Court on this subject in the following language:

* * * As a means of putting out of view questions which are not debatable we at once state two legal propositions which are indisputable because conclusively settled by previous decisions.

First. Where in a survey of the public domain a body of water or lake is found to exist and is meandered, the result of such meander is to exclude the area from the survey, and to cause it as thus separated to become subject to the riparian rights of the respective owners abutting on the meander line in accordance with the laws of the several States. *Hardin v. Jordan*, 140

U. S. 371; *Kean v. Calumet Canal Co.*, 190 U. S. 452, 459; *Hardin v. Shedd*, 190 U. S. 508, 519.

Second. But where upon the assumption of the existence of a body of water or lake a meander line is through fraud or error mistakenly run because there is no such body of water, riparian rights do not attach because in the nature of things the condition upon which they depend does not exist, and upon the discovery of the mistake it is within the power of the Land Department of the United States to deal with the area which was excluded from the survey, to cause it to be surveyed and to lawfully dispose of it. *Niles v. Cedar Point Club*, 175 U. S. 300; *French-Glenn Live Stock Co. v. Springer*, 185 U. S. 47; *Security Land & Exploration Co. v. Burns*, 193 U. S. 167; *Chapman & Dewey Lumber Co. v. St. Francis Levee District*, 232 U. S. 186.

It is urged, however, that the force of these prior rulings no longer obtains since the very recent decision, rendered on April 1, 1935, by the Supreme Court in the case of *United States v. Oregon* (Vol. 79, page 573, L. ed., 295 U. S. 1). This contention cannot be admitted. Nothing is found in that decision to disturb the former cases hereinabove cited. On the contrary, there is an express reaffirmance of the established rule. This is shown succinctly in headnote No. 15, and is stated in the body of the opinion, with reference to lands under nonnavigable waters, as follows:

It is true, as was specifically pointed out in *Oklahoma v. Texas*, *supra* (258 U. S. 594, 596, 66 L. ed. 779, 780, 42 S. Ct. 406), that the disposition of such lands is a matter of the intention of the grantor, the United States, and "if its intention be not otherwise shown it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the state in which the land lies." This was the effect of the decisions in *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 S. Ct. 808, 838, *supra*; *Mitchell v. Smeal*, 140 U. S. 406, 35 L. ed. 442, 11 S. Ct. 819, 840; and *Kean v. Calumet Canal & Improv. Co.*, 190 U. S. 452, 47 L. ed. 1134, 23 S. Ct. 651, in which conveyances bounded upon the waters of a non-navigable lake were, when construed in accordance with local law, held impliedly to convey to the middle of the lake.

In that case, however, the facts were that the lands within the meander line had been withdrawn and reserved prior to the effective date of the grant to the State. The effect of this condition is sufficiently stated in headnote No. 1, as follows:

The setting aside, by executive order, of lands of the United States within a meander line boundary, as a bird reserve, precludes the passing of such lands to the state as incident to a school land grant of upland, where the order preceded the approval of the survey of the upland, notwithstanding it antedated the effective date of the Migratory Bird Treaty Act of July 3, 1918 (40 Stat. at L. 755).

One feature of the argument is that the surveyor had no right to meander such lakes and to exclude the lake beds from the survey. In that connection reference is made to the early laws which established the rectangular system of surveys of the public lands. It

may be said, however, that from a very early date the surveying regulations have carried the provision that all lakes embracing an area of more than 25 acres should be meandered, and the courts have given recognition to the propriety of such surveying procedure. Reference to this matter is made in the statement of the case of *Railway Company v. Schurmair* (7 Wall. 272). It was said that apparently no law required what was spoken of as "meandering" of watercourses, but that the law did require the *contents* of each subdivision to be returned, and a plat of the land to be prepared. Reference was also made to section 9 of the Act of May 18, 1796 (1 Stat. 464), to the effect that in all cases where the opposite banks of any stream, not navigable, shall belong to different persons, the stream and the bed thereof shall become common to both. That provision is now embodied in section 2476 of the Revised Statutes. It has been recognized by the courts as applicable to nonnavigable lakes. This provision alone shows that title to the beds of nonnavigable waters may pass to riparian owners by the issuance of patents for the surveyed uplands. It was in effect merely a statutory declaration of the common law rule.

The Department has in several cases declined to issue prospecting permits under similar conditions. See cases of *Grant L. Shumway* (47 L. D. 71); *Clayton Phebus* (48 L. D. 128); *William Erickson* (50 L. D. 281).

In this case there is no contention that any shore lands above ordinary high water were omitted from the surveys, and it is admitted that the lakes were and are nonnavigable. The patents issued without any reservation of the lake beds. The brief in this case refers to an unsurveyed island in each of Duck and Mud Lakes, but the areas are not given. Whether they were of such character as to justify their survey at the time of the survey and disposal of the adjacent uplands cannot be determined from the record. No decision can be rendered on the present showing as to the legal status of these islands except to say that error in omitting them from the survey has not been shown.

As indicative of the legal principles applicable with respect to belated surveys of small islands omitted from the original surveys of the adjacent shore lands, reference is made to the case of *Grand Rapids & Indiana Railroad Company v. Butler* (159 U. S. 87), which affirmed a decision by the Supreme Court of Michigan. The island in that case contained 2.56 acres in a meandered stream. It was surveyed and patented many years after the shore lands had been surveyed and patented. The court held that the first patent carried title to the island, since there was nothing to indicate mistake or fraud in the original survey of the lands in the township and it appearing that the circumstances were such at the time of the prior

survey as naturally induced the surveyor to decline to survey that particular spot as an island.

The decision appealed from is found to be correct and it is accordingly

Affirmed.

GRAVES v. MARSHALL

Decided July 30, 1935

CONTEST—HOMESTEAD ENTRY—NOTICE—SERVICE—ABATEMENT OF CONTEST.

The contest of a homestead entry abates where there has been no service of notice on the contestee within thirty days from date of issuance of the contest notice.

CONTEST—RULES OF PRACTICE—SERVICE OF NOTICE.

The rules of practice of the Department provide, in contests, for three modes of service, namely, personal service, by registered mail, and by publication where the party cannot be found after diligent search and inquiry, and affidavit to that effect is filed within thirty days from allowance of the application to contest; and the contestant assumes the risk of service when he elects to adopt the method of service by registered mail. If he has reason to apprehend that such service will not be effected within the thirty days allowed, he should employ one of the other methods of service.

WALTERS, *First Assistant Secretary:*

March 15, 1934, Chester R. Marshall filed contest against the stock-raising entry, Cheyenne 050243, of James R. Holmes, made June 17, 1930, charging that the entryman had not resided upon the land, and notice of contest was issued on the same date. April 18, 1934, William C. Graves filed simultaneously a relinquishment by Holmes of his entry and an application to amend his own homestead application 056470 to embrace the land relinquished, and on the same date the register suspended the application and issued notice to Marshall of his preference right to enter the land. April 20, 1934, Graves filed a supplemental stock-raising homestead application for the land.

On May 2, 1934, Marshall filed an affidavit alleging that on March 22, 1934, he had mailed by registered mail the notice of contest to James R. Holmes, Wheatland, Wyoming; that Holmes resided at Wheatland and receives his mail at the post office at Wheatland, and that on April 11, 1934, the registered letter was returned to him marked unclaimed. The affidavit was accompanied by the unclaimed letter. Marshall also filed on May 2 application to make homestead entry of the land. On the same date, the register issued notice to Graves of the filing of Marshall's homestead application, and allowed the former twenty days to file affidavit requesting a hearing at which he might show: (1) that the contest charge was not true; (2)

that the contestant is not a qualified applicant; and (3) that the land is not subject to his application. Graves was further notified that if he failed to take the action required the application of Marshall would be allowed and his rejected.

By letter of May 5, 1934, in reply to an inquiry by the register, the postmaster at Wheatland advised him as follows:

In reply your letter of May 2, 1934, you are advised that James R. Holmes is now and has been receiving his mail here. The registered letter addressed to him which was returned April 11, 1934, marked unclaimed, should have been marked refused. He stated to one of the clerks that he thought he knew who the letter was from and that he would not call for it.

Graves appealed from the register's action, contending that the contest had abated under Rule 8 of Practice, no service of contest having been made on contestee within thirty days from issuance of notice.

By decision of October 19, 1934, the Commissioner of the General Land Office held that the filing of the relinquishment, April 18, 1934, was the result of Holmes' knowledge of the pending contest, that the register had correctly followed the instructions in Circular 225 (42 L. D. 71), affirmed his action and rejected Graves' application.

An appeal by Graves brings the case before the Department.

Assuming the truth of the statements in the postmaster's letter, those statements do not show service of notice of contest on the entryman. The sending of a notice of contest by registered mail to the entryman's record address is no more than an attempt to make service, and without delivery of the notice to him there is no service. The rules of practice provide for three modes of service: (1) by personal service; (2) by registered mail; and (3) by publication under the provisions of Rule 9 where the party cannot be found by due diligence and inquiry and affidavit is filed to that effect within thirty days from the allowance of the application to contest. The contestant assumes the risk of service of the contest when he elects to adopt the method of service by registered mail, and when he has reason to apprehend that such service will not be effected within the thirty days, as Rule 8 requires, in the exercise of due diligence he should employ one of the other methods mentioned above to save his contest.

The affidavit of the contestant filed May 2 was an admission that service of contest had not been made within the time required under Rule 8 of Practice, and apprized the register of the fact that the contest had abated under said rule. The provision of section 3 of Circular 225 applied by the register reads:

Where a good and sufficient affidavit of contest has been filed against an entry and no notice of contest has issued on such affidavit, or, if issued, there is no evidence of service of such notice upon the contestee, if the entry should be relinquished you will, as heretofore, immediately note the cancellation of the entry upon the records of your office. In such cases for

purposes of administration a presumption will obtain that the contest induced the relinquishment and you will at once so notify the contestant and that he will be allowed to make entry accordingly. If the relinquishment is accompanied by the application of another than the contestant, you will at once advise the applicant of the pending contest and of the presumptive preference right thereunder, and that should the contestant in the exercise of such right make timely application for the land, showing himself duly qualified, said right can only be avoided on a showing that the contest charge was not true, or that the contestant is not a qualified applicant, or that the land is not subject to his application. Should the contestant apply for the lands, showing himself duly qualified within the preference-right period, and the intervening applicant file request for a hearing, with his corroborated affidavit as to the facts above stated in avoidance of a preference right in the contestant, within 20 days after the filing of the contestant's application, hearing will be had, after at least 30 days' notice to all interested parties, upon the issues thus presented, the intervening applicant having the burden of proof.

But these instructions are predicated on the assumption that at the time the relinquishment is filed there is pending a valid contest. It does not apply where and when it appears that there has been no service of notice on the contestee within thirty days from the date of the issuance of the contest notice and the contest has consequently abated. The rule laid on Graves to apply for hearing was therefore error. Instead, the register should have noted abatement of the contest of Marshall and considered the applications of Graves without regard to the contest.

For the reasons stated, the Commissioner's decision is

Reversed.

PHOSPHATE REGULATIONS AMENDED

[Circular No. 1363, modifying Circular No. 696]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 9, 1935.

REGISTERS, UNITED STATES LAND OFFICES:

Under the existing regulations Circular 696 (47 L. D. 513), as amended by Circular 936 (50 L. D. 503), governing the disposition of phosphate deposits under the Leasing Act of February 25, 1920 (41 Stat. 437), and acts amendatory thereof, the practice is to award phosphate leases to applicants therefor without competitive bidding. This system of disposing of phosphate deposits has proved unsatisfactory.

Accordingly, sections 7 to 10, inclusive, of Circular 696, are hereby amended as follows:

7. *Action by Register.*—An application when filed with the district land office will be given the current serial number, promptly noted of record, and trans-

mitted to the Commissioner of the General Land Office, accompanied with a statement as to the status of the lands embraced therein. After the receipt of such application, no applications, filings, or selections for the lands embraced therein will be permitted until so directed, except applications under this act.

8. *Action in General Land Office.*—Upon receipt in the General Land Office, said application will be referred to the Geological Survey for determination as to whether the lands or deposits are properly subject to lease, and to fix the minimum terms on the basis of which the lease will be offered for sale. When the lease applicant shall have signified his consent thereto, the lands or deposits will be advertised for lease to the bidder offering the highest bonus therefor; but if no bonus is offered the lease will be awarded to the petitioner, subject to the approval of the Secretary of the Interior.

8 (a). *Notice of lease offer.*—The register of the appropriate district land office will be directed to publish notice of the offer of the lands or deposits for lease for a period of 30 days in a newspaper of general circulation to be designated by the Commissioner of the General Land Office in the county in which the lands or deposits are situated. Such notice shall state the date and the hour on which bids will be received at the district land office, such date to be not earlier than the last day of publication, and shall describe the land, the amount of royalty and rental to be charged, the minimum investment required, and that the sale of lease will be made at public auction at the time fixed to the qualified bidder offering the highest bonus for the privilege of leasing the lands or deposits on the terms therein set forth. A copy of the notice will also be posted in the district land office during the period of publication thereof. Publication of the offer will be at the expense of the Government.

All bidders at any public sale of leases are warned against committing any act by intimidation, combination, or unfair management, to hinder or prevent bidding thereat; in violation of section 59 of the Criminal Code of the United States, approved March 4, 1909.

9. *Auction of lease.*—At the time fixed in the notice, the register will, by public auction at his office, offer the land or deposits for lease on the terms and conditions fixed in the notice to the qualified bidder of the highest amount offered as a bonus for the privilege of leasing the land, subject to the approval of the Secretary of the Interior. The successful bidder must deposit with the register on the day of sale a certified check or cash, for one-fifth of the amount of his bid, such sum to be deposited by the register in his account "Trust funds—Unearned money."

9 (a). *Right to reject bids.*—The right is reserved by the Secretary of the Interior to reject any and all bids; and should a bid be rejected, the deposit made by the bidder will be returned.

10. *Action by bidder.*—The successful bidder will be allowed 30 days from date of auction within which to (a) file in the district land office a lease, duly executed by him in quintuplicate in the form herein prescribed; (b) file evidence of qualifications as prescribed by paragraph 6 hereof, unless such evidence has theretofore been filed; (c) file the bond required by section 2 (b) of the lease, or United States bonds in lieu thereof under the act of February 24, 1919 (40 Stat. 1148); (d) pay the remainder of the bonus bid by him and the annual rental for the first year of the lease, together with the required filing fee of \$2 for each 160 acres of land, or fraction thereof, but in no case less than \$10.

10 (a). *Action by district land office.*—At the end of the 30 days allowed the successful bidder, or sooner, if the foregoing be complied with by him, the district land office will forward by special letter all papers with full report

of action taken. In case of default, the amount deposited by the bidder will be forfeited, and disposed of as other receipts under this act.

All former instructions relative to phosphate leases are hereby modified in so far as they are inconsistent herewith.

FRED W. JOHNSON, *Commissioner*.

Approved:

T. A. WALTERS,

First Assistant Secretary.

SODIUM REGULATIONS AMENDED

[Circular No. 1364, modifying Circular No. 1194]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 9, 1935.

REGISTERS, UNITED STATES LAND OFFICES:

Under the existing regulations (Circular 1194, 52 L. D. 651), governing the disposition of sodium deposits under the Leasing Act of February 25, 1920 (41 Stat. 437), and acts amendatory thereof, the practice is to award sodium leases to applicants therefor without competitive bidding. This system of disposing of sodium deposits has proved unsatisfactory.

Accordingly, sections 4 to 8, inclusive, Title II, of Circular 1194, are hereby amended to read as follows:

4. *Action in General Land Office.*—Upon receipt in the General Land Office, said application will be referred to the Geological Survey for determination as to whether the lands or deposits are properly subject to lease, and to fix the minimum terms on the basis of which the lease will be offered for sale. When the lease applicant shall have signified his consent thereto, the lands or deposits will be advertised for lease to the bidder offering the highest bonus therefor; but if no bonus is offered the lease will be awarded to the petitioner, subject to the approval of the Secretary of the Interior.

5. *Notice of lease offer.*—The register of the appropriate district land office will be directed to publish notice of the offer of the lands or deposits for lease for a period of 30 days in a newspaper of general circulation to be designated by the Commissioner of the General Land Office in the county in which the lands or deposits are situated. Such notice shall state the date and the hour on which bids will be received at the district land office, such date to be not earlier than the last day of publication, and shall describe the land, the amount of royalty and rental to be charged, the minimum investment required, and that the sale of lease will be made at public auction at the time fixed to the qualified bidder offering the highest bonus for the privilege of leasing the lands or deposits on the terms therein set forth. A copy of the notice will also be posted in the district land office during the period of publication thereof. Publication of the offer will be at the expense of the Government.

All bidders at any public sale of leases are warned against committing any act by intimidation, combination, or unfair management, to hinder or prevent

bidding thereat; in violation of section 59 of the Criminal Code of the United States, approved March 4, 1909.

6. *Auction of lease.*—At the time fixed in the notice, the register will, by public auction at his office, offer the land or deposits for lease on the terms and conditions fixed in the notice to the qualified bidder of the highest amount offered as a bonus for the privilege of leasing the land, subject to the approval of the Secretary of the Interior. The successful bidder must deposit with the register on the day of sale a certified check or cash, for one-fifth of the amount of his bid, such sum to be deposited by the register in his account "Trust funds—Unearned money."

6 (a). *Right to reject bids.*—The right is reserved by the Secretary of the Interior to reject any and all bids; and should a bid be rejected, the deposit made by the bidder will be returned.

7. *Action by bidder.*—The successful bidder will be allowed 30 days from date of auction within which to (a) file in the district land office a lease, duly executed by him in quintuplicate in the form herein prescribed; (b) file evidence of qualifications as prescribed by paragraph 11 hereof, unless such evidence has theretofore been filed; (c) file the bond required by section 2 (b) of the lease, or United States bonds in lieu thereof under the act of February 24, 1919 (40 Stat. 1148); (d) pay the remainder of the bonus bid by him and the annual rental for the first year of the lease, together with the required filing fee of \$2 for each 160 acres of land, or fraction thereof, but in no case less than \$10.

8. *Action by district land office.*—At the end of the 30 days allowed the successful bidder, or sooner, if the foregoing be complied with by him, the district land office will forward by special letter all papers with full report of action taken. In case of default, the amount deposited by the bidder will be forfeited, and disposed of as other receipts under this act.

All former instructions relative to sodium leases are hereby modified in so far as they are inconsistent herewith.

FRED W. JOHNSON, *Commissioner.*

Approved:

T. A. WALTERS,

First Assistant Secretary.

**EXTENSIONS OF TIME FOR HOMESTEAD AND DESERT LAND
PROOFS UNDER ACT OF JULY 26, 1935 (49 STAT. 504)**

[Circular No. 1365]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., August 14, 1935.

REGISTERS, UNITED STATES LAND OFFICES:

The Act of July 26, 1935 (49 Stat. 504), entitled "An Act to further extend the period of time during which final proof may be offered by homestead and desert land entrymen", reads as follows:

That section 1 of the Act entitled "An Act to extend the period of time during which final proof may be offered by homestead entrymen", approved May 13,

1932, as amended, is amended by striking out "December 31, 1934" and inserting in lieu thereof "December 31, 1935."

The instructions in Circular No. 1311 will be followed in granting relief under this act, the only changes therein made necessary by this act being that wherever the year 1934 appears it should be changed to 1935 and the following should be added to the title:

Amended by Act of July 26, 1935 (49 Stat. 504), so as to apply to final proofs becoming due on or prior to December 31, 1935.

Such changes have been made on the supply of said circular in this office. You will make similar changes in all copies of said circular in your office before sending them out to persons making requests for same.

FRED W. JOHNSON, *Commissioner.*

Approved:

T. A. WALTERS,

First Assistant Secretary.

SALE OF ELECTRIC ENERGY FROM HETCH HETCHY POWER SITE, CALIFORNIA

Opinion, August 24, 1935

PUBLIC DOMAIN—HETCH HETCHY PROJECT—AUTHORITY OF CONGRESS.

Congress, in the exercise of its duly delegated legislative powers under the Constitution, had full authority to prohibit access to the Federally owned land embracing the Hetch Hetchy Project, by any individual or corporation, and full authority to dispose of such land or of the right to generate electric energy thereon under such conditions as it saw fit to impose.

POWER SITE—HETCH HETCHY—SALE OF ELECTRIC ENERGY—RAKER ACT, SEC. 6.

Section 6 of the Act of December 19, 1913 (38 Stat. 242, 245), commonly termed the Raker Act, provides: "That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee: * * *"*Held*, That a sale by the grantee, the City and County of San Francisco, to a private utility corporation, of the electric energy developed under its grant, with a view to resale and distribution by said corporation to consumers of electricity, constitutes a violation of the act.

POWER SITE—HETCH HETCHY—RAKER ACT—SALE OF ELECTRIC ENERGY BY CITY AND COUNTY OF SAN FRANCISCO TO PRIVATELY OWNED UTILITY COMPANY.

An act of Congress which granted to the City and County of San Francisco authority to generate and sell to municipalities and water and irrigation districts electric power produced on public lands of the United

States, forbade the selling, assigning, or transferring of such electric power to "any private person, corporation, or associaton." The grantee entered into a contract with a private company for the distribution of the power so generated, which company has since distributed and sold electric current in San Francisco. *Held*, That although the contract entered into was stated to be one of agency or consignment, and not one of sale, and the language of consignment was employed, the contract, when judged by the substance of its terms, must be held to be one of sale, the disposition of the electric power being under conditions necessarily contemplating its resale to consumers.

HETCH HETCHY PROJECT—RAKER ACT—LEGISLATIVE INTENT.

The legislative history of the Raker Act clearly shows that the purpose of section 6 thereof was to prevent the water or power developed on the Hetch Hetchy Project from ever falling into the hands of a private corporation or monopoly. From the facts it appears that the power developed on the Hetch Hetchy Project has fallen into the hands of just such a corporation or monopoly.

ICKES, *Secretary*:

The question before me for decision is whether the action of the City and County of San Francisco in contracting with the Pacific Gas and Electric Company for the distribution of electric power generated by it in connection with the Hetch Hetchy Project constitutes a violation of the provisions of the Raker Act (38 Stat. 242). By that act the City and County of San Francisco was authorized to construct and operate the Hetch Hetchy Project within the Yosemite National Park, the Stanislaus National Forest, and the public domain of the United States.

In the autumn of 1934 I instructed the Solicitor of the Department of the Interior to advise me whether, in his opinion, the Raker Act was being violated. Shortly thereafter I directed the Director of the Division of Investigations to investigate and report to me on the facts in connection with the arrangement between the City and County of San Francisco and the Pacific Gas and Electric Company whereby the latter named corporation was distributing this electric power. This report on the facts was submitted to me on February 4, last, with an accompanying memorandum by the Solicitor on the law involved. Thereafter, on May 6, last, I held an open hearing at the Interior Department in the city of Washington, at which San Francisco and other interested parties were represented. At and since the time of that hearing several briefs pertinent to the inquiry have been filed with me and a considerable amount of argumentative correspondence has been received.

After careful consideration of all the facts presented and of the arguments made on behalf of the City and County of San Francisco, and other interested parties, I have come to the conclusion that the provisions of the Raker Act are being and for some time past have

been violated. As the parties in interest are entitled to know upon what grounds my conclusion is based, I shall discuss as briefly as may be the facts and the law that seem to me to be applicable to and controlling of the issues involved. First, however, I believe it would be helpful to a clear understanding of the case to present a resume of the history of the problem that is before me for decision.

I

On May 8, 1923, the National Park Service called to the attention of the Secretary of the Interior the fact that the City and County of San Francisco was openly selling Hetch Hetchy power to the Pacific Gas and Electric Company, which, in turn, was selling that power to its consumers. First Assistant Secretary Finney, on May 22, 1923, requested the opinion of Solicitor Edwards concerning the legality of that procedure. In an opinion dated June 8, 1923, the Solicitor determined that any sale of Hetch Hetchy power for the purpose of resale was prohibited by the Raker Act. He recognized the fact, however, that due to the difficulty of acquiring or constructing a distributing system, a great waste of power would result unless the then existing distributing facilities might be utilized. To obviate such a possibility of waste he suggested that an arrangement be made "by which the grantee would have its power transmitted over the lines of the concern owning or controlling the existing distribution system."

Presumably as a result of this suggestion the City and County of San Francisco on July 1, 1925, entered into a contract with the Pacific Gas and Electric Company for the distribution of Hetch Hetchy power. The propriety of that contract, under which power is still being distributed by the private concern, was questioned immediately. On July 20, 1925, Acting Solicitor Wright rendered an opinion in which, after a significant reference to the temporary character of the contract and the inability of San Francisco to obtain its own distributing system for at least two years, he held that the contract was one of agency or consignment and not one of sale in violation of the provisions of the statute. The opinion, however, did recognize the fact that operations under the contract might be conducted in such a way as to constitute a violation of the statutory prohibitions.

A copy of that opinion was transmitted to the Attorney General with the request that he advise the Department of his views concerning the contract. That he refused to do on the ground that the Department of Justice could not commit itself on a legal question which that Department might subsequently be called upon to litigate. In his letter of August 5, 1925, however, the Attorney General, Mr. Sargent, did indicate the view to be taken on the question. Imme-

diately after pointing out that the contract might be viewed (1) as proper, (2) as improper, or (3) as proper because temporary, he stated, "In the exercise of your discretion you may come to the conclusion that this last is the correct view."

After receiving that advice, Secretary Work, on August 19, 1925, wrote to Mayor Rolph of San Francisco to the effect that no action would be taken by the Department until such time as the facts attendant on the future performance of the contract with the Pacific Gas and Electric Company might be sufficient to indicate whether the provisions of the statute were being met. The contract has been in effect continuously since that time.

Apparently the issue lay dormant until it was brought to life by Congressman Crampton who, on May 19, 1928, delivered on the floor of the House of Representatives a vigorous attack against San Francisco, charging, among other things, the sale of electric power to the Pacific Gas and Electric Company in "direct and open violation" of the Raker Act. Cong. Rec., vol. 69, p. 9236. See also Cong. Rec., vol. 69, pp. 9239-9242. On February 23, 1929, Congressman Crampton wrote to Secretary West in effect demanding action because of San Francisco's violation of the statutory provisions regarding the sale of power. As a result of that demand Secretary West, on March 2, 1929, wrote to Mayor Rolph requesting certain information concerning the performance of the power sales contract and concerning the time which must elapse before San Francisco might acquire its own power distributing system. Mayor Rolph's reply of April 4, 1929, addressed to Secretary Wilbur, indicated the profits which had been realized by San Francisco from the contract and set out in some detail the steps which had been taken by the City and County looking toward the acquisition of the distributing systems of the Pacific Gas and Electric Company and the Great Western Power Company. (The latter company has since been absorbed by the former.) At that time proceedings had been begun before the California Railroad Commission for the purpose of fixing the value of the properties of those two companies so that a purchase might be effected.

With those materials at hand, Solicitor Finney, on May 29, 1929, rendered an opinion in which it was set out that "any method for the distribution of the power generated under this grant, involving an element of private gain, can only be justified as a temporary arrangement, and to avoid waste, and only so long as the City and County in the meantime are proceeding in good faith and with diligence to comply with the conditions and to meet the obligations imposed upon them by the law and the acceptance of the grant." The Solicitor, however, refused to express his opinion on the facts before him, saying that, since the Attorney General must bring suit

if a violation existed, the opinion of that official should be had. Such an opinion was requested in a letter dated February 28, 1930. To that request Attorney General Mitchell responded on April 26, 1930, suggesting that representatives of the two departments confer "to develop the situation more fully."

When the representatives met it was determined that additional information was necessary. Eventually it was learned not only that the California Railroad Commission had fixed a value on the distributing systems of the two concerns which San Francisco desired to purchase, but also that the City and County had arranged to submit to the electors on August 26, 1930, a proposed bond issue sufficient to finance the acquisition of the necessary systems. In view of those facts the Attorney General suggested, and Secretary Wilbur agreed, that no further action be taken until the result of the election had been determined. The electors, however, failed to approve the bond issue.

After that, Secretary Wilbur arranged a conference, after notice to the Attorney General, at which San Francisco was given an opportunity to present its case. For the consideration of that conference Secretary Wilbur, on November 8, 1930, transmitted to the Mayor of San Francisco a memorandum stating that the Department "cannot permit the arrangement between the city and the company to go on indefinitely, as an end in itself", and suggesting three courses of action open to San Francisco: (1) the immediate calling of another bond election; (2) the termination of the "agency" contract in the absence of a bond election; or (3) application to Congress for modification of the Raker Act.

At the conference, which was held on December 4, 1930, San Francisco submitted further argument concerning the legality of the contract with the Pacific Gas and Electric Company as a temporary expedient. With that argument apparently there was submitted, although there appears to be no copy of it in the files, a tentative program whereby San Francisco proposed to acquire a distributing system and terminate the existing contract within three years. The only reference found to any departmental consideration given to, or action taken on, San Francisco's plea is the following short paragraph contained in a letter of December 8, 1930, from Secretary Wilbur to Mr. John J. O'Toole, city attorney of San Francisco:

I note that your communication advises the Department of the City's three-year program for compliance with the provisions of the Raker Act respecting power distribution, which will be followed with interest. Kindly keep me advised of the completion of the successive steps outlined.

Subsequent to this communication, the departmental files show nothing pertinent to this question until the present inquiry was

begun. It does appear, however, that another bond election was held in San Francisco on September 29, 1933, for the purpose of authorizing the sale of bonds sufficient to construct a small municipal distributing system. This bond proposal was also rejected by the voters.

II

It is necessary to a determination of the issues to consider in some detail the statutory provisions relating to the disposal of the power generated from the Hetch Hetchy Project. It is also necessary to consider the terms of the contract under which the Pacific Gas and Electric Company has been and is distributing that power.

In section 9 (1) of the Raker Act there is an express provision covering the use to which electric power may be put. It is to be utilized first for the pumping of the water supply for San Francisco and for the actual municipal needs of the City and County not including "sale to private individuals or corporations." Any excess of power must be sold, on request, to satisfy the needs of the land-owners of the Modesto Irrigation District and the Turlock Irrigation District for the pumping of subsurface waters to effectuate irrigation or drainage and for the needs of municipalities within those districts, again not including "sale to private individuals or corporations." Any remaining power may be sold by San Francisco to private individuals, corporations or others "for commercial purposes." This authority is limited, however, by section 6 of the act, which provides:

That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee: *Provided*, That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States.

It has been argued that a direct sale of power by San Francisco to the Pacific Gas and Electric Company for the express purpose of resale would not constitute a violation of the prohibitions contained in section 6 for the reason that the company, as a public utility, already has the right to sell power to consumers and, thus, need not be invested by the City and County with that right in violation of the statutory prohibitions. This contention confuses the right or authority of the company to sell power in general to consumers with its right to sell them the power generated through the operation of the Hetch Hetchy Project. It also confuses the authority of a private corporation, under the terms of its charter and the provisions of laws creating it, to dispense among consumers such electric energy as it is in a position legally to control, with the disability of the

City and County of San Francisco, under the terms of the Hetch Hetchy grant, to sell or let Hetch Hetchy water or power to such a corporation for purposes of resale to consumers. In each instance, it is the latter, not the former, that is in issue here.

We are not particularly concerned with the question whether the sale or disposition of Hetch Hetchy power by the Pacific Gas and Electric Company to consumers is *ultra vires*. The real question is whether the sale or disposition of that power by the City and County of San Francisco under conditions necessarily contemplating its resale by the company to consumers violates section 6 of the Raker Act. This question depends not on the charter or statutory powers of the company to dispose of electric energy whose disposition is legally subject to its control, but on the power of San Francisco to vest in the company any right to dispose of Hetch Hetchy energy at all where the disposition contemplated inevitably must take the form of a distribution of the power by the company among its consumer customers. Since the only authority which the City and County of San Francisco can have to dispose of the electric energy generated at Hetch Hetchy is derived from the Hetch Hetchy grant, we must look at the provisions of that grant and of the Raker Act embodying it to see whether such a disposition is within or outside of the scope of the delegated authority. And looking at those provisions we cannot reasonably refuse to see that under the limitations on the authority of San Francisco to dispose of the Hetch Hetchy energy, expressly imposed in section 6 of the act, San Francisco is prohibited from making any sale of that energy to a private corporation with a view to its resale by that corporation to its customers. See Solicitor's opinions of June 8, 1923 (M. 10228) and October 27, 1933 (M. 27615, 54 I. D. 316).

It has also been argued that this construction of the statute is improper because it forces on San Francisco municipal ownership and operation of distributing facilities, a result that was neither intended by nor within the power of Congress. That Congress did not intend to force municipal ownership and operation on San Francisco would, of course, be immaterial even if true. An explicit prohibition by Congress against the disposition of Hetch Hetchy power to a private corporation for purposes of resale is not to be defeated merely because its necessary consequence is to compel San Francisco to acquire and operate a distributing system of its own. Indeed, the natural conclusion is that Congress intended to bring about the results flowing from the limitations which it imposed. A clear expression by Congress in the statute that it was not intended that San Francisco should acquire a municipal distributing system would, to be sure, serve to cast doubt on the validity of any construction of section 6 necessitating the acquisition of such a system by San Francisco.

But there is nothing in the act which expressly or by legitimate implication can be taken to express such an intention. In the absence of any such expression of intention, there is no reason to refuse either to indulge the usual inference as to the legislative intention or to give effect to the claim of an unexpressed prohibition because failure so to do would lead to a consequence not specifically spelled out in the act.

The contention that Congress does not have power to compel the City and County of San Francisco to acquire and operate its own distributing system, while true (see *Uhl v. Badaracco*, 199 Cal. 270), is quite beside the point. We are not concerned here with a direct attempt to force municipal ownership and operation on the City and County of San Francisco by a mandatory Congressional enactment. We are dealing merely with a specification by Congress of the terms and conditions under which it was willing to grant certain rights to San Francisco with respect to the generation and utilization of electrical energy on the Federally owned land embracing the Hetch Hetchy Project. Congress, exercising its duly delegated legislative powers under the Constitution, had full authority to prohibit any one, including San Francisco, from having any access at all to this land belonging to the United States. It also had full authority to dispose of that land or of the right to generate electric energy thereon under any conditions which it saw fit to impose.

This is exactly what was done by the Raker Act. San Francisco was granted certain rights on Federally owned lands, subject to various conditions, among them those contained in section 6 prohibiting sale for the purpose of resale of any electric power developed on the land. The City and County was not compelled to accept the grant if it was unwilling to observe the limitations on which the grant was conditioned. When it accepted the grant, it acted voluntarily for the purpose of obtaining the benefits conferred, but by that same act it obligated itself to comply with the conditions imposed. Certainly San Francisco cannot continue to enjoy those benefits and at the same time repudiate the conditions on which their enjoyment, by the very terms of the grant, is made to depend. See *Denver v. New York Trust Company*, 229 U. S. 123, and also *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518; *Atkins v. Kansas*, 191 U. S. 207; *Heim v. McCall*, 239 U. S. 175. The method by which San Francisco is to comply with those conditions is, of course, a matter to be controlled by the provisions of its charter. But in good faith it must exercise its powers to the full in order to carry out its obligations under the Raker Act, and, if necessary, even an enlargement or amendment of those powers must be secured.

At the hearing on May 6 it was also sought to cast doubt on the meaning of section 6 by insisting that the requirements contained in

section 9, subsection (m), that certain designated amounts of power must be generated by San Francisco "for municipal and commercial use" might be impossible to perform if sale for the purpose of resale were not permissible. Congress, however, provided, in section 9 (m), that lesser amounts of power might be generated if "in the judgment of the Secretary of the Interior the public interest will be satisfied with a lesser development." Consequently, if no market for Hetch Hetchy power exists which may be served without a violation of the conditions imposed by Congress, including those contained in section 6 of the act, the Secretary may determine that the public interest does not require the generation of the prescribed amounts of power. Thus there is no conflict between the provisions of the act and no ambiguity concerning the meaning of section 6.

For these various reasons I have concluded that section 6 of the Raker Act prohibits the sale of Hetch Hetchy power for the purpose of resale and that this prohibition is legally valid. Since the meaning of the section is, in my opinion, clear and unequivocal, recourse to the legislative history of the Raker Act is neither necessary nor permissible. I may say, however, that an exhaustive examination of the history of the Raker Act when it was being considered by Congress unquestionably supports the interpretation which has been placed on section 6.

The contract of July 1, 1925, between the City and County of San Francisco and the Pacific Gas and Electric Company undoubtedly was drafted and executed with this section in mind and in the light of the suggestion contained in the Solicitor's opinion of June 8, 1923, that a temporary arrangement be made for distributing power through the existing facilities of private concerns. Throughout this contract the language of consignment is used. However, true consignment is not a sale; it merely constitutes the consignee an agent of the consignor for a particular purpose—in this case, to sell and distribute electric power. If there be a true consignment, the sale to the consumer is directly by the consignor. The consignee has not purchased the commodity himself and then resold it; he has merely negotiated a sale for and on behalf of the consignor. So if this particular contract is not of the latter type, if it does in fact contemplate a purchase of power from San Francisco by the Pacific Gas and Electric Company, it constitutes a violation of the Raker Act, for it also clearly contemplates that some one other than the Pacific Gas and Electric Company may ultimately purchase the power after it has once been delivered to that company.

The mere fact that the contract uses the language of consignment is not sufficient to establish its character. The substance of the instrument may be such as to make the transaction one of sale despite verbal twistings and turnings intended to cause it to appear to be

one of consignment only. *Standard Fashion Co. v. Magrane Houston Co.*, 258 U. S. 346; *Vermont Marble Co. v. Brow*, 109 Cal. 236, 41 Pac. 1031; *Chickering v. Bastress*, 130 Ill. 206, 22 N. E. 542. In my opinion, in substance this contract is one of sale—sale for the purpose of resale in violation of the statute.

In the introductory recitals of the contract there are alleged the desire and effort of the City and County to acquire a distributing system of its own and the necessity, in order to prevent waste of power and loss of potential revenue, of effecting a temporary arrangement whereby the company may distribute Hetch Hetchy power until the City and County can acquire its own facilities. In the body of the contract it is agreed that San Francisco "employs" the company temporarily to distribute electric energy, and that the entire output of the Moccasin Power House, the large unit on the Hetch Hetchy project, except power needed for construction of the project or needed to supply irrigation districts or other municipalities, shall be delivered and consigned to the company at the company's substation in Newark. Based on the experience of the company in transmitting power from Newark to consumers in San Francisco, it is agreed that distribution losses amounting to 24 percent of the power delivered at Newark shall be deducted from the total amount delivered and that the company shall pay to the City and County 26.935 percent, and retain as compensation for its services 73.065 percent of the average revenue received by it for the remaining 76 percent of the "consigned" power. For the purposes of the contract it was assumed that the average revenue received by the company was 2.383 cents per kilowatt hour, a figure obtained by computation based upon the established rates for the year 1924. Any change in the established rates is to cause a proportionate change in the amount to be paid to the City and County. The contract then provides that, in case of the refusal, failure, or inability of the company to accept and distribute the power offered at Newark by the City and County, the company shall make payment on the basis of the amount of power which the City and County could have delivered.

Because of the temporary character of the arrangement, the contract expressly provides for its termination at any time by either party on one day's notice. It also provides for "immediate cancellation upon request or demand of the Secretary of the Interior of the United States should he hold that in his opinion the agreement violates any provisions of the laws of the United States in general, or the Raker Act in particular."

In speaking for the United States Circuit Court of Appeals for the Eighth Circuit concerning factorage contracts, which are agency contracts involving consignments, Judge Booth has aptly said:

But in recent times, the real or supposed needs and exigencies of business and the ingenuity of business men and of their lawyers have evolved a class of contracts which have the earmarks of both sale contracts and factorage contracts. It is not always easy to determine into which class a particular contract falls. If it becomes necessary to decide the question, all the court can do is to consider the various earmarks as disclosed by the contract, and the surrounding facts and circumstances, and determine, as best it can, into which class the contract should be placed. *Marrinan Medical Supply, Inc., v. Ft. Dodge Serum Co.*, 47 Fed. (2d) 458, 460.

The difficulties surrounding the consideration of the present case are greater by reason of the character of the commodity which is the subject matter of the contract. Electric power is not a tangible, material thing. It can be stored only in quantities too small to be of significance in a sale or consignment contract. Because of its characteristics, power alleged to have been consigned by A to B cannot be segregated from other power owned by B; an accounting of the sales of the allegedly consigned power cannot be made by B separate from an accounting of the sales of his own power; the proceeds of the sales of the consigned power cannot be separated from the proceeds of the sales of B's own power; and any unsold surplus of the consigned power, even if it could be segregated, cannot for practical reasons be returned by B to A. Yet each of these enumerated things which cannot be done with respect to power is, if done, one of the characteristics which serves to distinguish a consignment from a sale. Because of the intrinsic nature of electricity, therefore, the concept of a consignment thereof presents something of an anomaly. It may be that electricity is not capable of consignment; at least it may not be possible of consignment to a company which distributes it, as does the Pacific Gas and Electric Company, by means of facilities through which flows other power owned by it.

It is, however, unnecessary to decide this question on the facts that have been recited, inasmuch as the contract possesses sufficient characteristics, in my opinion, to stamp it indelibly as one of sale for the purpose of resale.

It is fundamental in the law of agency and consignments that the activities of the agent or consignee, concerning the commodity entrusted to him by the consignor, are subject to the direction and control of the consignor. Yet neither this contract nor the course of action adopted by the parties under the contract indicates that San Francisco retains any power to direct or control the method of handling, distributing, or selling Hetch Hetchy power after it is delivered to the Pacific Gas and Electric Company at Newark. In the absence of provisions forcibly compelling a contrary conclusion, this fact alone is sufficient to classify the transaction as one of sale for the purpose of resale rather than one of consignment for sale on

behalf of the consignor. As incidents of this general proposition it may be said that mere freedom on the part of the alleged consignee in the making of sales to customers is sometimes considered almost conclusive in establishing that the transaction between the alleged consignor and consignee is one of sale (see *In re Wayside Furniture Co.*, 67 Fed. (2d) 201; *Chickering v. Bastress*, 130 Ill. 206, 22 N. E. 542), and that the fact that the alleged consignee disposes of the commodity in the ordinary course of its retail trade to its usual customers indicates a sale rather than a consignment (see *Public Utilities Commission v. Landon*, 249 U. S. 236, 245).

Instead of provisions leading to a contrary opinion, this contract contains language forcibly compelling the conclusion that the transaction at issue is one of sale to and resale by the Pacific Gas and Electric Company. The company is bound to, and actually does, pay for all power delivered to it by San Francisco whether or not that power is resold. In commenting upon this feature of the arrangement the Pacific Gas and Electric Company in its April 1934 issue of "Progress", a regular publication issued by it, stated:

The city simply turns the power on and leaves it to the P. G. and E. to dispose of it at a time when it has a large surplus of its own.

The P. G. and E. is not like a private customer who can turn the power on and off when he wants to. It must take all the city's power as and when it comes and must pay for it whether it has a market or not.

There can be no doubt that this requirement of the contract definitely fixes the character of the transaction. It is one of sale for the purpose of resale. The very essence of consignment is that the consignee, acting merely as the agent of the consignor, effects a transfer of title to the consigned commodity directly from the consignor to the ultimate purchaser. The consignee is merely an instrumentality to effect that transfer and is not responsible to the consignor for the price of the commodity unless he has also acted as the consignor's agent for the collection of that price from the ultimate purchaser. In the latter case he is responsible to the consignor either for the money actually collected by him or for the price of the commodity sold whether or not he has collected from the consumer. Whether the one or the other of these liabilities exists depends on the terms of the consignment contract, but in no instance is the consignee directly obligated to pay for the consigned commodity if a sale of it is not effected by him. If he is obligated to pay for everything delivered to him, he is not acting on behalf of the alleged consignor in effecting a subsequent sale to consumers; he is acting on his own behalf. He has purchased the commodity and a subsequent sale is a resale. See *Sturm v. Boker*, 150 U. S. 312; *In re Sachs*, 31 Fed. (2d) 799; *In re United States Electrical Supply Co.*, 2 Fed. (2d) 378; *In re Thomas*, 231

Fed. 513; *Parlett v. Blake*, 188 Fed. 200; *Coweta Fertilizer Co. v. Brown*, 163 Fed. 162; *In re Galt*, 120 Fed. 443; *D. M. Ferry Co. v. Hall*, 188 Ala. 176, 66 So. 104; *Peoria Manufacturing Co. v. Lyons*, 153 Ill. 427, 38 N. E. 661; *Norwegian Plow Co. v. Clark*, 102 Ia. 31, 70 N. W. 808; *Arbuckle Bros. v. Kirkpatrick & Co.*, 98 Tenn. 221, 39 S. W. 3. Compare *Ludvig v. American Woolen Co.*, 231 U. S. 522.

Besides its admitted liability for power delivered, whether or not it is sold to consumers, the Pacific Gas and Electric Company has assumed in addition an absolute obligation to pay for power offered to it by San Francisco *even though the company does not accept it*. It would appear that here again the obligation is completely inconsistent with the theory of consignment. The reasoning in the cases set out above establishes the fact that one who is obligated to pay, whether or not he effects a sale to consumers, is a purchaser and not a consignee, for the reason that any subsequent sale is of no benefit to the alleged consignor and, therefore, is not on his behalf. Certainly no subsequent sale of power by the company can be of benefit to San Francisco, and thus be made on its behalf, when a binding obligation to pay is imposed on the company by the mere offer of power at Newark whether or not the company accepts it. The contract, therefore, cannot be one of consignment. It can, however, be one of sale, giving the right to the company to resell any power which is received by it, for it is not inconsistent with the theory of a contract of sale that a commodity offered must be paid for even though it is not accepted. See *Swift & Co. v. Columbus Railway, Gas & Electric Co.*, 17 Fed. (2d) 46, in which substantially such a provision was enforced in connection with the sale of electric power.

In my opinion these significant characteristics of this transaction between San Francisco and the Pacific Gas and Electric Company conclusively disclose the nature of that transaction. It is a contract for the sale of electric power that expressly contemplates resale by the company to the consumers who are its customers.

This conclusion is not affected by the existence in the contract of the provision that San Francisco shall receive payment only for the power offered or delivered at Newark less the estimated amount of power lost in transmission from that point to the consumers, which amount is definitely fixed at 24 percent of the total. This provision, in effect, throws on San Francisco the burden of the estimated loss at any time before the power passes to the ultimate purchaser. The placing on the alleged consignor of the risk of loss is one of the characteristics of a true consignment. It is, however, not necessarily inconsistent with a sale, for buyer and seller are always free to provide by express agreement how, when, and by whom, the risk of loss

is to be borne. Viewed in the light of the other characteristics of the agreement, even a complete and genuine assumption by San Francisco of the risk of loss would not necessarily stamp the contract as one of consignment rather than one of sale. The assumption of loss would be, as it actually is, merely an ingredient in a formula used in determining the sale price. *A fortiori* is this so where, as here, there is no true assumption of actual loss, but merely an agreement upon an arbitrary and fixed percentage representing an approximate estimate of expected actual loss. The benefit or disadvantage arising from any variation of the actual loss from the estimated and fixed loss accrues only to the Pacific Gas and Electric Company, a fact which again indicates a sale to that company and not a consignment.

Likewise my conclusion that the transaction is one of sale for the purpose of resale is not varied by the fact that payment to the City and County of San Francisco is, according to the terms of the contract, not at a fixed price but on the basis of determined percentage of a variable retail electric power rate. A contract of sale may include any terms or any type of terms for payment on which the parties can and do agree. Consequently, this type of provision for payment cannot be said to change the transaction from one of sale to one of consignment, and it was so held in *Public Utilities Commission v. Landon, supra*. Furthermore, it is pertinent to point out that, according to the facts before me, the company has paid continually to the City and County the same rate per kilowatt hour of electricity despite changes in the rates charged to consumers effective in 1928 and 1930. Even though the rate changes may have been made at the request of the company, these facts, establishing payment to the alleged consignor at a fixed price irrespective of variation in the price placed on sales by the alleged consignee, present another indication, although not a conclusive one, of a sale rather than a consignment. See *In re Rabenau*, 118 Fed. 471. Compare *Dryden v. Michigan State Industries*, 66 Fed. (2d) 950; *McCullum v. Bray-Robinson Clothing Co.*, 24 Fed. (2d) 35. That it is proper to look to the facts, such as those pertaining to the conduct of the parties under the contract, is established in such cases as *Ludvig v. American Woolen Co.*, *supra*; *In re Thomas, supra*; and *Flanders Motor Co. v. Reed*, 220 Fed. 642.

In the various briefs that have been submitted for consideration it has been suggested that a determination of the nature of the contract between San Francisco and the Pacific Gas and Electric Company should follow the decision of the Supreme Court of California in the case of *Los Angeles Gas and Electric Corporation v. City of Los Angeles*, 188 Cal. 307. In that case the court held that a contract between Los Angeles and certain power companies, whereby

the city's power would be distributed through the facilities of those companies, did not violate a provision of the city charter prohibiting the sale of that power for the purpose of resale. In arriving at that conclusion the court laid stress on the fact that the charter provision should not be construed as prohibiting a temporary arrangement for the distribution of power pending the purchase or construction of the city's own facilities.

The facts of the case, as they may be gathered from the opinion, are materially different from those in the case at issue. The Los Angeles contract contemplated the purchase by the city of the facilities then owned by the contracting power companies and, in the words of the court, it was "more in the nature of an agreement regulating the use and possession of property for the buyer and seller pending the consummation of the sale thereof." In that contract it was provided that, during the interim prior to consummation of the sale, the city's power should be distributed through the companies' facilities and that, both before and after the consummation of the sale, the city should purchase from the companies 25,000 horse power of electric energy to augment its own supply. In other words, *all* the power in the lines of the companies belonged to the city. Also, the city acquired a measure of control over the operation of the facilities, and thus over the distribution of its power, by reason of its stipulated right to appoint two members of a board, composed of four members, whose duty it was to operate the distributing system pending the consummation of the purchase. The companies, as compensation for the use of their property, were compelled to look to a fixed percentage of the amounts realized from the sale of power to consumers. The city, on the other hand, received as compensation, not the value of the power owned by it, whether sold or not, but the remainder of the amount realized from actual sales to consumers after the percentage accruing to the companies.

Inasmuch as it is the absence of such provisions as these and, in some instances, the presence of contrary provisions, that justify my opinion that the San Francisco contract is one of sale for the purpose of resale, it is obvious that the decision of the court in the Los Angeles case does not affect my conclusion that the Raker Act is being violated.

From the foregoing it must be evident that the provisions of section 6 of the act expressly prohibit the sale of power for the purpose of resale, despite which San Francisco is actually selling Hetch Hetchy power for the purpose of resale. In such circumstances there is, in my opinion, no possible conclusion other than that San Francisco is not complying, either absolutely or "reasonably", as specified in section 9 (u) of the act, with the requirements prescribed by Congress. The Raker Act is clearly being violated.

III

Although the chief interest in the past, as at present, has centered around the distribution of the power generated at the Moccasin power plant and delivered to the Pacific Gas & Electric Company under the contract of July 1, 1925, there is another phase of this question to be considered. The City and County owns and operates, as a part of the Hetch Hetchy Project, the Early Intake power plant that is located, according to the records of the General Land Office, in the Stanislaus National Forest and is dependent on the grant contained in the Raker Act. This plant is of small capacity and was constructed early in the development of the project primarily for the purpose of providing the electricity necessary for the construction of the remainder of the works. It appears that some power in excess of that required for the construction of the project was generated at this plant and that, by an order dated September 18, 1918, the Power Administrator for the State of California directed that the surplus be delivered to the Sierra and San Francisco Power Company to alleviate the power shortage occasioned by activities essential to the effective carrying out of the undertaking by the United States in connection with the World War. Pursuant to that order, power from the Early Intake plant was sold to the company named, and subsequently to its lessee, the Pacific Gas and Electric Company, at the flat rate of one-half cent per kilowatt hour.

There is no written contract under which this power is sold to the Pacific Gas and Electric Company. From the facts reported, however, there appears to be no doubt that an absolute sale at a fixed price is effected. Nor does there appear to be any doubt that the power is resold by the company to its regular customers in the Tuolumne circuit, which does not include San Francisco itself. Since the purpose of the sale of this power by the City and County clearly includes resale by the company for commercial purposes, it is manifest, on the basis of the prior discussion, that such an arrangement constitutes a violation of the statutory prohibitions in the Raker Act.

IV

Although they are not necessary to the legal determination of the question whether the existing arrangements for the distribution of Hetch Hetchy power constitute a violation of the provisions of the Raker Act, and although I have already given and supported my opinion on that question, certain items in the legislative history of the act and certain facts attendant upon the performance of the contract of July 1, 1925, by San Francisco and the Pacific Gas and Electric Company have sufficient general significance to justify calling them briefly to attention.

An examination of the legislative history of the act makes it manifest that Congress, in the enactment of section 6, meant to eliminate completely any private monopolistic control over the water or power produced from the Hetch Hetchy Project, and that the Pacific Gas and Electric Company was specifically considered as one of the monopolistic concerns to be excluded. Of the numerous significant facts found in the legislative history only a few need be referred to here.

The Committee on Public Lands of the House of Representatives incorporated in its report (House Report No. 41, 63d Congress, 1st session) a complete analysis of the bill which, with amendments not now pertinent, subsequently was enacted as the Raker Act. In commenting on section 6 of the bill it was stated:

This provision, acquiesced in by the grantee, was designed to prevent any monopoly or private corporation from hereafter obtaining control of the water supply of San Francisco (p. 11).

This report and explanation of the bill was also included, by reference, in the report of the Committee on Public Lands of the Senate (Senate Report No. 113, 63d Congress, 1st Session).

A clear, concise statement in explanation of this section of the bill was made to the Senate by Senator Pittman, one of its sponsors before that body:

It provides absolutely that neither this water nor this power can ever fall into the hands of a monopoly (Cong. Rec., vol. 50, p. 5473).

Of particular significance are the statements made on the floor by Senator Norris in the course of an extended speech in support of the bill:

* * * This bill is not giving to a private corporation any power. It is giving to the people of the locality of San Francisco the right to use a cheap power when it is developed. To my mind, it is the very highest type of conservation. Here for ages this stream has been running down from the mountains, even destroying property, without doing man any good, and this proposition is to harness that power and to put it to public use, not to give it to a private corporation. Why do we want to develop water power? Will we give it to the public or to a private individual or corporation?

Here is an instance where we are going to give it directly to the people, if we pass this bill. It is going to come into competition with power companies and corporations that have, or will have, if this bill is defeated, almost a monopoly not only in San Francisco but throughout the greater portion of California (Cong. Rec., vol. 51, p. 343).

* * * * *

So we have a maze of corporations here. When you sum them all up you will find that they own practically all of the hydroelectric power of the State of California, and this bill, if passed, will bring into competition with them one of the greatest units for the development of power that has ever been developed in the history of the world. It means competition.

[Quoting from a report of the Bureau of Corporations concerning the development of water power in California:]

"It will be recalled that the Pacific Gas & Electric Co. controls directly or influences nearly 200,000 horsepower developed and under construction and at least 100,000 horsepower undeveloped. But as large as these holding are, that alone does not by any means give this company a monopoly of the water power in the territory served. There is undoubtedly a vast volume of undeveloped power in this region that is not owned by it. This lack of ownership of practically all the power in the territory where it operates has not, however, prevented the Pacific Gas & Electric Co. from establishing a fairly effective monopolistic market condition.

"The operations of this company and its subsidiaries cover the north central portion of California for about 225 miles from north to south and 125 miles from east to west. This territory embraces at least 30 counties, containing about 38,000 square miles. San Francisco, the largest city in the State, Sacramento, and other important cities are in this territory" (Cong. Rec., vol. 51, p. 344).

* * * * *

Mr. President, I could go on at great length if I were physically able to do so and develop those propositions and trace down in detail those various corporations, but I think I have gone far enough to show that if the power of the Hetch Hetchy is developed it will come into direct competition with what a sworn official of the Government says is a monopolistic control of the hydro-electric power of California (Cong. Rec., vol. 51, p. 345).

* * * * *

* * * The people who ride on street cars, the people who use electric lights, the people who are now using gas, those who eventually will use coal for purposes of heat, and those who use water for washing purposes will all receive all the benefit there is in this legislation without any rake-off by any corporation or monopoly (Cong. Rec., vol. 51, p. 347).

From these excerpts the intent of Congress is clear. Yet the Pacific Gas and Electric Company, now having a complete monopoly in San Francisco by reason of the acquisition in 1930 of the properties of the Great Western Power Company, receives the entire output of the Moccasin power plant, which produces almost all of the power generated on the Hetch Hetchy Project. Instead of competing with that power, the company has control of it. Consumers in San Francisco must purchase their power, whether or not it is Hetch Hetchy power, from the Pacific Gas and Electric Company. Even the City and County of San Francisco purchases from the company the power necessary for street lighting and other municipal uses.

It should especially be noted that the Pacific Gas and Electric Company, according to statements contained in its annual reports of 1930 and 1933 to the California Railroad Commission, expended some \$45,500 in working for the defeat of the proposed bond issues submitted to the voters of San Francisco on August 26, 1930, and November 7, 1933. Had those bond issues been approved, Hetch

Hetchy power, or a part thereof, would have been distributed by San Francisco itself in conformity with the mandate of Congress.

For the reasons stated in Parts II and III hereof, it is my opinion that the provisions of section 6 of the Raker Act are being violated by reason of the sale of Hetch Hetchy power to the Pacific Gas and Electric Company for the purpose of resale.

I have been reluctant to arrive at this conclusion, but I have no other option under the law and the facts. However, there are two methods by which San Francisco may follow the clear intendment of the law and at the same time enjoy all the benefits that would accrue to it under the Raker Act. A general bond issue to finance a distribution system may be adopted by a two-thirds vote of those participating in the election; or the charter of the city may be amended by a majority vote so as to permit the issuance of revenue bonds, which will require the approval of only a majority of those voting at the election.

Who can doubt that, conscious of both its obligations and its opportunities under the Raker Act, San Francisco will rally under its splendid civic leadership as it has done so many times in the past and by its vote declare itself to be on the side of carrying out the solemn obligation with the United States Government that it undertook when it accepted the benefits of the Raker Act?

If the contract under discussion was ever justified as a measure of temporary expediency, that justification can no longer be pleaded in its defense, after such a lapse of time as this case discloses. Nor can San Francisco be heard to urge, as an excuse for its continued failure to carry out a clear and binding obligation, disabilities that the citizens can overcome if they have the will so to do.

OIL AND GAS LEASING ACT AMENDED *

[Circular No. 1367]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 28, 1935.

REGISTERS, UNITED STATES LAND OFFICES:

By the act approved August 21, 1935 (49 Stat. 674), Sections 13, 14, 17, and 28 of the Leasing Act of February 25, 1920 (41 Stat. 437), were amended. A copy of the act will be forwarded to you when available.

The amendatory act provides, among other things, that:

Lands subject to disposition under the act known or believed to contain deposits of oil and gas may be leased by the Secretary of the

Interior to the highest responsible bidder at competitive bidding under general regulations, in leasing units of not exceeding 640 acres in as nearly compact form as possible. Such leases will be conditioned upon payment of a royalty of not less than $12\frac{1}{2}$ per centum and an annual rental of not less than 25 cents per acre. Leases of lands not within a known structure of a producing oil or gas field shall be for a period of 5 years and so long thereafter as oil or gas is produced in paying quantities, and leases for lands within known producing structures for a period of 10 years and so long thereafter as oil or gas is produced in paying quantities.

The person first making application for lease of lands not within a known producing structure, including applicants for permits whose applications were filed after 90 days prior to the approval of the act, are entitled to preference rights to leases without competitive bidding, the royalty to be $12\frac{1}{2}$ per centum where the production does not exceed 50 barrels of oil per well per day, and not less than $12\frac{1}{2}$ per centum when the production exceeds 50 barrels of oil per well per day.

Prospecting permits shall be issued on the pending applications filed 90 days or more prior to the date of the act, but no permits based upon applications filed after 90 days prior to the date of the amendatory act will be issued. Applications for permits filed after 90 days prior to the date of the act shall be considered as applications for leases under the amendatory act.

Outstanding permits heretofore extended and not subject to cancellation for violation of the law or operating regulations are extended by the Act to December 31, 1937, and may thereafter be extended for not exceeding one year by the Secretary of the Interior. The extension of permits not heretofore extended or which may be issued under the pending applications is authorized for a period of not exceeding two years where the Secretary of the Interior shall find that the permittee has been unable with the exercise of diligence to test the land in the two years for which the permit was issued, but in no case beyond December 31, 1938. The extensions to December 31, 1937, are granted by the act, and no application for extension nor action by the Secretary of the Interior is required. However, such extensions are subject to conditions of prior extensions, and where the prior extensions were on condition that stipulations be filed and unit plans of operation submitted for approval, these conditions must be complied with in order to make the extensions fully effective.

You will receive no more applications for oil and gas prospecting permits, and will promptly reject all such applications that have been filed after the date of the approval of the amendatory act, *i. e.*, after August 21, 1935.

Pending receipt of approved regulations under the amendatory act, applications for leases of lands not within the geologic structure of a producing oil or gas field may be accepted and filed. Such applications may not include more than 640 acres of land in as compact a form as possible, and should cover so far as applicable the points outlined in Section 4 of Circular 672, and be accompanied by a filing fee of \$10. The form of lease to be issued, bonds, royalty, and rental requirements will be provided for in the regulations under the amendatory act, which will be issued as promptly as possible. You will note on any such application the date and hour of filing, and after noting your records, transmit the application to this office.

Action looking to the issuance of prospecting permits on the pending applications filed 90 days or more prior to the date of the act will be taken in regular order and as expeditiously as possible, the suspension of action directed by the Secretary of the Interior on May 4, 1935, having been terminated.

FRED W. JOHNSON, *Commissioner*.

Approved:

CHARLES WEST,
Acting Secretary.

UNITED STATES v. SAMUEL DON PROBERT

Decided September 3, 1935

ADDITIONAL ENTRY UNDER STOCK-RAISING ACT—PRIOR ENTRY UNDER SEC. 6,
ENLARGED HOMESTEAD ACT—RESIDENCE REQUIREMENTS.

Where one who has perfected a homestead entry under section 6 of the enlarged homestead act applies to make an additional entry under section 5 of the stock-raising act he is only required to show that at the time of filing application he owned and resided in good faith upon the land embraced in his original entry.

Case of *Sanford H. Wallis* (53 I. D. 274), cited and applied.
Paragraph 19 of Circular No. 523 modified.

GOVERNMENT ADVERSE PROCEEDINGS—CHARGE—DEMURRER—INSUFFICIENCY.

In adverse proceedings by the Government, a demurrer which is not a defense to the whole of the charge or charges must be overruled.

WEST, Under Secretary:

Samuel Don Probert made homestead entry, Salt Lake City 044104, on July 23, 1928, for 240 acres in Secs. 14 and 23, T. 20 S., R. 2 W., S. L. M., under section 5 of the stock-raising homestead act, as additional to patented entry 09677, made under section 6 of the enlarged homestead act for 200 acres in Secs. 24 and 25, T. 18 S., R. 3 W.

Final proof was made upon the additional entry October 19, 1933, but no final certificate issued.

In his final proof entryman stated that he owned and resided upon the original entry when the additional entry was made, and specified periods of residence amounting to more than seven months each year from 1928 to 1933, inclusive.

March 17, 1934, adverse proceedings were directed against the additional entry on the charge:

That the entryman did not establish a residence on the land as alleged in his final proof, nor was residence thereon maintained in the manner and for the period stated in the said proof, nor was residence maintained thereon for a period of as much as seven months each year for at least three years as required by the law under which the entry was made.

The entryman filed a demurrer and motion to dismiss the proceedings, and also filed answer denying the charges. The demurrer attacked the charge on the ground of insufficiency, it being stated in that connection:

1. That his original entry was patented under Sec. 6 of the Enlarged homestead act. Under this Act double the cultivation is required in lieu of residence.


2. That his additional entry against which this proceeding was initiated, was made under Sec. 5 of the Stockraising Homestead Act. Under this provision of the law an entryman is required to show that he owns and is residing upon the land in his original entry when he files his additional application, *but he is not required*, upon submitting his final proof, to show the *extent* to which he lived upon his original entry. Neither is he required to show residence on his additional entry. The law makes no distinction between entries perfected under Sec. 6 of the Enlarged Homestead Act and entries perfected under other laws. It makes no difference whether he lives continuously on the land after making a Sec. 5 Stockraising Additional entry or whether he resides off the land entirely. The law makes no further requirements as to residence.

3. That the sufficiency of residence made upon the original patented entry should be determined prior to the allowance of a Sec. 5 additional homestead entry. If further residence is required, allowance under Sec. 5 of the Stockraising Homestead Act should be denied and the applicant allowed to make entry under some other provision of the Act. After an entry has been allowed under Sec. 5 of the Stockraising Homestead Act, the question of residence should not later be made an issue.

The register overruled the demurrer and dismissed the motion. As ground for such action, the register, advertng to the allegation in the motion that entryman resided on the original at the time of making the additional entry, further said:

We have to advise you that the Department has held in various cases that residence in the amount required under the homestead laws must be shown, either upon the original or the additional entry, even though the original entry was made under Section 6 of the enlarged homestead act.

The charge is to the effect that residence was not had by you to the extent claimed in the final proof. Motion to dismiss is denied.



On appeal from this action, the Commissioner of the General Land Office, by decision of July 26, 1934, held the register's action was correct and directed that hearing be held, stating:

The record has been considered in connection with the several acts involved and it appears therefrom that in this case a showing of residence upon the original entry, or the additional, for a sufficient time each year for at least three years, as required by the homestead law, is an essential to final proof. See paragraph 19 of the regulations governing stock-raising homestead entries, Circular No. 523. The charge stated in the order directing adverse proceedings, if admitted, or proved by competent evidence, would warrant the cancellation of the entry, inasmuch as it is charged that the entryman has failed to comply with the requirements of the law under which the entry was made.

Notice of the Commissioner's decision was served on entryman on August 6, 1934. It was not until December 5, 1934, that he took action, then filing an appeal, renewal of demurrer and motion to dismiss. By decision of December 11, 1934, the register held the action taken by the Commissioner was interlocutory and not appealable and that the appeal was filed out of time, and adverting to the appellant's statement in his appeal, viz:

It is requested that the entire matter heretofore presented be reviewed and that the Commissioner's decision be reversed and the contest proceedings dismissed. In order to save the Government the expense of a hearing, which I am not properly prepared to defend, I waive my right to a hearing and elect to stand on my motion and appeal.

the register vacated the order for hearing and held the entry for cancelation. On January 23, 1935, the entryman appealed from the decision of the register and upon transmission of the record, the Commissioner treated entryman's appeal from his decision of July 26, 1934, as an allowable one, and transmitted the record to the Department.

In his appeal the entryman insists upon his grounds for demurrer and contends that paragraph 19 of the regulations governing stock-raising homestead entries (Circular 523, 51 L. D. 1), referred to by the Commissioner, is an arbitrary ruling which is not justified by any reasonable construction or interpretation of the stock-raising homestead act (39 Stat. 862).

If, as contended by the entryman, proof of residence on the original entry at the time of the filing of the application for additional is sufficient to qualify the applicant under section 5 of said act and to obtain title in so far as the requirement of residence is concerned, that part of the charge in the proceedings which alleged, as a basis of invalidity of the entry, failure to reside upon the land to the extent required by the three-year homestead act, stated no cause of action, imposed a condition not required by law, and in effect denied the entryman a substantial right. A decision that amounts to the denial of a substantial right is not interlocutory.

Rathbun v. Warren (10 L. D. 111). Moreover, as this is a proceeding solely between the entryman and the Government and no adverse claim asserted, the fact that the appeal was not filed in time may be disregarded. *Henry Hale* (13 L. D. 365). It is therefore believed that the Commissioner properly allowed the appeal.

There is no merit in the contention that after entry is allowed under section 5 of the stock-raising act, the question of residence should not later be made an issue. The present application, like applications to make entry under other statutes, is allowed on *ex parte* allegations of the entryman, if sufficient to meet the requirements of the applicable regulations. If it later be reported, as the result of field investigation, that certain essential allegations made by the entryman are false and untrue or misleading, or if there otherwise come to the attention of the Land Department facts which tend to show that entries were obtained on such allegations, the Land Department has the right and the duty to inquire into the matter and take such action as may be appropriate. The Department consequently had unquestionable jurisdiction to inquire and determine whether the entryman owned and resided upon his original at the time of application for the additional entry.

Turning now to the question as to the quantum of residence required on the original as a prerequisite to entry and patent to the additional under section 5 of the stock-raising homestead act, section 5 reads:

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

Paragraph 19 of Circular 523, *supra*, provides that:

A person who has made entry under section 6 of one of the enlarged homestead acts may make an additional entry under the provisos to section 3 or under section 4 or 5 of this act, provided all be designated as stock-raising land; but he must reside on the land entered under the act or that originally entered, to the extent required by the 3-year homestead act.

However, section 9 (b) of the same circular provides that:

Where satisfactory proof has been submitted on the original entry the additional entry may be perfected under this section of the act (Sec. 5) regardless of the question whether it was 3-year, 5-year, or commutation proof.

As commutation proof on the original would require only 14 months' residence, it is plain that that amount of residence would be sufficient in cases where commutation proof was made.

In the case of *Sanford H. Wallis* (53 I. D. 274) the view was expressed that:

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.

It is also noticed that in the unreported decision of the Department of July 9, 1923, involving entries Salt Lake City 017499, 018692, it was said that "the Department is not disposed to adhere strictly to the provisions of said paragraph 19", meaning the paragraph in question. In that case a Miss Gray, on May 1, 1916, made entry 017499 under section 2289, Revised Statutes. She had her entry changed in June following to one under the nonresidence provisions of section 6 of the enlarged homestead act. She completed her proof and obtained patent in 1922. On January 2, 1917, Miss Gray made application for additional entry 018692 under the stock-raising homestead act, which was allowed May 14, 1920. On December 20, 1916, one Snelgrove likewise made a homestead entry under section 2289, Revised Statutes, which was changed in February 1918, to one under the nonresidence provisions of section 6 of the enlarged homestead act and was patented in 1922. He made application for additional entry under the stock-raising act January 29, 1917. Gray and Snelgrove were united in marriage June 14, 1917. The final proof of Gray showed that she and her husband had resided on her original entry from September 21, 1920, to July 5, 1922, and thereafter the couple removed to the husband's patented entry. The Department held that in view of her residence on her original entry as above stated "she was entitled to have the additional entry treated as one under section 5." In view of this decision the Commissioner suggested to the Department that paragraph 19 be amended by changing the semicolon after the word "land" to a period and omitting the remainder of the paragraph. This suggestion was not acted upon favorably.

It may be assumed that in the formulation of paragraph 19 the fact was recognized that entries under section 6 of the enlarged homestead act would be patented without the necessity of any residence, and therefore it was necessary for the applicant under sec-

tion 5 of the stock-raising act to show, as that section required, that he resided upon the land previously acquired. It is believed, however, that the specification in the regulation that the residence should be to the extent required under the three-year homestead act goes further than is necessary under the terms of the act.

Section 5 of the act plainly requires that the applicant must reside on the land theretofore patented to him as a condition precedent to the allowance of entry under that section. The word "reside", however, is used in the same sense as it is used in other provisions of the homestead law, and means an actual, *bona fide* residence on the land to the exclusion of a home elsewhere, and not a temporary sojourn at the time of application made for the purpose of ostensible compliance with the condition. It is therefore within the province of the Department to inquire into, and the entryman may be required to show, all the facts and circumstances relating to the character and extent of his residence for the purpose of determining whether he was residing upon the land in good faith at the time of application for the additional entry. If the *bona fide* character of his residence appears, nothing further in that regard is required.

It follows that the last clause of the charge, which alleged failure to maintain residence for seven months each year for at least three years, is immaterial and may be regarded as surplusage. On the other hand, that part of the charge alleging—

That entryman did not establish a residence on that land as alleged in his final proof, nor was residence thereon maintained in the manner and for the period stated in said proof—

put at issue the question whether the entryman resided upon the land at the date of application, an issue which it was incumbent on the entryman to meet. Under well-settled rules of pleading it seems settled that a demurrer to a pleading, or to a count, or paragraph as a whole, will not be sustained if part thereof is good, and that a demurrer, not a defense to the whole declaration to which it is applied, should be overruled. See "Pleading", Sec. 541, notes 24, 25, in 49 C. J. 429.

For the reasons stated, the action of the Commissioner overruling the demurrer and denying the motion to dismiss was correct and is affirmed. As entryman has waived a hearing and elected to stand or fall on his demurrer, the entry will be canceled unless the entryman shall file application for hearing, within 30 days from notice hereof, to determine whether he resided on the patented entry at the date of the additional entry.

Affirmed.

**AMENDMENT OF CIRCULAR NO. 1309, COAL TRESPASS
REGULATIONS**

[Circular No. 1366]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 4, 1935.

SPECIAL AGENTS IN CHARGE;
REGISTERS, UNITED STATES LAND OFFICES:

Circular No. 1309, approved August 17, 1933, is hereby amended by changing paragraph 3b to read as follows:

For willful trespass, payment must be made for the full value of the coal at the time of conversion without deduction for labor bestowed or expense incurred in removing and marketing the coal. *Liberty Bell Gold Mining Company v. Smuggler-Union Mining Company* (203 Fed. 795). The mining of coal in trespass is presumed to be willful, in the absence of persuasive evidence of the innocence and good faith of the trespasser. *United States v. Ute Coal and Coke Company* (158 Fed. 20).

and by adding as paragraph No. 7, the following:

The Commissioner of the General Land Office will not recommend, with knowledge of any unpaid balance due for coal mined in trespass, the issuance of a coal prospecting permit or lease to such a trespasser, until the trespass account is settled.

FRED W. JOHNSON, *Commissioner.*

Approved:

CHARLES WEST,
Under Secretary.

**CULTIVATION REQUIREMENTS ELIMINATED AS TO CERTAIN
HOMESTEADS—EXCEPTION OF FOREST AND RECLAMATION
HOMESTEADS AND ALASKA**

[Circular No. 1368]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 11, 1935.

SPECIAL AGENTS IN CHARGE;
REGISTERS, UNITED STATES LAND OFFICES:

The Act of August 19, 1935 (49 Stat. 659), entitled "An Act to eliminate the requirement of cultivation in connection with certain homestead entries", provides as follows:

That, exclusive of Alaska, the provisions of the homestead laws requiring cultivation of the land entered shall not be applicable to existing homestead

entries made prior to February 5, 1935, or thereafter if based upon valid settlement prior to said date, and no patent shall be withheld for failure to cultivate such lands: *Provided*, That this Act shall not be construed to affect any provision of law requiring the cultivation of lands subject to the reclamation laws, nor to apply to entries made under the Forest Homestead Act of June 11, 1906 (34 Stat. 233).

The provisions of said act apply to existing homestead entries made in any of the public land States prior to February 5, 1935, and to those made thereafter if based upon valid settlements made prior to that date. In all cases where said act applies, no proof shall hereafter be rejected solely for failure to show that the cultivation requirements of the homestead laws have been complied with.

The law does not apply to homestead entries made subject to the provisions of the act of June 17, 1902 (32 Stat. 388), and amendments thereof, known as the reclamation law; or under the act of June 11, 1906 (34 Stat. 233), and amendments thereof, known as the law providing for entry of agricultural lands within national forests; or to homestead entries made in the Territory of Alaska.

FRED W. JOHNSON, *Commissioner*.

I concur:

B. W. McLAUGHLIN,

Acting Director of Investigations.

Approved:

CHARLES WEST,

Under Secretary.

UNITED STATES v. EL PORTAL MINING COMPANY

Decided September 12, 1935

MINING CLAIM—EXPENDITURE AS BASIS FOR PATENT—AERIAL TRAMWAY.

An aerial tramway used and essential for the transportation of ore from a mine is available toward meeting the requirement of the statute respecting expenditures prerequisite to patent.

DEPARTMENT DECISIONS IN CONFLICT MODIFIED.

Department decisions in the cases of *Copper Glance Lode* (29 L. D. 542), *Monster Lode* (35 L. D. 493), and *Fargo No. 2 Lode* (37 L. D. 404), in so far as in conflict with decision in this case in the accrediting of expenditures, held not controlling.

WEST, *Under Secretary*:

The El Portal Mining Company has appealed from a decision of the Commissioner of the General Land Office dated March 7, 1935, rejecting its application, Sacramento 025328, for patent to the Barium Nos. 2, 3, and 6 lode mining claims, situated in Secs. 18 and 19, T. 3 S., R. 20 E., M. D. M., and within the Sierra National Forest.

Protest against the claims was filed by the Forest Service, charging lack of discovery and insufficient expenditures for patent purposes. At the hearing the Forest Service conceded discovery on Barium No. 2 and sufficient expenditure on behalf of Barium Nos. 3 and 6. The action of the Commissioner, rejecting the application, results from his findings that the expenditure on behalf of Barium No. 2 was insufficient, and that no discovery had been made on Barium Nos. 3 and 6. The appeal challenges the correctness of these findings.

The material testimony has been set forth and analyzed in the Commissioner's decision and need not be repeated. Excluding the testimony of witness Argall, an old and very deaf witness for defendant, which betrays uncertainty, lack of comprehension of some of the questions and other infirmities, the testimony shows little disagreement as to the controlling facts.

With respect to the discovery of a lode or vein of mineral-bearing rock in place on Barium 6, Friedhoff, mineral examiner for the Forest Service, found high-grade float in a slide and nothing in place. Warford, witness for defendant and superintendent of a mine and assayer, found a large quantity of detrital containing barium estimated to run 20 percent. Murchison, witness for defendant, superintendent of the National Pigments Company, a company leasing the property and adjacent claims and conducting active mining operations on barium deposits on the latter, found only exposed nodules carried where it is by a small slide. None of these witnesses testifies to the exposure within the bounds of the claim of rock in place bearing barium or other valuable mineral. A placer discovery will not sustain a lode location or a lode discovery a placer location. *Cole v. Ralph* (252 U. S. 286, 295); *Big Pine Mining Corporation* (53 I. D. 410) and cases there cited.

With respect to like discovery on Barium 3, Friedhoff testified that he found no lode, simply rock outcrop probably containing a few percent of barite, and considering the vast amount that could be mined on the patented land there would be no excuse for developing something containing only a few percent of barium.

Warford found "a silicified layer of lime impregnated with barite, that is, such portions of the lime bed as have not been protected against replacement by barytes show small amounts of barytes mineral."

Warford further testified that barytes is formed by replacement of limestone beds except where such beds are silicified; that the limestone occurs in layers between layers of sandstone and slate, all being distorted into folds; that barium solutions consumed and replaced the limestone, except where it was sealed against such action by silica. In some of the beds silicification is complete in places, in others in-

complete, in still others, completely replaced by barium, which renders the deposit irregular in extent, and through the best grades of barium alternating areas of silicified limestone occur.

Murchison testified that on Barium 3 there was an outcrop of low-grade barytes, very silicious; that it would take development to prove whether the conditions there would produce barium; that 90 percent barium was commercial ore, though 70 percent ore could be treated and rendered commercial; that with the installation of new metallurgical processes 20 percent ore could be taken out and made commercial.

While both Warford and Murchison were of the opinion that the showing on Barium 3 was sufficient to justify expenditure with the expectation of finding barium in commercial grade and quantity, the meager and dubious character of the showing on the claim, considered in connection with the large deposits available and valuable for mining purposes on the claims that now or have been operated in the group, lends little support to the conclusion.

Lands containing limestone or other minerals, which under the conditions shown in the particular case cannot probably be successfully mined and marketed, are not valuable because of their mineral content, nor subject to location under the mining law. *Big Pine Corporation* (53 I. D. 410) and cases there cited.

It is believed from the evidence that adequate discovery is not shown on the Barium Nos. 3 and 6, and the finding of the Commissioner that no discovery was made thereon was fully warranted.

The defendant sought credit as acceptable expenditure for the Barium 2 a proportion of the expense of construction of an aerial tramway extending from Barium 6 across Barium 2 and the Merced River to lessee's mill. The tramway is said to have cost \$40,000. The testimony is to the effect that the tramway is used to carry the ore from the mines to the mill. There is no question that if a tramway may be accredited as a proper mining improvement, and can be made available at nominal cost to transport ore from the Barium 2 claim, as the superintendent of the mine asserts, the cost thereof, prorated among contiguous claims of the group which it may serve, will be more than enough to supply the deficiency of the other work on the claim, which the mineral examiner appraises at \$205.

The Commissioner refused credit for any expense of the tramway, under the rule that structures which in no way facilitate the extraction of ore from the claim cannot be credited as patent expenditures, citing *Copper Glance Lode* (29 L. D. 542); *Monster Lode* (35 L. D. 493); *Fargo No. 2 Lode* (37 L. D. 404). The doctrine of these cases should not be regarded as controlling in the present case. In the first case cited, credit was refused for the costs of a wagon road and

foundation for a smelter; in the second, for a quartz mill; in the third, for a wagon road partly on and partly off the claim to which it was sought to be accredited.

Since these decisions, however, were rendered, the Department has returned to its earlier views and subscribed to and quoted with approval the view of Lindley on Mines, sections 629, 631, that:

Roadways are necessities and where such have been constructed on the claim for the manifest purpose of assisting in the development of the mine such as transporting machinery and material to and ore from the mine, it is a legitimate expenditure.

* * * * *

As we have heretofore observed, roadways are necessary, and where constructed in good faith and for the manifest purpose of aiding in the conduct of mining operations on the particular claims sought to be represented by this character of work, the cost of their construction in connection with active mining operations may be entitled to consideration; but this rule is to be applied cautiously and on the lines of obvious common sense. See Tacoma and Roche Harbor Lime Co. (43 L. D. 128, 135).

The rule stated by Mr. Lindley is recognized in numerous decisions of the courts and has been followed by the Department to the present time in unreported cases.

While a clear distinction may be drawn between smelters, quartz mills, lime kilns, and other instrumentalities for the treatment of ore after it is mined, and roads for its transportation from the mine, no distinction in principle is seen between a road and an aerial tramway when both are used and essential for the transportation of ore from the mine.

The road in such a case is no more intimately connected with mining operations than the tramway used for like purposes, and manifestly the removal of the ore or rock extracted from entrance to a mine or quarry facilitates the extraction of the ore or rock that follows. It is undisputed in the present case, under the conditions existing, that an aerial tramway is essential to the removal of the barium deposits from Barium No. 2 claim, and that the utilization of the present one is much less expensive than to build another one. The credit claimed on account of such expense of construction should be allowed. Accordingly, the application will be rejected as to the Barium Nos. 3 and 6, and allowed as to Barium No. 2.

As modified, the Commissioner's decision is affirmed.

Modified and affirmed.

PROOF ON HOMESTEAD ENTRIES BY DISABLED WORLD WAR
VETERANS—ACT OF AUGUST 27, 1935

[Circular No. 1371]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 4, 1935.

REGISTERS, UNITED STATES LAND OFFICES:

The Act of August 27, 1935 (49 Stat. 909), entitled "An Act to authorize certain homestead entrymen who are disabled World War veterans to make final proof of their entries, and for other purposes", provides as follows:

That any entryman under the homestead laws of the United States who on or after April 6, 1917, and prior to November 12, 1918, enlisted or was a member of the United States Army, Navy, or Marine Corps during the war with Germany, who was honorably discharged from such service, whose entry was made prior to January 1, 1935, and who because of physical or mental disabilities has been or may hereafter become unable to perform the prescribed residential and improvement and other requirements may make proof without further residence, improvement, or cultivation, at such time and place as may be authorized and under such regulations to be issued by the Secretary of the Interior, and receive patent to the land by him so entered upon.

The benefits of this act extend to persons who, on or after April 6, 1917, and on or before November 12, 1918, enlisted or were members of the United States Army, Navy, or Marine Corps during the war with Germany, were honorably discharged from such service, and whose homestead entries were made prior to January 1, 1935.

Notice of intention to submit final proof must be given in the usual manner by posting and publication.

The final proof should consist of:

(a) The testimony of two of the advertised witnesses having personal knowledge, taken in usual manner before the officer and at the time and place advertised, which officer must reside in the county or land district in which the land is situated, showing the facts as to claimant's compliance with the homestead law, if any, in connection with his entry before his disability prevented further compliance.

(b) An affidavit of the homesteader showing the same facts and that he is unable to perform the prescribed residence and improvements on account of his physical or mental disabilities and describing the nature and extent of such disability. This affidavit may be taken before any officer at any place who is authorized to administer oaths and who uses an official seal.

(c) The testimony of two other witnesses having personal knowledge (need not be advertised) taken in similar manner, corroborating the statements made by the homesteader in regard to his disability, and of these witnesses at least one must be a practicing physician.

(d) A copy of his discharge from the Army, Navy, or Marine Corps, or an affidavit showing all the facts regarding his service and discharge, if same has not already been furnished. (In each case the facts will be verified from

the records of the proper department of the government which had jurisdiction over his service.)

The final proof when received in your office must be forwarded to this office by special letter for consideration and appropriate instructions.

The regular final proof blanks should be used by witnesses testifying as to claimant's compliance with the law.

The "Notice for Publication" should read as follows:

U. S. Land Office at _____, _____, 193__.

Notice is hereby given that _____ of _____ (Name of claimant)

_____, who made _____ No. _____, _____ (Post office address) _____ (Kind of entry)

for _____ Sec. _____, Township _____, Range _____,

_____ Meridian, has filed notice of intention to make final proof in support thereof, pursuant to the provisions of the Act of August 27, 1935 (49 Stat. 909), on the ground that he is a World War veteran and because of physical or mental disabilities has been unable to perform the prescribed requirements of the homestead law.

Claimant's affidavit as to the extent to which he had complied with the law before his disability prevented further compliance will be supported by the testimony of two of the following named witnesses which will be taken before _____ at _____ on the _____ day of _____,

(Name of Officer)

193__.

Names of Witnesses and Addresses:

_____ of _____
_____ of _____
_____ of _____
_____ of _____

Register.

FRED W. JOHNSON, *Commissioner.*

Approved:

T. A. WALTERS,
First Assistant Secretary.

CHARLES A. RUTHERFORD

Decided October 8, 1935

STOCK-RAISING HOMESTEAD—ADDITIONAL TO FOREST HOMESTEAD—MAKELA DECISION.

The making and perfecting of a forest homestead entry under the Act of June 11, 1906 (34 Stat. 233), for less than the maximum acreage permitted does not exhaust the homestead right, and, accordingly, one who

has made acceptable final proof on such an entry and sold and disposed of the land is qualified to make original stock-raising entry of such quantity of land, designated as stock-raising, outside the national forest, as, when added to the forest homestead, will not exceed 640 acres; and this regardless of whether the two tracts are more than 20 miles apart.

WALTERS, *First Assistant Secretary*:

Prior to 1932 Charles A. Rutherford made a forest homestead entry (Elko 02994) pursuant to the act of June 11, 1906 (34 Stat. 233), for the N $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 32, T. 42 N., R. 54 E., and lot 5, section 5; T. 42 N., R. 54 E., M. D. M., containing 86 acres. He obtained a patent on submission of final proof and later sold and conveyed the property.

On October 14, 1932, he filed application 046483 for an original entry under the stock-raising homestead act (39 Stat. 862) for the E $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 20, NW $\frac{1}{4}$ Sec. 28, W $\frac{1}{2}$ Sec. 21, T. 16 S., R. 8 E., B. M., accompanied by a petition for the designation of the land in the patented forest homestead entry Elko 02994 under the enlarged homestead act.

The land in the original entry was designated under the enlarged homestead act February 16, 1933, effective February 27, 1933, designation list No. 1280, letter No. 1486342, and the land in the application for stock-raising entry was designated under the stock-raising homestead act April 2, 1927, effective April 21, 1927, designation list No. 634, letter No. 1255900.

The General Land Office held the application for the stock-raising homestead for rejection, stating, among other things, that—

The applicant's only right to make entry under the stock-raising act is under the act of March 4, 1923; therefore, he is not qualified to make an original entry under the *Makela* decision, nor to make an entry for lands more than 20 miles from the original patented entry.

The applicant has appealed to the Department from the rejection by the General Land Office. In his appeal Rutherford stated that there were no other lands within 20 miles of the original entry that were open for settlement; that at the time of his original entry he was told by the local land office agent that he could make entry for the remainder of his citizen's allotment at any time he desired at any place in the United States. After selling his land he bought the improvements on the land described in the stock-raising homestead application from the former entryman for \$100 and other considerations and there has been considerable expense for other improvements. About one-half the land is fenced; there is a comfortable log cabin, a good rock-walled well, cellar, barn, corrals, chicken house, and a small plot of cultivated ground around the place. The entryman asserts that he intends to make a permanent home on the land, supported by stockraising.

The making and perfection of a forest homestead entry for 86 acres under the Act of June 11, 1906, *supra*, did not exhaust the claimant's right to entry under that law. He could have made an additional entry in the forest under the Act of April 28, 1904 (33 Stat. 527). *Lee S. Miller*, A-17806. And he could have made an additional entry under said act for land outside of the forest. *Milton L. Hinds* (49 L. D. 263). If, after perfecting his forest homestead for less than 160 acres, he was qualified to make another entry for land outside the forest under said act, he was also qualified to make an additional entry outside of the forest under section 6 of the act of March 2, 1889 (25 Stat. 854). Being qualified, under the *Makela* decision (46 L. D. 509) he had the right to make an original stock-raising homestead entry for approximately 560 acres. The Act of March 4, 1923 (42 Stat. 1445), which provides for additional entries within 20 miles of a forest homestead entry, has no application here. That act provides for additional entries under the stock-raising homestead laws for lands outside of national forests additional to unperfected or perfected homestead entries for lands within national forests upon which the claimant resides. Said act is not exclusive and does not prohibit the making of original stock-raising homestead entries based upon the additional homestead rights provided for in the cited acts of 1904 and 1889.

The decision appealed from is

Reversed.

**AMENDED RULES AND REGULATIONS FOR THE HOLDING OF
ELECTIONS UNDER THE INDIAN REORGANIZATION ACT OF
JUNE 18, 1934 (48 STAT. 984)**

DEPARTMENT OF THE INTERIOR,

BUREAU OF INDIAN AFFAIRS,

Washington, D. C., October 18, 1935.

**ELECTIONS ON THE ADOPTION OF CONSTITUTIONS AND CONSTITUTIONAL
AMENDMENTS**

Section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), reads in part as follows:

Any Indian Tribe, or tribes, residing on the same reservation shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as herein-

above provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

By the Act of June 15, 1935 (49 Stat. 378), section 16 has been modified. Said act provides that:

In any election heretofore or hereafter held under the Act of June 18, 1934 (48 Stat. 984), on the question of excluding a reservation from the application of the said Act or the question of adopting a constitution and bylaws or amendments thereto or on the question of ratifying a charter, the vote of a majority of those actually voting shall be necessary and sufficient to effectuate such exclusion, adoption, or ratification. *Provided, however,* That in each instance the total vote cast shall be not less than 30 per centum of those entitled to vote.

In accordance with the foregoing acts, and with the Solicitor's opinion (M-27810), approved December 13, 1934, on twelve questions of construction raised by the Act of June 18, 1934, the following rules and regulations are hereby prescribed for the holding of elections under section 16 of said act:

1. The Department will cooperate with and offer its advice and assistance to any authorized tribal council or representative committee of an Indian tribe or tribes, or of the adult Indians residing on a particular reservation, in the drafting of a constitution and bylaws. An election on the adoption of such constitution and bylaws will be called by the Secretary of the Interior, upon request by the tribal council or any authorized representative committee, or upon a petition signed by at least one-third of the adult members of the tribe where such a council or committee does not exist, or fails to request such election.

2. Constitutions and by-laws may be adopted by a traditionally recognized Indian tribe or tribes residing on the same reservation, or by the adult Indians residing on a reservation as such. The Indian Reorganization Act contemplates two distinct and alternative types of a tribal organization. In the first place, it authorizes the members of a tribe (or of a group of tribes located upon the same reservation) to organize as a tribe without regard to any requirements of residence. In the second place, this section authorizes the residents of a single reservation (who may be considered a tribe for purposes of organization under section 19) to organize without regard to past tribal affiliation.

3. When the members of an Indian tribe or tribes residing on the same reservation shall vote in an election on a proposed constitution and by-laws, the following rules shall determine the eligibility of voters in such election:

- (a) Any member of the tribe or tribes shall be entitled to vote, regardless of whether or not he is a resident of the reservation at the time of such election.

(b) Descendants of members, although not enrolled as members of the tribe, or tribes, shall be entitled to vote, if recognized as members of the tribe or tribes. Any person omitted from the tribal rolls, through accident or mistake, shall likewise be entitled to vote, if recognized as a member of the tribe or tribes.

(c) No person not a member of the tribe or tribes shall be entitled to vote.

(d) No person who has abandoned his tribal membership shall be entitled to vote, even though he may be enrolled as a member.

(e) Non-resident members may vote by absentee ballot. A ballot will be sent upon request to each such member in sufficient time to permit him to execute and return same on or before the date of the election. The ballot must be sworn to before a notary public or other official authorized to administer oaths, and must be returned in a sealed envelope marked on the outside, "Non-resident Ballot." Proper records shall be kept of all such ballots sent out, to whom mailed, date of mailing, addresses of the voters, and of all such ballots returned, from whom received, and time of receipt. Absentee ballots shall not be counted until all other ballots are counted, and no ballot received after the polls have closed shall be counted.

4. When the adult Indians residing on a reservation shall vote in an election on a proposed constitution and by-laws, the following rules shall determine the eligibility of voters in such election:

(a) Any Indian residing on the reservation shall be entitled to vote, regardless of his membership in any tribe.

(b) No person shall be entitled to vote unless he is a resident of the reservation, but no person shall be deprived of the right to vote by reason of his temporary absence from the reservation.

(c) In elections conducted under this section absentee voting shall be permitted in the manner prescribed in section 3 (e) of these rules and regulations.

5. No person shall be entitled to vote in any election on the adoption of a proposed constitution and by-laws unless he has reached the age of 21 years.

6. There shall be an Election Board, consisting of the Superintendent of the reservation and representatives of an authorized council or committee of the Indians, whose duty it shall be to conduct the election and to enforce and execute these rules and regulations.

7. The Election Board shall compile a list of voters, which shall be posted at the agency office and at various other public places throughout the reservation at least 10 days prior to the election. Copies of such lists arranged according to voting districts shall also be made for the purpose of checking off each name as his or her ballot is cast, and of determining, in the event of any question, the right of any individual to vote. Each district shall be supplied with a list of those voters who will cast their ballot within that district.

8. The Election Board shall determine any claim as to the right of any person not listed to vote, as well as any challenge to the right to vote of any person who is listed, and the findings of such

Board shall be final. The Election Board shall fix a date, not less than five days before the election, at which time all complaints will be heard and passed upon.

9. Not less than twenty (20), nor more than sixty (60), days' notice shall be given of the calling of an election, unless a shorter notice is requested by those authorized to request an election under Section 1 of these rules and regulations. Where an election is called upon less than 20 days' notice the time allowed absentee voters for the return of absentee ballots shall be extended beyond the date of balloting so as to afford such absentee voters a sufficient opportunity to register their votes.

10. Posters in the English, Indian, or other appropriate languages, in the discretion of the Superintendent, shall be distributed among the Indians, notifying them of the election, and shall be posted at the agency office and at various other public places throughout the reservation. Absentee members shall be notified by circular of the calling of the election, and shall receive instructions as to the proper manner of voting therein.

11. Official ballots for the election will be furnished by the Commissioner of Indian Affairs. These ballots should be counted on receipt thereof and should be carefully guarded at all times.

12. Mimeographed copies of the proposed constitution and by-laws shall be distributed to every eligible voter requesting same prior to the election.

13. Voting districts shall be delimited throughout the reservation by the Election Board. A polling place shall be designated for each district, the choice of which shall be based upon the needs and convenience of the Indians. In all cases, unless there are strong reasons to the contrary, the regular voting places where elections are usually held shall be the polling places for the election. Places where State and county elections, in which the Indians participate, are usually held, may be chosen as polling places for the election. Where possible, voting equipment should be borrowed from the local authorities.

14. The polls shall remain open from 8:00 A. M. to 6:00 P. M., unless different hours are agreed to in advance, and the Indians are notified thereof.

15. The Election Board shall appoint a judge, clerk, and teller for each district. The duties of these officials shall be to see that the name of each person voting is on the approved list, that his name is checked off as his ballot is cast, and that the ballot is individually executed. It shall be the further duty of these officials at the close of the polls to count the ballots, return them to the boxes, lock and mark the boxes, and on the evening of the election day

turn over the certified election returns of the district, the ballot boxes, a list of those voting, and all unused ballots, to the Superintendent. Throughout the voting the ballot boxes shall be kept locked, and after the voting shall be opened only long enough to permit the counting of the votes.

16. Interpreters may be provided to explain the execution of the ballot to such Indians as may need instruction. Assistance may be provided for those unable to execute their own ballots, but all necessary precautions shall be taken to insure that the voter is not influenced in casting his ballot.

17. There shall be no electioneering within 200 feet of the voting place while the polls are open.

18. The Election Board shall canvass the returns from the various voting districts, and shall certify the result of the election to the Office of Indian Affairs. The result of the election shall be posted at the agency office and at other public places on the reservation for the information of the Indians. A telegraphic report should be made to the Indian Office immediately after the result of the election is determined. Ballots and other election materials should be kept by the Superintendent and should be placed under lock and key for one year in the event of any protest or order for recount.

19. Election on the adoption of amendments to an approved constitution and by-laws shall be called as provided in said constitution and by-laws, and shall be conducted in the manner prescribed in these rules and regulations, except where modified in said constitution and by-laws as to voting districts, eligibility of voters, and the manner of holding election.

ELECTIONS FOR THE RATIFICATION OF CHARTERS OF INCORPORATION

Section 17 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), reads in part as follows:

The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe; Provided, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. * * *

20. Elections on the ratification of a charter of incorporation issued to any organized tribe by the Secretary of the Interior, pursuant to section 17 of the Indian Reorganization Act, shall be conducted in the manner prescribed in these rules and regulations, except as modified by sections 21, 22, 23 hereafter. No tribe may incorporate until it has adopted a constitution and by-laws, approved in accordance with section 16 of the Indian Reorganization Act.

21. The following rules shall determine the eligibility of the signers on any petition for a charter:

(a) When the members of a tribe, or tribes, residing on a reservation, have organized under a constitution and by-laws, any member of the tribe, or tribes, may sign such petition.

(b) When the adult Indians residing on a reservation have organized under a constitution and by-laws, any person entitled to vote on the adoption of such constitution and by-laws may sign such petition. (See section 4).

22. It shall be the duty of the Superintendent, together with a committee representing the Indians organized under the constitution and by-laws, to check the petition as to whether those who sign are eligible to do so within the language of the act and these regulations.

23. In any election on the ratification of a charter of incorporation, the following rules shall determine the eligibility of voters in such election:

(a) When the members of a tribe, or tribes, residing on a reservation, have organized under a constitution and by-laws, any resident member of the tribe or tribes may vote in such election. No person shall be deprived of his right to vote by reason of his temporary absence from the reservation.

(b) When the adult Indians residing on a reservation have organized under a constitution and by-laws, any person entitled to vote on the adoption of said constitution and by-laws shall be entitled to vote on the ratification of the charter. (See section 4.)

JOHN COLLIER, *Commissioner*.

Approved:

HAROLD L. ICKES,
Secretary.

TAYLOR GRAZING ACT, SEC. 7—EXECUTIVE ORDERS OF
NOVEMBER 26, 1934, AND MAY 20, 1935

[Instructions]¹

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D. C., October 19, 1935.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

Reference is made to your letter of October 11, requesting instructions as to whether the Executive order of November 26, 1934, as amended by Executive order of May 20, 1935, bars the allowance

¹ See Executive Order of January 14, 1936.

of homestead entries under the authority of Section 7 of the Taylor Grazing Act in either of the following cases:

1. Where the land was withdrawn for the grazing district prior to the date of the Executive order.
2. Where the Executive order preceded the withdrawal for or by virtue of the establishment of the grazing district.

The said Executive order does not purport to affect lands embraced in prior reservations so long as such prior withdrawals are in effect. Therefore, where lands were withdrawn for the purpose of establishing a grazing district prior to the date of the Executive order, and if the grazing district has become established, I am of the opinion that the lands within the grazing district are subject to such use or disposal as is authorized by the Taylor Grazing Act (48 Stat. 1269). Section 7 of the act expressly provides for the allowance of homestead entries in grazing districts upon proper classification, in tracts of not exceeding 320 acres, but it is declared "the lands shall remain a part of the grazing district until patents are issued therefor."

But where the lands were not reserved for a grazing district prior to the date of the said Executive order, they are not subject to "entry" prior to amendment or revocation of that order.

Since it appears that a large proportion of the lands within existing grazing districts were withdrawn by the said Executive order prior to the establishment of grazing districts, or withdrawal therefor, and having in mind that the grazing act limits the establishment of grazing districts to eighty million acres of vacant, unreserved and unappropriated lands, it would appear to be advisable to make a check of the lands in the several grazing districts to determine their status with respect to the eighty million acres limitation. Such of them as are unaffected by prior disposals or reservations, not exceeding eighty million acres, should be regarded as subject to all of the provisions of the Taylor Grazing Act. This situation suggests the further question whether any useful purpose will be served by the continuation of the withdrawal of November 26, 1934, as to areas embraced in grazing districts, not exceeding a total of 80,000,000 acres. You are requested to consider this question in cooperation with the Director of Grazing, and submit a suitable order to exclude such areas from the effect of the Executive order of November 26, 1934, if you agree as to the advisability of such action.

T. A. WALTERS,
First Assistant Secretary.

**EXCHANGES OF LANDS IN APACHE, NAVAJO, AND COCONINO
COUNTIES, ARIZONA****REGULATIONS**

[Circular No. 1335]

DEPARTMENT OF THE INTERIOR,**GENERAL LAND OFFICE,***Washington, D. C., August 28, 1934.*

**REGISTER, PHOENIX, ARIZONA; SUPERINTENDENT, LEUPP AGENCY,
LEUPP, ARIZONA; SUPERINTENDENT, SOUTHERN NAVAJO AGENCY,
FORT DEFLIANCE, ARIZONA; SUPERINTENDENT, WESTERN NAVAJO
AGENCY, TUBA CITY, ARIZONA:**

The act of June 14, 1934 (48 Stat. 960), entitled "An Act to define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes", provides as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the exterior boundaries of the Navajo Indian Reservation, in Arizona, be, and they are hereby, defined as follows: Beginning at a point common to the States of Arizona, New Mexico, Colorado, and Utah, thence west along the boundary line between the States of Arizona and Utah to a point where said boundary line intersects the Colorado River; thence down the south bank of that stream to its confluence with the Little Colorado River; thence following the north bank of the Little Colorado River to a point opposite the east boundary of the Grand Canyon National Park; thence south along said east boundary to the southeast corner of section 5, township 30 north, range 6 east, Gila and Salt River base and meridian, Arizona; thence east to the southeast corner of section 4; thence south to the southwest corner of section 10; thence east to the southeast corner of section 10; thence south to the southwest corner of section 14; thence east to the northwest corner of the northeast quarter section 23; thence south two miles to the southeast corner of the southwest quarter section 26; thence west one half mile to the southeast corner of section 27, township 30 north, range 6 east, Gila and Salt River base and meridian, Arizona; thence south seven miles to the southwest corner of section 35, township 29 north, range 6 east; thence east one mile; thence south one and one half miles to the southwest corner of the northwest quarter section 12, township 28 north, range 6 east; thence east through the center of section 12 to the range line between ranges 6 and 7 east; thence south along said range line five and one-half miles to the southeast corner of section 1, township 27 north, range 6 east; thence west three miles to the southwest corner of section 3, township 27 north, range 6 east; thence south five miles to the southeast corner of section 33, township 27 north, range 6 east; thence east along township line between townships 26 and 27, six and one half miles to the northeast corner of the northwest quarter section 3, township 26 north, range 7 east; thence south two miles to the southeast corner of the southwest quarter section 10, township 26 north, range 7 east; thence east four and one half miles to the southeast corner of section 8, township 26 north, range 8 east; thence north four miles to the northwest corner of section 28, township 27 north, range 8 east, Gila and

Salt River base and meridian; thence east one mile to the southeast corner of section 21; thence north four miles to the northeast corner of section 4, township 27 north, range 8 east, thence east along township line between townships 27 and 28 north to its intersection with the Little Colorado River; thence up the middle of that stream to the intersection of the present west boundary of the Leupp Extension Reservation created by Executive order of November 14, 1901; thence south along the present western boundary of said extension to where it intersects the fifth standard parallel north; thence east along said standard parallel to the southwest corner of township 21 north, range 26 east, Gila and Salt River base and meridian; thence north six miles to the northwest corner of township 21 north, range 26 east; thence east twelve miles to the northeast corner of township 21 north, range 27 east; thence south two miles; thence east twelve miles; thence south four miles; thence east along the township line between townships 20 and 21 north to the boundary line between the States of New Mexico and Arizona; thence north along said boundary line to the point of beginning. All vacant, unreserved, and unappropriated public lands, including all temporary withdrawals of public lands in Arizona heretofore made for Indian purposes by Executive order or otherwise within the boundaries defined by this Act, are hereby permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as may already be located thereon; however, nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive order of December 16, 1882. There are hereby excluded from the reservation as above defined all lands heretofore designated by the Secretary of the Interior pursuant to section 28 of the Arizona Enabling Act of June 20, 1910 (36 Stat. L. 575), as being valuable for water-power purposes and all lands withdrawn or classified as power-site lands, saving to the Indians, nevertheless, the exclusive right to occupy and use such designated and classified lands until they shall be required for power purposes or other uses under the authority of the United States: *Provided*, That nothing in this Act contained shall be construed as authorizing the payment of proceeds or royalties to the Navajo Indians from water power developed within the areas added to the Navajo Reservation pursuant to section 1 of this Act; and the Federal Water Power Act of June 10, 1920 (41 Stat. L. 1063), and amendments thereto, shall operate for the benefit of the State of Arizona as if such lands were vacant, unreserved, and unappropriated public lands. All valid rights and claims initiated under the public land laws prior to approval hereof involving any lands within the areas so defined, shall not be affected by this Act.

SEC. 2. The Secretary of the Interior is hereby authorized in his discretion, under rules and regulations to be prescribed by him, to accept relinquishments and reconveyances to the United States of such privately owned lands, as in his opinion are desirable for and should be reserved for the use and benefit of the Navajo Tribe of Indians, including patented and nonpatented Indian allotments and selections, within the counties of Apache, Navajo, and Coconino, Arizona; and any Indian so relinquishing his or her right shall be entitled to make lieu selections within the areas consolidated for Indian purposes by this Act. Upon conveyance to the United States of a good and sufficient title to any such privately owned land, except Indian allotments and selections, the owners thereof, or their assigns, are hereby authorized, under regulations of the Secretary of the Interior, to select from the unappropriated, unreserved, and non-mineral public lands of the United States within said counties in the State of Arizona lands approximately equal in value to the lands thus conveyed, and where surrendered lands contain springs or living waters, selection

of other lands taken in lieu thereof may be of like character or quality, such values to be determined by the Secretary of the Interior, who is hereby authorized to issue patents for the lieu lands so selected. In all selections of lieu lands under section 2 of this Act notice to any interested party shall be by publication. Any privately owned lands relinquished to the United States under section 2 of this Act shall be held in trust for the Navajo Tribe of Indians; and relinquishments in Navajo County, Arizona, excluding Indian allotments and selections, shall not extend south of the township line between townships 20 and 21 north, Gila and Salt River base and meridian. The State of Arizona may relinquish such tracts of school land within the boundary of the Navajo Reservation, as defined by section 1 of this Act, as it may see fit in favor of said Indians, and shall have the right to select other unreserved and non-mineral public lands contiguous or noncontiguous, located within the three counties involved equal in value to that relinquished, said lieu selections to be made in the same manner as is provided for in the Arizona Enabling Act of June 20, 1910 (36 Stat. L. 558), except as to the payment of fees or commissions which are hereby waived. Pending the completion of exchanges and consolidations authorized by section 2 of this Act, no further allotments of public lands to Navajo Indians shall be made in the counties of Apache, Navajo, and Coconino, Arizona, nor shall further Indian homesteads be initiated or allowed in said counties to Navajo Indians under the Act of July 4, 1884 (23 Stat. L. 96); and thereafter should allotments to Navajo Indians be made within the above-named counties, they shall be confined to land within the boundaries defined by section 1 of this Act.

SEC. 3. Upon the completion of exchanges and consolidations authorized by section 2 of this Act, the State of Arizona may, under rules and regulations to be prescribed by the Secretary of the Interior, relinquish to the United States such of its remaining school lands in Coconino, Navajo, and Apache Counties as it may see fit; and shall have the right to select from the vacant, unreserved, and nonmineral public lands in said counties lieu lands equal in value to those relinquished without the payment of fees or commissions.

SEC. 4. For the purpose of purchasing privately owned lands, together with the improvements thereon, within the boundaries above defined, there is hereby authorized to be appropriated, from any funds in the Treasury not otherwise appropriated, the sum of \$481,879.38, which sum shall be reimbursable from funds accruing to the Navajo tribal funds as and when such funds accrue and shall remain available until expended: *Provided*, That title to the land so purchased may, in the discretion of the Secretary of the Interior, be taken for the surface only: *Provided further*, That said funds may be used in purchasing improvements on any land within said boundaries or on leased State school land within the boundaries above defined, provided the State of Arizona agrees to the assignment of said leases to the Navajo Tribe of Indians on a renewable and preferential basis, and provided the Legislature of said State enacts such laws as may be necessary to avail itself of the exchange provisions contained in section 2 of this Act, and disclaim any right, title or interest in and to any improvements on said lands.

1. Applications to select by the owners of the lands within the area described in the act should be filed in the U. S. land office at Phoenix, Arizona. They need not be on any particular form but must state the date of the act, whether the applicant is the owner of the offered base land, and specifically describe the land desired to be surrendered and that sought to be selected. The application should

be accompanied with an affidavit wherein it is shown that the selected land is surveyed, unappropriated, unreserved, non-mineral public land of the United States in one of the three counties aforesaid, in Arizona. It should also state that a deed of relinquishment of the base land and an abstract of title thereto are also submitted and that the applicant will without cost to the Government place the deed of relinquishment of record and extend the abstract of title to the date of such recordation when called upon to do so.

2. The affidavit accompanying the application may be executed before any officer qualified to administer oaths, by the applicant or by some credible person who is familiar with the character, condition, and value of the selected land and the value of the land relinquished. This affidavit must be corroborated by at least one person who has no personal interest in the exchange and who is familiar with the value of the land relinquished and that selected. The affidavit must describe the base and selected land and show the following: That there is not within the limits of the lieu land any known vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper; that there is not any known deposit of coal or any placer deposit, oil, or other valuable mineral; that said land contains no salt springs or known deposits of salt in any form sufficient to render it chiefly valuable therefor; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that said land is essentially non-mineral in character, has upon it no mining or other improvements and is not in any manner occupied adversely to the selector and that the selection is not made for the purpose of obtaining title to mineral lands. The affidavit must also show that affiant is well acquainted with the value of the relinquished and selected land and that from personal observations and knowledge he states that the lands are of equal value and that the lieu land is not used by Indians.

3. The application must be accompanied with a deed of relinquishment or reconveyance to the United States of the land tendered as the basis of the exchange, duly executed and acknowledged in the same manner as conveyances of real property are required to be executed by the laws of the State of Arizona.

4. There must be filed a duly authenticated abstract of title to the relinquished land showing title thereto to be in the applicant. The certificate of authentication of the abstract must be signed by the Recorder of Deeds under his official seal and must show that the title memorandum is a full, true, and complete abstract of all matters of record or on file in his office including conveyances, mortgages, or other incumbrances. The custodian of tax records must certify that all taxes levied or assessed against the land or that could operate

as a lien thereon have been paid in full and that there are no unredeemed tax sales and no tax deeds outstanding as shown by the records of his office. The absence of judgment liens for pending suits against the grantor which might affect the title to the land relinquished must be shown by the official certificates of the clerks of the courts of record whose judgments under the laws of the United States or the State constitute a lien on the land conveyed. The abstract may also be made by an abstract company or abstracter approved under section 42 of the mining regulations of April 11, 1922 (49 L. D. 15, 69).

5. The register will certify to the application, showing whether or not the selected land is free from conflict, adverse filing, entry, or claim thereto.

6. Upon receipt of an application in the General Land Office, if all be regular, a field examination will be requested of the Division of Investigations of both the selected and base lands and a report secured from the Geological Survey as to the mineral, water holes, springs, and power possibilities of the selected land.

7. If all be regular and the reports of the Special Agent in Charge and the Geological Survey are satisfactory the General Land Office will require the applicant at his expense within 30 days from receipt of notice to begin publication of notice for four consecutive weeks in a newspaper of general circulation in the vicinity of the selected lands. During this period a similar notice must be posted in the district land office.

8. The notice should describe the selected land, give name of applicant, date of application, and act under which made and allow all persons claiming the land under the mining or other laws and desiring to show that it is mineral in character or adversely occupied, an opportunity to file objection or to establish their interest therein or the mineral character thereof.

9. Proof of publication will consist of the affidavit of the publisher or foreman or other employee of the newspaper with a copy of the published notice attached. The register will certify to the posting in his office. The first and last dates of publication and posting must also be given.

10. The act provides for the selection of lands containing springs or living waters in lieu of other lands of the same character or quality, notwithstanding that the selected lands may be included in a public water reserve if not otherwise reserved. However, the allowance of any such selection is within the discretion of the Secretary of the Interior.

11. In all cases where the applicant for an exchange is an Indian, the application must be filed in duplicate and the register will forward the duplicate copy of the application to the proper Indian

superintendent and will furnish said superintendent with the serial number of the application, which serial number, together with the name of the land office, must be indorsed thereon as a means of identification and referred to in all correspondence concerning said applications. Copies of applications by Indians involving lands in Coconino County north of the township line between Ts. 24 and 25, will be forwarded to the Indian superintendent at Tuba City, Arizona; those for lands in Coconino County south of the township line mentioned, and in Navajo County, will be forwarded to the Indian superintendent at Leupp, Arizona, and those for lands in Apache County will be forwarded to the Indian superintendent at Fort Defiance, Arizona.

12. Upon the completion of a selection as herein provided, and in the absence of objection then appearing, approval of the selection by the Secretary will be recommended by the General Land Office. If and when so approved the deed and abstract of title will be returned to the applicant to have the deed recorded and the abstract of title extended to show the recordation.

13. Upon the acceptance of title to the base lands they will be held in trust for the Navajo Tribe of Indians and the Commissioner of Indian Affairs will be notified thereof.

14. You will accept no applications, other than those by Indians, where the lands offered are south of the township line between Ts. 20 and 21, in Navajo County.

15. Pending the completion of exchanges and consolidations authorized by section 2 of the act you will accept no further applications for allotments, or Indian homesteads under the act of July 4, 1884 (23 Stat. 96), for public lands to Navajo Indians in the counties of Apache, Navajo, and Coconino, and thereafter should allotments to Navajo Indians be made within the above named counties, they shall be confined to land within the boundaries defined by section 1 of said act of June 14, 1934.

16. Selections by the State of Arizona in lieu of school lands within the boundary of the Navajo Reservation as defined by section 1 of the act, will be made in accordance with the regulations governing the selection of lands by States and Territories approved June 23, 1910 (39 L. D. 39), in so far as they apply to indemnity school land selections, and will also be subject to all other existing regulations pertaining to such selections except that no fees or commissions are required, and the offered and selected lands need not be of equal area as in ordinary indemnity school land selections, but need only be approximately equal in value.

17. Upon the completion of the exchanges and consolidations authorized by section 2 of the act further instructions will be issued regarding the exchanges authorized by section 3 of the act.

18. The register will note on his records the boundaries of the reservation as defined by the act of June 14, 1934, and in the adjudication of applications and claims he will be governed by the following direction contained in the proviso to section 1 of the act:

All valid rights and claims initiated under the public land laws prior to approval hereof involving any lands within the area so defined, shall not be affected by this Act.

FRED W. JOHNSON,
Commissioner.

I concur:

JOHN COLLIER,
Commissioner of Indian Affairs.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

APPEALS FROM DECISIONS OF THE DIRECTOR OF GRAZING

RULES AND REGULATIONS

[Circular No. 4]

DEPARTMENT OF THE INTERIOR,
DIVISION OF GRAZING,
Washington, D. C., October 7, 1935.

Section 9 of the Taylor Grazing Act, approved June 28, 1934 (48 Stat. 1269), provides, among other things: "The Secretary of the Interior shall provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer in charge in a manner similar to the procedure in the Land Department."

In accordance with the above provision the following rules and regulations are prescribed for proceedings on appeals from decisions of the Director of Grazing:

RIGHT OF APPEAL

1. An appeal may be taken by any party affected from the decision of the Director of Grazing, on a matter involving any claim or right within a grazing district, to the Secretary of the Interior.

NOTICE OF APPEAL

2. Notice of appeal from any decision by the Director of Grazing involving any privilege exercised or asserted involving any matter concerning the administration of any grazing district established

under the Taylor Grazing Act shall be filed within 30 days from the date of receipt of notice of such decision by filing a notice of appeal with the Director of Grazing at Washington, D. C. Failure to give notice of appeal as herein provided will be construed as acceptance of the decision rendered.

3. The notice of appeal must be in writing and set forth in clear, concise language the grounds of appeal in the form of specifications of error, which shall be separately stated and numbered. Where error is based upon insufficiency of the evidence to justify the decision, the parts wherein it is deemed insufficient must be specifically set forth in the notice. Appellant will be allowed 20 days after filing of such notice within which to file brief or argument in support thereof. A copy of any such appeal, brief, or argument shall be served upon the opposing party, if any.

DISPOSITION OF APPEAL

4. Appeals filed with the Director, together with briefs and arguments relating thereto, will be reviewed by the Director of Grazing and the action complained of reversed or the record transmitted to the Secretary of the Interior with such report as may be deemed appropriate.

LOCAL HEARINGS ON APPEAL

5. Local hearings may be ordered by the Director of Grazing in appropriate cases upon the application of any party in interest in any matter.

6. Local hearings may be held before the register of the district land office within which the lands concerned are situated.

7. Any order for hearing before the register of the district land office shall be addressed to that official through the Commissioner of the General Land Office, and shall contain a clear and concise statement of the subject matter of the appeal, together with the names and addresses of the parties involved. The register will confer with the local representative of the Division of Grazing relative thereto and fix the time and place for the hearing, due notice of which must be given the appellant and other parties in interest by registered mail. A like notice will be sent by ordinary mail to the local representative. Subpoenas for witnesses will be issued and served as provided for in cases before the Land Department. See instructions of March 20, 1903 (32 L. D. 132).

8. The local representative of the Division of Grazing will duly submit to the register an estimate of the probable expense required on behalf of the Government. He will represent the Director of Grazing in the proceedings and also cause subpoenas to be served

upon such witnesses as he may desire to call, and take such other steps as are necessary to prepare the case for hearing.

9. In appropriate cases, testimony may, by order of the register, and after such notice as he may direct, be taken before a United States commissioner, or other officer authorized to administer oaths, at a time and place to be designated in a notice of the taking of such testimony, in accordance with the rules of practice in cases before the Land Department.

10. Upon the date set for the hearing or the day to which it may continue, the testimony of the witnesses for either party may be submitted. The representative of the Division of Grazing and the representatives of the appellant or other parties may examine and cross-examine witnesses. The proceedings will be governed by the rules of practice in cases before the Land Department and when the testimony of all the witnesses has been submitted and the hearing completed, the entire record will be transmitted by the register, through the Commissioner of the General Land Office, to the Director of the Division of Grazing without recommendation.

11. Each party must pay the cost of taking the testimony on direct examination of his own witnesses and the cross-examination on his behalf of other witnesses; the cost of noting motions, objections, and exceptions must be paid by the party on whose behalf the same are made. The register, or other hearing officer, may require a party to give security for costs including expense of taking and transcribing testimony.

12. The appellant and other parties in interest may file briefs and arguments in connection with the record of the hearing at such time as may be agreed upon by the local representative of the Division of Grazing and the claimants or their representatives, not exceeding 30 days after completion of the hearing.

PROCEEDINGS BEFORE THE SECRETARY OF THE INTERIOR

13. After the record has been transmitted to the Secretary of the Interior the proceedings will be governed by the rules of practice as in other cases on appeal in the Land Department. (See 51 L. D. 547.)

GOVERNMENT COSTS

14. Costs incurred on behalf of the Government will be paid from the appropriation for the purposes of administration of the Grazing Act.

F. R. CARPENTER,
Director of Grazing.

Approved:

CHARLES WEST,

Acting Secretary of the Interior.

DEATH VALLEY NATIONAL MONUMENT—APPROPRIATION OF WATER

Opinion, October 22, 1935

WATER RIGHTS—RESERVED LANDS—PUBLIC USE¹

Reserved lands of the United States needed or used by the public for watering purposes are not subject to appropriation, either by individuals or any branch of the Government, but are required, while so reserved, to be kept and held open to the public use for such purposes.

WATER RIGHTS—UNITED STATES THE PROPRIETOR—BENEFICIAL USE.

The Government, as riparian owner of lands in California, is recognized as entitled to such water as is needed for beneficial use, but the law of appropriation permits only such quantity as is beneficially used.

WATER RIGHTS—NAVIGABLE STREAMS—SECS. 2339 AND 2340, REVISED STATUTES—RESERVED PUBLIC LANDS—RIGHTS OF WAY FOR WATERS.

Congress, in sections 2339 and 2340 of the Revised Statutes, and various later acts, surrendered to the States the right to control the appropriation and use of the waters of nonnavigable streams on the public lands; but this general rule does not apply to reserved public lands unless the water can be diverted at a point not affected by the reservation or unless a right of way has been obtained in accordance with Federal laws providing for rights of way over certain classes of reservations and under prescribed conditions, there being a clear distinction, between water rights and rights of way over land for the use of such waters.

MINING LAWS—AUTHORITY OF CONGRESS—ACT OF JUNE 13, 1933—EXTENT OF CONTROL RETAINED.

Congress, in extending the operation of the mining laws to the Death Valley National Monument, "or as it may hereafter be extended", by the Act of June 13, 1933, did not thereby abrogate its control over the lands involved, which is evidenced by the fact that the act itself expressly provides that the surface use of locations, entries, or patents shall be subject to general regulations to be prescribed by the Secretary of the Interior.

WATER RIGHTS—DESERT LAND ACT—RULE OF APPROPRIATION OR COMMON LAW RULE—DISCRETION LODGED IN STATES.

The Desert Land Act, passed March 3, 1877 (19 Stat. 377), left with each State the right to determine for itself to what extent the rule of appropriation or the common law rule in respect to riparian rights should obtain; does not bind or purport to bind the States to any policy; and simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the State and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation (*California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U. S. 142).

POWER OF CONGRESS OVER PUBLIC LANDS—EXERCISE OF POWER.

It is well established that Congress, in the exercise of its right to legislate with respect to its own property, may reserve any portion of the public lands and altogether prohibit the use thereof by private parties, or permit

¹ See, also, Solicitor's opinion on Underground Water Claims, Utah, at page 378.

such rights of way thereon or such use thereof as it may deem proper to allow. This Congress has frequently done.

WATER RIGHTS—METHODS OF ACQUISITION.

The right to the use of water from springs located on lands of the United States not withdrawn for public watering purposes, may be acquired by use on riparian lands of the United States, or by appropriation under State laws, subject merely to prior vested rights.

WATER RIGHTS IN DEATH VALLEY NATIONAL MONUMENT—SPRINGS—RUNNING STREAMS.

Where the water from springs in the Death Valley National Monument does not flow beyond the confines of the reservation, the Government, as riparian owner, is sufficiently protected in the use thereof without appropriation under State laws; but where running streams are involved, as where water flows through the reservation and may be subject to appropriation and diversion, either above or below, it may be advisable for the Government to make appropriation under State laws, in order that claims may be adjudicated and equitable division awarded and established.

MARGOLD, *Solicitor*:

In accordance with your [First Assistant Secretary] reference, I have considered the five separate applications submitted by the National Park Service for consideration of the propriety of applying to the State to appropriate the water from five springs located on lands of the United States west of the Death Valley National Monument in California. There was also submitted for consideration in this connection a report on California water law, which report was prepared by Mr. Joseph E. Taylor, water rights attorney of the National Park Service.

In the recent decision in the case of *California Oregon Power Co. v. Beaver Portland Cement Co.*, decided April 29, 1935 (295 U. S. 142), the Supreme Court of the United States, after general review of Federal legislation and court decisions on the subject of water appropriations on the public domain, said, *inter alia*, that:

As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. *Howell v. Johnson* (C. C.), 89 F. 556, 558. The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. The words that the water of all sources of water supply upon the public lands and not navigable "shall remain and be held free for the appropriation and use of the public" are not susceptible of any other construction. The only exception made is that in favor of *existing* rights; and the only rule spoken of is that of *appropriation*. It is hard to see how a more definite intention to sever the land and water could be evinced. The terms of the statute, thus construed, must be read into every patent thereafter issued, with the same force as though expressly incorporated therein, with the result that the grantee will take the legal title to the land conveyed, and such title, and only such title, to the flowing waters

thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the state of their location. If it be conceded that in the absence of federal legislation the state would be powerless to affect the riparian rights of the United States or its grantees, still, the authority of Congress to vest such power in the state, and that it has done so by the legislation to which we have referred, cannot be doubted.

The said decision does not announce a new doctrine. It merely restates the established rule recognized and applied in numerous precedents cited therein. It held that a Federal patent for public land did not carry with it a water right from a stream flowing through the land; that Congress, in sections 2339-40, Revised Statutes, and various later acts, had surrendered to the States the right to control the appropriation and use of the waters of nonnavigable streams on the public lands. But this general rule does not apply with respect to reserved public lands, unless the water can be diverted at a point not affected by the reservation or unless a right of way has been obtained in accordance with laws of the United States providing for rights of way over certain classes of reservations and under prescribed conditions; for there is a clear distinction between water rights and rights of way over land for the use of such waters.

In the decision above quoted, the court did not consider the effect of section 10 of the Stock-raising Homestead Act of December 29, 1916 (39 Stat. 862), which, in part, provides—

That lands containing water holes or other bodies of water needed or used by the public for watering purposes shall not be designated under this Act but may be reserved under the provisions of the Act of June twenty-fifth, nineteen hundred and ten, and such lands heretofore or hereafter reserved shall, while so reserved, be kept and held open to the public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe.

By Executive order of April 17, 1926, it was provided as follows:

Under and pursuant to the provisions of the act of Congress approved June 25, 1910 (36 Stat. 847), entitled "An Act to authorize the President of the United States to make withdrawals of public lands in certain cases", as amended by act of Congress approved August 24, 1912 (37 Stat. 497), it is hereby ordered that every smallest legal subdivision of the public-land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole, and all land within one-quarter of a mile of every spring or water hole located on unsurveyed public land be, and the same is hereby, withdrawn from settlement, location, sale, or entry, and reserved for public use in accordance with the provisions of section 10 of the act of December 29, 1916 (39 Stat. 862), and in aid of pending legislation.

The descriptions of the respective springs in question would seem to bring the lands containing them within the purpose and effect of the said Executive order unless it can be shown that they are not "needed or used by the public for watering purposes." Assuming that they are within the category of tracts so reserved, they are not

subject to appropriation, either by individuals or by any branch of the Government, but "shall, while so reserved, be kept and held open to the public use for such purposes." There can be no doubt of the validity of said reservation under the Congressional authority cited therein. In the case of *Utah Power & Light Co. v. United States* (243 U. S. 389), it was held (*syllabi*):

The power to regulate the use of the lands of the United States, and to prescribe the conditions upon which rights in them may be acquired by others, is vested exclusively in Congress.

The inclusion of such lands within a State does not diminish this power, or subject the lands or interests in them to disposition by the state power; and, therefore, such lands, within a State, or ways across them, are not subject to be occupied or used for private or *quasi*-public purposes, under state laws, save such laws as have been adopted or made applicable by Congress.

The Act of May 14, 1896, c. 179, 29 Stat. 120, relating exclusively to rights of way and the use of land for electric power purposes, covering the subject fully and specifically and containing new provisions, was evidently designed to be complete in itself, and therefore, by necessary implication, superseded the provisions of Rev. Stats., secs. 2339 and 2340 (derived from the Acts of 1866 and 1870), in so far as they were applicable to such rights of way.

If, as assumed, these tracts, with the springs thereon, are of the class reserved by the said Executive order, and if it be desired to remove them from the force and effect of that order, it would be appropriate to request the President to modify the withdrawal so as to except therefrom the lands in question. If the said lands be eliminated from the withdrawal of April 17, 1926, the said waters will then be subject to appropriation and use by the National Park Service, if there be no prior valid rights disturbed thereby. The method of such appropriation and use would be governed by the laws of California. That State recognizes both the doctrine of appropriation and the common law doctrine of riparian rights, the latter modified, however, as provided in section 3, article 14 of the constitution of the State, inserted as a new section by amendment in 1928. In the recent decision in the case of *Peabody v. City of Vallejo* (40 Pac., 2d series, 486), the Supreme Court of California held that:

The rule of reasonable use as enjoined by section 3 of article 14 of the constitution applies to all water rights enjoyed or asserted, whether the same be grounded on the riparian right or the right, analogous to the riparian right, of the overlying owner, or the percolating water right, or the appropriative right.

Since these lands appear to be owned by the United States, it would not be necessary for the Federal Government to apply to the State to appropriate the waters of the springs thereon, in so far as the waters are put to beneficial use on the riparian lands. It would be doubtful, however, whether the doctrine of riparian rights

could be applied in the instance of the proposed conveyance by pipeline to the Death Valley National Monument. It would probably afford greater security to obtain a water right from the State in that case, unless the course hereinafter suggested be adopted.

The papers submitted show that it is the intention of the National Park Service to have this area included in the Death Valley National Monument. But Mr. Taylor, in his letter of April 13, 1935, recommended that the water rights in these springs be secured before such extension of the said national monument. He states the case as follows:

I feel that it would be wise to file an application to appropriate water with the proper State department before the territory is included within the monument boundaries, and that this should be done as soon as possible. While the amounts of water to be used by the Federal Government in Death Valley are actually small, they are nevertheless vital and they constitute a relatively fair proportion of the available supply, and it is important that the Government procure the best possible title to all of the water which may be put to use now or in the future.

The suggestion that an early filing be made is based on several reasons. First, that in the event the territory is not included, the monument will be protected by proper evidence of priority and it will have a recognized right to the water and a right-of-way over the land for its system; secondly, in order to forestall a possible prior appropriation from this same source of supply; thirdly, and mainly, because if we wait until the territory is included within the monument and then file an application, we will be definitely setting a precedent of National Park Service recognition of State supremacy. I do not wish to infer that, perhaps, the State does not have complete jurisdiction over the non-navigable waters within its boundaries, yet because of somewhat different circumstances in other parks within this State, I do not feel that it would be wise to make any such complete recognition of State authority as would be the effect of seeking permission to appropriate water from our own land.

California law upon the subject is complicated and fairly ambiguous, and recent court decisions have not rendered it any clearer. Some of the other parks in this State were withdrawn from entry and reserved for public recreational purposes comparatively early, and it is my belief that they acquired certain rights as of those dates, which would be unaffected by subsequent state legislation. Death Valley, on the other hand, is of recent withdrawal and may be affected by changes in state law with respect to the riparian right, that is, the right attaching to land contiguous to a water course. Further, the mining laws of the United States are extended to include the Death Valley area and miners, subject to regulations prescribed by the Secretary of the Interior regarding surface use, might secure water rights necessary for monument purposes.

By filing an application to appropriate this water before the inclusion of the territory within the monument, we are making no concessions because the jurisdiction of the State would be undisputed. If we wait until afterwards our precedent is set, and we will have to go through the same procedure for all important developments. I am not at all sure that it would be to the best interests of the Government to file these applications, because there still is in California a recognition of the riparian right. The old riparian right has

been considerably curtailed by constitutional provisions, legislation, and court decisions, and it is now probably saddled with the doctrine requiring beneficial use, but it remains in the law in its abridged form, and can be made the basis of the Government's right in Death Valley water by protection through regulation of miners' uses by the Secretary of the Interior. However, this riparian right is a common right of all land owners on the water course and it carries with it no definite amount of water. Consequently, it is probably well to try to establish a right to the greatest quantity of water from this new source that you can possibly put to park uses.

Also, in his general report of May 22, 1935, Mr. Taylor stated:

It may be very forcibly argued in California that the Desert Land Act of 1877 had the effect of destroying the riparian rights upon lands falling within that classification. It is the writer's belief that if the question were squarely presented to the courts, a decision to that effect would result. So far as is definitely known, no parks or monuments fall within this classification, but there is such a possibility in connection with Death Valley National Monument, and if it were so classified, all water rights within that area would have to be gained by following the procedure for appropriation of water rather than relying upon any riparian right.

Apparently the view thus expressed by Mr. Taylor as to the effect of the Desert Land Act is based upon that part of the act (March 3, 1877, 19 Stat. 377), which provides that:

* * * all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights.

It will be noted that this provision relates only to water supply upon the "public lands", but if it be assumed that no public lands could thereafter be withdrawn or reserved so as to prevent the appropriation of waters flowing or existing thereon, nevertheless it is well established that Congress has the right to legislate with respect to its own property, and it may reserve any portion of the public lands and altogether prohibit the use thereof by private parties or to permit such rights of way thereon or such use thereof as it may deem proper to allow. It has frequently done so. Where such rights of way have been authorized on reserved lands, it is only on condition that the purpose of the reservation will not be substantially injured thereby. For instance, the Act of February 15, 1901 (31 Stat. 790), authorizes the Secretary of the Interior to permit the use of rights of way through the public lands and reservations for certain purposes, including water conduits, tunnels, etc., for mining purposes, 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.

This control is not destroyed by the act of June 13, 1933 (48 Stat. 139) which extended the mining laws to the Death Valley National Monument," or as it may hereafter be extended." Furthermore, that act expressly provides that the surface use of locations, entries, or patents shall be subject to general regulations to be prescribed by the Secretary of the Interior.

With respect to Mr. Taylor's suggestion that the Desert Land Act may have had the effect of destroying the riparian rights as to lands of that classification, it is sufficient to say that California has made no such distinction or such limitation of riparian rights, and that the Supreme Court of the United States in the case of *California Oregon Power Co., supra*, after extended consideration of the Desert Land Act, held that it left with the States "the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain"; that it "does not bind or purport to bind the states to any policy"; that it "simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation."

Upon review of this subject I have reached the following conclusions:

1. That if these springs are of the class contemplated by the Executive order of April 17, 1926, no rights to the use of the lands containing them could be acquired by any party after the date of that order, and that any one so using the same to the exclusion of the public would be a trespasser thereon. If vested rights therein existed at the date of the said order, they were not affected thereby.
2. That so long as said order stands, no one can be granted private use of the lands, except in pursuance of a prior vested right, and that it would be inconsistent with that order for the National Park Service to apply to the State for appropriation of the waters, either on that land or for transportation to other lands.
3. That the President has authority to extend the boundaries of the Death Valley National Monument to include these lands, and that if such extension be made there would appear to be no practical need for claiming the waters of these springs through application to the State, because these do not appear to be in the category of running streams, so as to endanger appropriation thereof off the reservation by private parties, but will be used substantially at the place of issuance from the ground. No one can obtain a right of way for the use of such waters except by consent of the Secretary of the Interior, and only if compatible with the purposes of the reservation. Furthermore, the Federal Government, as riparian

owner, will be recognized as entitled to such waters as are needed for beneficial use on the land, and the law of appropriation permits only such amount as is beneficially used.

4. Where running streams are involved, as where waters flow through the reservation and may be subject to appropriation and diversion, either above or below, I can see some substantial merit in filing application with the State for appropriation, even though we might properly claim as riparian owner, in order that claims may be adjudicated and equitable division awarded and established. But where running waters are not involved, and where the surface waters are confined within the reservation, it is not apparent that any purpose would be served by application to the State, with its attendant expense and onerous procedure.

Approved:

T. A. WALTERS,

First Assistant Secretary.

UNDERGROUND WATER CLAIMS, UTAH

Opinion, October 22, 1935¹

WATER RIGHTS—STATE CONTROL—STATUS OF FEDERAL GOVERNMENT.

It is now well settled that State laws govern with respect to the right to appropriate and use the nonnavigable waters with the State on private lands or on the unreserved public lands of the United States, and also as regards navigable waters, except where the powers of the Federal Government with respect to navigable streams would be interfered with (citing *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U. S. 142).

RIGHTS OF WAY—PUBLIC LANDS—WATER RIGHT AND RIGHT OF WAY DISTINCT—RIGHT OF WAY PROHIBITED OR QUALIFIED.

The right to appropriate water does not necessarily carry with it a right of way over public land for the use of such water, and Congress has in various laws provided for permitting rights of way over public and reserved lands of the United States for the use of waters, which rights of way vary as to conditions and purposes and may be altogether prohibited.

WATER RIGHTS—PUBLIC LANDS—RIGHTS OF WAY—LAW OF UTAH GOVERNING WATER APPROPRIATION.

Where wells are developed on public lands of the United States, the Government can protect the use thereof for governmental purposes, in so far as the use of the waters depends upon the use of the land for the storage or carriage of such waters, by refusing to grant rights of way for such purpose. But under the law of Utah, if the waters are in flux, either on the surface or underground, they are subject to claim by the first appropriator thereof, for use on private land or on any public lands properly subject to such use.

¹ See, also, Solicitor's opinion on Death Valley National Monument, at page 371.

WATER RIGHTS—PUBLIC LANDS OF THE UNITED STATES—AUTHORITY TO APPROPRIATE WATER.

No authority appears for the acquisition by the Federal Government of underground water rights in connection with wells on public lands of the United States in the State of Utah, except upon compliance with the water-right laws of the State of Utah.

MARGOLD, *Solicitor*:

My opinion has been asked as to the propriety and necessity for the Federal Government to file applications for underground water claims under the laws of the State of Utah when wells on the public domain are involved. It appears that these are well developments of the Utah Emergency Relief Agency which have been turned over to the Division of Grazing, of this Department, in connection with the administration of public range.

In a companion opinion of this date [page 371] I considered certain phases of the water right law of the State of California as related to the appropriation and use of waters on lands of the United States, reserved and unreserved. California recognizes the common law doctrine of riparian rights in waters, as modified in certain respects. The State of Utah, on the contrary, recognizes that the right to the use of waters can be acquired only by appropriation in accordance with State laws. It is now well settled that State laws govern with respect to the right to appropriate and use the non-navigable waters within the State on private lands or on the unreserved public lands of the United States, and also as regards navigable waters, except where the powers of the Federal Government with respect to navigable streams would be interfered with. See *California Oregon Power Co. v. Beaver Portland Cement Co.*, decided April 29, 1935 (295 U. S. 142).

In the decision cited, it was held (*syllabi*):

After the enactment of the Desert Land Act of 1877, if not before, all nonnavigable waters in any part of the public domain became *publici juris*, subject to the plenary control of the designated states, including those thereafter created out of the territories named, with the right in each to determine for itself to what extent the law of appropriation or the common-law rule in respect of riparian rights should apply, the act not binding the states to any policy, but recognizing and giving sanction, as regards the United States and its future grantees, to the state and local doctrine of appropriation.

Having thus surrendered its primary rights to nonnavigable waters on the public domain, the Federal Government, with respect to its public lands, stands on the same footing as private owners, and must conform to State laws governing the appropriation of waters.

It must be understood, of course, that the right to appropriate water does not necessarily carry with it a right of way over land for the use of such water. Congress has in various laws provided for permitting rights of way over public and reserved lands of the

United States for the use of waters. These vary as to conditions and purposes. See *Utah Power & Light Co. v. United States* (243 U. S. 389). But they may be altogether prohibited. See act of March 3, 1921 (41 Stat. 1353), forbidding the granting of rights of way for the storage or carriage of water within national parks and national monuments, as then constituted, without specific act of Congress.

Where wells are developed on public lands of the United States, the Government could protect the use thereof for governmental purposes, in so far as the use of the waters depended upon the use of the land for the storage or carriage of such waters, by refusing to grant rights of way for such purpose. But, under the law of Utah, if the waters are in flux, either on the surface or underground, they are subject to claim by the first appropriator thereof for use on private land or on any public lands properly subject to such use. In the case of *Snake Creek Mining & Tunnel Co. v. Midway Irrigation Co. et al.* (260 U. S. 596), the Supreme Court of the United States held that under the law of Utah an appropriation of the water of a natural stream to a beneficial use so far attaches to underground waters feeding the stream by percolation that an owner of private land cannot intercept, appropriate, and sell such percolating waters so as to interfere with the prior appropriation of the waters from the stream.

In view of these conditions, it will be seen that if the Government were to proceed to develop and use such wells without appropriation of the waters under State law, it might be found that prior appropriations at other points were thereby infringed, or later appropriations at other points might interfere with the water supply of the wells.

A recent law of the State of Utah, effective March 22, 1935 (Chapter 105, Laws of Utah 1935), amended the revised statutes of Utah (1933) in several particulars relating to the appropriation of waters. Section 100-1-1, as thus amended, provides:

All waters in this state, whether above or under the ground are hereby declared to be the property of the public, subject to all existing rights to the use thereof.

Another provision of said act purports to allow rights of way "across and upon public, private, and corporate lands" for the use of waters "upon payment of just compensation therefor."

If it be meant thereby to regulate the granting of rights of way on public lands of the United States, the legislature exceeded its powers, as only Congress has such power.

Section 100-3-1 provides in part as follows:

Rights to the use of the unappropriated public waters in this state may be acquired only as provided in this title. No appropriation of water may be

made and no rights to the use thereof initiated and no notice of intent to appropriate shall be recognized except application for such appropriation first be made to the state engineer in the manner hereinafter provided, and not otherwise.

Section 100-3-2 in part provides:

Any person who is a citizen of the United States, or who has filed his declaration of intention to become such as required by the naturalization laws, or any association of such citizens or declarants, or any corporation, in order hereafter to acquire the right to the use of any unappropriated public water in this state shall, before commencing the construction, enlargement, extension, or structural alteration of any ditch, canal, well, tunnel, or other distributing works, or performing similar work tending to acquire such rights or appropriation, or enlargement of an existing right or appropriation, make an application in writing to the state engineer.

That section further contains minute instructions with respect to the requirements of the application, and section 100-3-6 requires notice of the application to be published, at the expense of the applicant, in a newspaper of general circulation in the vicinity of the water source once a week for a period of four weeks.

Section 100-3-7 recognizes the right of protest against the allowance of the application, and authorizes the state engineer to consider the same and either allow or reject the application.

Section 100-2-14 provides for the collection of certain fees by the state engineer for his services in connection with such applications. For the filing and recording of each notice of claim to underground waters, the fee is \$2.50. It is declared that the provision of said section relating to the collection of fees shall not apply "to works prosecuted under the supervision of the United States Bureau of Reclamation."

As the projects here in question are not within the excepting clause above mentioned, it may be that the specified filing and recording fee will have to be paid if demand therefor be insisted upon. It is doubtful, however, whether it was intended to charge the United States for such services, and such fees should be tendered under protest. The cost of advertising should be paid, and all such fees and expenses may be made a proper charge against the funds available for the administration of grazing.

Upon review of this subject I am unable to find that the United States could acquire water rights in these wells without compliance with the laws of Utah.

It is deemed proper also to call attention to section 100-3-22 of the Revised Statutes of Utah, as thus amended. It reads as follows:

Any person, firm, copartnership, association or corporation boring or digging wells or tunnels for the purpose of appropriating or using unappropriated underground waters shall, within thirty days after the completion or abandonment of such work, report to the state engineer the data relating to each well

or tunnel drilled. The report shall be made on forms furnished by the state engineer and shall contain such information as he may require, including but not limited to the following:

The name and postoffice address of the driller and the owner of well or tunnel; the number of the approved application to appropriate water under which work was prosecuted; the location of well or tunnel and the size and kind of casing used therein; the depth and log of well or tunnel; the date on which well or tunnel came into production; temperature and quantity of water issuing, drawn or pumped therefrom, and the location of water bearing strata.

Failure to comply with the provisions of this section shall constitute a misdemeanor.

The Government of the United States is not expressly included as subject to the terms of this provision, or various other provisions of the act, and the express exclusion of works of the Bureau of Reclamation with respect to the payment of fees may have been inserted with the thought that no other Federal works would be involved. Nevertheless, the information thus required will be useful and necessary to enable the State Engineer to perform his duties in acting upon applications for the appropriation of waters, and, in my opinion, the requirements stated should be complied with in a spirit of courtesy and cooperation by the Federal agents or employees.

Approved:

CHARLES WEST,
Acting Secretary.

J. E. SMITH (ON REHEARING)

Decided October 24, 1935

MINERAL LEASING ACT—CONSTRUCTION OF STATUTES—SELECTION OF ACREAGE—COMPACTNESS OF AREA.

As used in section 14 of the Mineral Leasing Act of February 25, 1920, the expression "compact" relates to squares, so that, to be "compact", the selection of primary lease acreage must be in the form of a square wherever possible, and where that is not possible, a rectangle or approximate rectangle approaching as nearly as possible a square would conform to the statutory requirement.

MINERAL LEASING ACT, SECTION 14—AMENDMENT—ACT OF AUGUST 21, 1935.

It is a reasonable assumption that Congress, in changing the wording of section 14 of the Mineral Leasing Act by inserting the word "reasonably" before the word "compact" in the Act of August 21, 1935 (49 Stat. 674), was aware of and had in mind the construction placed by the Department upon the word "compact" in connection with the selection of primary lease acreage under the Mineral Leasing Act, and in adding the word "reasonably" did so with a view to allowing the lease applicant more latitude of choice in making his mineral selection.

MINERAL LEASING ACT, SECTION 14—ACT OF AUGUST 21, 1935—SCOPE OF APPLICATION OF LATER ACT.

The Act of August 21, 1935, plainly contemplates the discontinuance of the existing permit system provided for in the Mineral Leasing Act, and consequently the amendment to section 14 thereof contained in the Act of August 21, 1935, by inserting the word "reasonably" before the word "compact", can apply only to cases in which leases are applied for under existing permits or allowable pending applications for permits.

WALTERS, *First Assistant Secretary*:

J. E. Smith, holder of oil and gas prospecting permit Cheyenne 045611, covering lots 1, 2, 3, 4, SW $\frac{1}{4}$ NE $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$, S $\frac{1}{2}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ Sec. 3, lot 1, S $\frac{1}{2}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$, E $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 4, SE $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ Sec. 8, all of Sec. 9, W $\frac{1}{2}$ W $\frac{1}{2}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 10, SE $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$, E $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 17, N $\frac{1}{2}$ Sec. 20, T. 46 N., R. 99 W., 6th P. M., applied for a lease on November 30, 1934, based on discovery of oil in a well on the SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 8. He selected as the area to be embraced in his (a) lease SE $\frac{1}{4}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 4, SE $\frac{1}{4}$ NE $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 8, NW $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SW $\frac{1}{4}$, W $\frac{1}{2}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 9. The Department, by decision of July 20, 1935, affirmed the Commissioner's action in requiring that the (a) lease embrace SE $\frac{1}{4}$ NE $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 8, W $\frac{1}{2}$, W $\frac{1}{2}$ E $\frac{1}{2}$ Sec. 9.

The requirement that the (a) lease embrace the subdivisions last described, was based, in both the decisions of the Commissioner and the Department, upon the construction of the word "compact" in section 14 of the Mineral Leasing Act, in an opinion of the Solicitor, dated December 1, 1933, which held that "To be compact, therefore; the selection of the primary lease acreage must be in the form of a square wherever possible. Where that is not possible, a rectangle or approximate rectangle approaching as nearly as possible a square in dimensions would conform to the statutory requirement."

The applicably pertinent part of section 14 reads as follows: "The area to be selected by the permittee shall be in compact form and, if surveyed, to be described by the legal subdivisions of the public land surveys." In commenting upon this provision of the statute, the opinion referred to above stated:

Thus, section 13, relating to the issuance of permits, provides that the area, not in excess of 2,560 acres, selected by the permittee, must be "in a reasonably compact form." However, section 14, which relates to the issuance of leases on the permit area after valuable discovery of oil and gas has been made, provides that the area, not in excess of 640 acres, to be selected by the permittee for incorporation into the primary lease to which he has become entitled, "shall be in compact form." This distinction in language clearly indicates an intent on the part of Congress to permit greater liberality as to compactness in the selection of 2,560 acres of permit area than in the selection of one-fourth of that area for the primary lease.

The motion is based upon the Act of August 21, 1935 (49 Stat. 674). Said act amended section 14 of the Mineral Leasing Act in several important particulars. Among such amendments the word "reasonably" was inserted before the word "compact" in the original provision herein above quoted.

In making this change in the wording of the provisions quoted, it may reasonably be assumed that Congress was aware of and had in mind the construction placed thereon by the Department, and the intention was to clothe the lease applicant with more latitude of choice in making his selection of the (a) lease area by doing away with a restriction on selection based on a difference in interpretation of the expressions "compact" and "reasonably compact", and give him the right to select the subdivisions in the permit area he desired to be embraced in the (a) lease, provided they are in reasonably compact form.

It will be noticed that the requirement, in effect, requires the applicant to substitute SE $\frac{1}{4}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 9, for SE $\frac{1}{4}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 4. While the former would cause the lease area to conform more nearly to a square, the latter are nearer to the discovery well, comprise, with the remaining area selected, but one body of land of but little greater compass than the area the applicant was required to select, and, it is believed, constitute an area "reasonably compact" within the meaning of section 14 as amended. The words "reasonably compact" do not seem to mean anything more than the words "fairly compact."

The Act of August 21, 1935, plainly contemplates the discontinuance of the existing permit system, and consequently the said amendment to section 14 can only apply to cases in which leases are applied for under existing permits or allowable pending applications for permit. The application in the instant case is still pending, and there seems to be no good reason for denying the applicant the benefits of the amended act. The motion is therefore granted, the Department's decision will be vacated and that of the Commissioner reversed.

Prior decision vacated.

GRAZING ON THE PUBLIC DOMAIN—COOPERATIVE AGREEMENTS WITH STOCKMEN—SECTIONS 9 AND 15, TAYLOR GRAZING ACT, CONSTRUED

Opinion, November 11, 1936

CONSTRUCTION OF STATUTES—RESORT TO LEGISLATIVE HISTORY.

In the construction of statutes, where the meaning of the language employed is vague and ambiguous and cannot be ascertained by considering the

words only, resort may be had to the legislative history of the act, and especially is this the case where the language is susceptible of two constructions, one reasonable and the other unreasonable.

TAYLOR GRAZING ACT—CONSTRUCTION—RULES AND REGULATIONS.

Section 9 of the Taylor Grazing Act provides that "the Secretary of the Interior shall provide, by suitable rules and regulations, for cooperation with local associations of stockmen, State land officials, and official State agencies engaged in conservation or propagation of wild life interested in the use of the grazing districts." *Held*, That, construed in the light of its legislative history, the language, "interested in the use of the grazing districts", qualifies the first sentence of the section in its entirety, and not merely the portion relating to wild life.

TAYLOR GRAZING ACT—SECTION 15 CONSTRUED.

Associations of stockmen may be granted leases under section 15 of the Taylor Grazing Act, but the lands of such associations must be contiguous to the public lands desired to be leased.

MARGOLD, Solicitor:

My opinion has been requested on two questions propounded by the Acting Director of Grazing which seek to adduce a more precise definition of certain powers conferred upon the Secretary of the Interior by sections 9 and 15 of the Taylor Grazing Law (48 Stat. 1269). These questions are as follows:

First, has the Secretary of the Interior the authority under the provisions of section 9 to enter into cooperative agreements with local associations of stockmen for the purpose of regulating grazing on public domain lands not included in a grazing district, and if such authority exists, what are the legal limitations on the type of agreement which may be made?

Second, does section 15 authorize the leasing of public domain to associations of stockmen?

That part of section 9 which is pertinent to the first question is as follows:

The Secretary of the Interior shall provide, by suitable rules and regulations, for cooperation with local associations of stockmen, State land officials, and official State agencies engaged in conservation or propagation of wild life *interested in the use of the grazing districts*. [Italics supplied.]

It is apparent that in defining the powers granted to the Secretary of the Interior to make cooperative agreements with stockmen under this provision it is important that the meaning and antecedents of the clause "interested in the use of the grazing districts" be determined. It will be observed that no comma separates this clause from the foregoing part of the sentence. Under ordinary rules of English construction this clause would modify the noun which immediately precedes it, or the words "wild life" and those words only. Such a construction would in the given case be absurd

and obviously give the sentence a meaning never intended by Congress. Further, the meaning of the clause itself is vague, ambiguous and cannot be ascertained by considering only the words used. The legislative history relevant to this part of section 9 should, therefore, be consulted for the purpose of aiding in its construction.

See *Banco Mexicano de Comercio e Industria v. Deutsche Bank*, 263 U. S. 591, to the effect that ambiguity in the meaning and purpose of a statute must be resolved by construction and that the construction should be such as will effectuate the legislative intention, avoiding, if possible, an unjust or an absurd conclusion. See also *Penn. Mutual Life Ins. Co. v. Lederer*, 252 U. S. 523, for the proposition that where the meaning of the words used in the statute is doubtful, the legislative history of an act should be resorted to as an aid to construction.

Construed in the light of its legislative history, this provision, in my opinion, requires that the first question be answered in the negative. This conclusion is supported by two reasons: *First*, the authority of the Secretary of the Interior under this section to make cooperative rules and regulations with local associations of stockmen is limited to the making of rules and regulations with such associations as are interested in the use of grazing districts, as the words "local associations of stockmen" are modified by the clause "interested in the use of the grazing districts." *Second*, the clause "interested in the use of grazing districts" restricts the authority of the Secretary to the making of cooperative rules and regulations, the subject matter of which relates to grazing districts.

The Taylor Grazing Law was first passed by the House of Representatives. As enacted by that body, that part of section 9 which addressed itself to the authority of the Secretary to cooperate with local associations of stockmen read as follows:

SEC. 9. The Secretary of the Interior shall provide, by suitable rules and regulations, for cooperation with local associations of stockmen interested in the use of the grazing districts and with such advisory boards as they may name. The views of authorized advisory boards shall be given fullest consideration consistent with the proper use of the resource and the rights and needs of minorities. [See Section 9, H. R. 6462, as passed by House of Representatives April 11, 1934.]

It is obvious from the provision quoted that the words "local associations of stockmen" were modified by the clause "interested in the use of grazing districts" when the legislation was at this status. Thereafter this provision of section 9 was amended in the Senate. The legislative history discloses that the amendment was made for the purpose of granting the Secretary of the Interior power to make cooperative rules and regulations with two additional groups, that is, State land officials and official State agencies engaged in the con-

servation and propagation of wild life. At page 72 of the hearings on H. R. 6462 before the Committee on Public Lands and Surveys, 73d Congress, 2d session, Senator Frederic C. Walcott urged that this language be amplified.

Senator WALCOTT. It will take me less than a minute. At the bottom of page 8 of the bill, line 23, after the third word, "with", substitute the words "official State agencies engaged in the conservation of wild life." Then the conjunctive "and" and follow with this language: "with such advisory boards as either may name." In other words, you will omit the word "they" and substitute the word "either."

At pages 214 and 215 of the same hearings the following colloquy took place between Senator William H. King and Mr. George A. Fisher, executive secretary of the State Land Board of Utah:

Mr. FISHER. That brings up another feature that we in Utah cannot reconcile, and that is that provision is made here for the Secretary to confer and deal with certain advisory boards, but no reference whatever is made to conferring or dealing with or receiving suggestions from the State of Utah through its land board, which owns outright 3,000,000 acres of the area affected.

Senator KING. I think, Mr. Fisher, we had an allusion to that several days ago. An amendment has been prepared, I think, or, if not, there will be, that will give to the State the right to be recognized as a sort of partner in the shaping of regulations.

Mr. FISHER. That is commendable.

No member of the Public Lands and Surveys Committee or any witness who appeared before it during the consideration of H. R. 6462 expressed any intention, insofar as is shown by the record, of making any other change in section 9 than those indicated. It is apparent, therefore, that the changes which the Senate did make in this section did not purport to authorize the Secretary of the Interior to make rules and regulations with livestock associations that had no interest in grazing districts; rather it would seem that that body intended the clause "interested in the use of a grazing district" to continue to modify the words "local associations of stockmen."

The legislative history of this section also supports the conclusion that the words "interested in the use of grazing districts" were intended to limit and confine the authority of the Secretary to the making of cooperative rules and regulations with respect to the establishment and operation of grazing districts. In explaining the provisions of H. R. 6462 to the Public Lands and Surveys Committee of the Senate, the representative of the Interior Department made the following statement with reference to section 9:

Mr. POOLE. Continuing with section 9 of the bill, under the provisions of this section the Secretary is directed to cooperate with local associations of stockmen interested in the use of grazing districts, and to give fullest consideration to the views of their advisory boards. Under this provision it is the intention of the Department in the administration of the bill to avail itself of the experience of those men who have spent their lifetime in the livestock industry, and

to intrust to them insofar as possible the local administration of the problems of managing the grazing districts. [See Committee hearings on H. R. 6462 hereinbefore referred to at page 100.]

The second sentence of this statement is particularly descriptive of the cooperative authority which it was presumed the Secretary of the Interior would exercise under this section. It shows clearly that the representative of the department of the Government which sponsored the legislation did not conceive of this section as authorizing cooperation with associations of stockmen except in connection with grazing districts. This statement was never questioned by any member of the committee. As Congress was aware of the fact that the legislation had been drafted by the Departments of the Interior and Agriculture, this statement is significant. Congressman Edward T. Taylor, who introduced H. R. 6462, made the following statement about H. R. 2385 (a bill identical with H. R. 6462, except that it contained a section 13 not carried in the latter bill as introduced), which he introduced at the first session of the same Congress:

This bill was written by executive departments of our Government, the Interior Department and the Agriculture Department, cooperating together, in the last Congress. See hearings on H. R. 2385, Public Lands Committee of the House, 73d Congress, 2d session, page 26.

From the legislative history of the Taylor Grazing Act, it must, therefore, be concluded that section 9 does not authorize the Secretary of the Interior to make cooperative rules and regulations with local associations of stockmen for the purpose of regulating grazing on public domain lands not included in a grazing district.

A study of the context of the entire act also supports this conclusion. Section 1 authorizes the Secretary of the Interior to establish grazing districts on the public domain. All other sections, except section 14, which provides for the sale of small parcels of public lands, and section 15, which authorizes the leasing of isolated tracts, relate to the establishment and operation of grazing districts and contemplate grazing regulation by that expedient only. The committee hearings on the legislation in both the Senate and House, which have been referred to above, unquestionably sustain this view. The rule-making authority of section 9, therefore, cannot be construed as an authority which may be exercised independently of the authority to establish and operate grazing districts, but is an authority which is incidental to it. See *United States ex rel. Parish v. MacVeagh*, 214 U. S. 124, which holds that in the construction of statutes the intention of the law makers is to be deduced from the whole statute.

In answer to the second question, it is my opinion that section 15 authorizes the leasing of the public domain to associations of

stockmen only where such associations are the owners of the land contiguous to the land to be leased. This section reads as follows:

Sec. 15. The Secretary of the Interior is further authorized in his discretion, where vacant, unappropriated, and unreserved lands of the public domain are situated in such isolated or disconnected tracts of six hundred and forty acres or more as not to justify their inclusion in any grazing district to be established pursuant to this Act, to lease any such lands to owners of lands contiguous thereto for grazing purposes, upon application therefor by any such owner, and upon such terms and conditions as the Secretary may prescribe.

It will be noted that the Secretary of the Interior has no authority to lease lands of the public domain except to those who are contiguous land owners. In my judgment this section authorizes the leasing of lands to an association of local stockmen if such association can qualify as the owner of the contiguous lands. The lease to be executed in such cases is "upon such terms and conditions as the Secretary may prescribe." This provision would, I believe, authorize the embodiment of a cooperative agreement in the lease providing for regulated grazing in the leased area.

Approved:

T. A. WALTERS,

First Assistant Secretary.

UNITED STATES v. NON-METALLIC PRODUCTS CORPORATION

Decided November 18, 1935

PRACTICE—SIGNATURES OF WITNESSES—DEPOSITIONS AND INTERROGATORIES—HEARINGS.

The rules of practice of the Land Department relating to depositions and interrogatories do not contain any authority for dispensing with the signatures of witnesses to their testimony. Rule 39, making provision for waiving the signatures of witnesses, is applicable only to hearings.

PRACTICE—SIGNATURES OF WITNESSES—CURABLE DEFECT.

Failure to secure the signatures of witnesses to depositions and interrogatories is a curable defect, and does not warrant dismissal of adverse proceedings brought by the Government against an entry, and upon receipt of depositions, duly signed, which were formerly inadmissible as evidence because of the absence of signature, the defendant should be afforded opportunity to adduce testimony.

PRACTICE—DEPOSITION—SUBSCRIBING BY WITNESS—WAIVER.

Notice and authentication of a deposition are for the benefit of the party against whom the deposition is to be used, and hence may be waived by him, and requirements that the deposition be read to and subscribed by the witness may be waived by stipulation; but in the absence of a stipulation between the parties or some explicit provision in the rules of practice, the requirement of signature of a witness to his deposition cannot be waived by any paper signed solely by the party at whose instance the deposition was taken.

PRACTICE—WITNESSES' SUBSCRIPTION TO THEIR TESTIMONY—WAIVER.

Where, in a trial of issues before the Land Department, the parties shall, by stipulation filed with the record so agree, or where the defendant has failed to appear or fails to participate in the trial, and the contestant shall, in writing, so request, the witnesses' subscription to their testimony may be dispensed with.

PRACTICE—TRIAL OR HEARING—NONAPPEARANCE OF DEFENDANT OR NONPARTICIPATION IN PROCEEDINGS—EFFECT.

Where, at a *hearing* or *trial*, the defendant fails to participate therein, and the contestant makes written request that the witnesses shall not be required to subscribe their names to their testimony, such will not be required; but where depositions are taken under other circumstances than a hearing or trial, such subscription may not be dispensed with, the conditions under which such request could be granted being nonexistent.

PRACTICE—DEFAULT IN APPEARANCE—DEPOSITION—TRIAL.

There is a substantial difference in consequences between a failure to appear at the trial of a case duly and regularly ordered and a failure to appear at the taking of oral depositions on behalf of one of the parties. In the former instance the defendant not only foregoes his right to present his case and cross-examine the plaintiff's witnesses, but also his right to object to the testimony offered.

PRACTICE—DEPOSITIONS—REQUIREMENTS.

There are no rules of practice of the Department relating to the time or manner in which objections to depositions may be taken other than the requirement that they be made at the hearing.

WALTERS, *First Assistant Secretary:*

April 15, 1932, adverse proceedings were brought against mineral entry, Phoenix 068042, embracing the Valley Stone Placer, in Sec. 9, T. 5 N., R. 11 W., G. & S. R. M., charging in the usual form that the locators were dummies. Notice issued, and answer denying the charges was filed by the Non-Metallic Products Corporation, who made the entry. Notice was served on attorneys for defendant, and motion and affidavit were made by the Government to take depositions orally and not on interrogatories of seven named persons before the clerk of the District Court at Anaconda, Montana, and one person before a notary public at Billings, Montana. The basis assigned for the motion and notice was that the persons whose depositions were to be taken resided without the State in which the trial of the case was to be held. Pursuant to commissions duly issued to the above-named officers, the depositions of the parties named were taken in shorthand, transcribed, and returned to the local office by the commissioners appointed to take the depositions. The commissioner's certificate, according to the usual approved form, was affixed to each return. According to this form the commissioner, among other things, certifies:

* * * that the within depositions are all the questions and answers, motions, and objections made at said hearing, and that I caused the same to be written out, and the whole when completed as to each witness was read over to such

witness and by him so above sworn was subscribed under oath before discharged; * * *

The depositions do not bear any signatures of the witnesses, but therewith is a form purporting to be a stipulation between the parties, but signed only by the special agent who conducted the taking of the depositions, which provides, in effect, that the testimony and proceedings may be taken in shorthand by the stenographer therein named, and when transcribed and sworn to as true and correct by him, shall be considered in all respects as if the witnesses testifying at said hearing had subscribed the testimony respectively given by them, the signatures of said witnesses being specifically waived. The defendant did not appear and was not represented at the taking of the depositions.

On September 26, 1934, the date set for the hearing before the register, the counsel for the Government called attention to the filing of the depositions aforesaid and announced that such depositions were all the testimony the Government desired to offer and that the Government's case was closed. Thereupon, counsel for the defendant moved that the proceedings be dismissed on the ground that the Government "has wholly failed to offer any competent evidence, or any evidence whatsoever, in support of its contest charges", and said that "we want the record to show that we stand on this motion."

On October 28, 1934, the defendant filed a brief assigning as ground for his motion to dismiss the failure of the witnesses to subscribe to their testimony, it being contended that there was a failure to comply with Rules of Practice 24 and 28 and with the principle announced in *McKinney v. Dooley* (5 L. D. 362). Upon consideration of the record and the briefs of the parties, the register held the depositions admissible, that the charges were proven, and recommended cancelation of the entry. In support of his appeal to the Commissioner of the General Land Office, in addition to the ground of lack of signature, defendant contended that the Government had filed no written request that the signatures of the witnesses be dispensed with in conformity with Rule of Practice 39, and further, that there was no endorsement by the register of the date of reception and opening of the depositions as required by Rule 25.

By decision of May 28, 1935, the Commissioner of the General Land Office held that the objections to the depositions made for the first time on appeal were too late. *Stovell v. Clyatt* (10 L. D. 339); *Condray v. Christensen* (47 L. D. 101).

As to absence of signature of the witnesses to their depositions the Commissioner held:

* * * The Rules of Practice (Rules 20 to 32, inclusive, exclusive of Rule 28 as amended October 26, 1928) relating to depositions and interrogatories do

not contain any authority for dispensing with the signatures of witnesses to their testimony. Rule 39 of Practice, making provision for waiving the signatures of witnesses, is applicable only to hearings and no case has been found where its provisions have been applied to depositions. The courts generally held that failure to sign a deposition warrants its exclusion. The objection of contestee in that regard therefore is well taken. The depositions being incomplete the record contains no testimony and the contestee could not in good conscience be expected to submit any testimony in its own behalf unless or until the Government had submitted testimony in support of its charges.

However, the defect is not one that justifies a dismissal of the proceedings, being subject to correction. *Heartley vs. Ruberson* (11 L. D. 575). Accordingly, the record is herewith returned and after the expiration of 30 days from receipt of notice hereof by the parties, if no appeal is filed herefrom you will issue directions to the officers before whom the several depositions were taken to require the witnesses on a day fixed to appear before them and subscribe and swear to their respective depositions. To insure the appearance of the witnesses you will issue subpoenas directing them to appear on the proper date and transmit the same to the Special Agent in Charge for service. Before fixing the date as directed above you should confer with the Special Agent in Charge to determine what date or dates will best suit his convenience.

On receipt of the depositions, completed as above directed, the defendant was given opportunity to adduce testimony.

The Special Agent in Charge, Bureau of Investigations, has appealed from so much of the decision as held the depositions not admissible.

The authority to take oral depositions on motion of one of the parties rests upon section 4 of the Act of January 31, 1903 (32 Stat. 790), which provides that depositions may be taken on 10 days' notice to the other party "whenever the witness resides outside the county in which the hearing occurs." (See instructions of April 6, 1914, Circular 311.)

The obvious purpose of section 4 of the act mentioned was to enable any party to the cause to obtain the testimony of a witness whose attendance could not be compelled at the trial or hearing, and in authorizing the taking of "depositions" it must be presumed that "depositions" were intended in their technical signification, and that the manner of their taking and authentication should be in accordance with the existing rules of practice in the Department in so far as applicable, and that the technical requirements necessary to constitute a deposition were to be fulfilled.

With reference to the necessity of the signature of a witness to a deposition, the following is stated in section 805 of *Wigmore on Evidence*, 2d edition:

(2) The witness' *signature* may be regarded either as necessary to constitute the writing his by adoption, or as symbolically equivalent to a knowing assent to its tenor (thus dispensing with the reading over), or as an additional means of identifying the person of the witness. Whatever the legal theory, it is usually treated as a technical requirement indispensable under the statutes.

(3) Supposing that the technical requirements of a reading over and signing are not fulfilled, a difference then arises between a *deposition* in the strict sense (*i. e.* testimony taken "de bene" before a mere commissioner for later use in a trial) and testimony before a *committing magistrate* in criminal cases. In the former instance the testimony is exclusively to be found in the writing, because a deposition is the creature of the statute or order granting the judicial officer's authority, and thus, if the writing fails in the above requirements, it never becomes testimony, and there is no testimony of that witness (*post*, sec. 1831). In the latter instance, on the other hand, the oral utterance was already testimony in that stage; it might become written testimony if a writing of the required sort was consummated; but, if not, then at least it remained oral testimony. Hence, it could be proved as such, by any ordinary and proper evidence. * * *

There can be no doubt that the depositions in question belong in the first class mentioned by Mr. Wigmore. Moreover, Rule 24 of the rules of practice provides, among other things, that the officer taking the deposition shall cause the deposition of a witness to be read over and subscribed by him, and that the officer shall so certify.

The requirement of the signature of the witness not being observed, the question remains whether under the rules of practice the signature, under the facts presented, may be regarded as not essential to the competency of the depositions.

Provisions respecting notice and authentication of a deposition are for the benefit of the party against whom the deposition is to be used, and hence such provisions may be waived by him (Jones on Evidence, section 645), and requirements that the deposition be read over to and subscribed by the witness may be and often are waived by stipulation (*Ibid.*, sec. 665). But plainly in the absence of a stipulation between the parties or some explicit provision in the rules of practice, the requirements of signature of the witness to his deposition, prescribed for the benefit of the party against whom the deposition is to be used, cannot be waived by any paper signed solely by the party at whose instance the deposition was taken.

The Government, however, relies upon the words of the proviso in the second paragraph of Rule of Practice 39.

For the proper understanding of the proviso the first and second paragraphs of Rule 39 must be considered in full. This rule occurs under the heading "Trials." The paragraphs mentioned read as follows:

RULE 39. At the time set for hearing, or at any time to which the trial may be continued, the testimony of all the witnesses present shall be taken and reduced to writing.

When testimony is taken in shorthand the stenographic notes must be transcribed, and the transcription subscribed by the witness and attested by the officer before whom the testimony was taken: *Provided, however,* That when the parties shall, by stipulation, filed with the record, so agree, or when the defendant has failed to appear, or fails to participate in the trial, and the

contestant shall in writing so request, such subscription may be dispensed with. [Italics supplied.]

The "testimony" mentioned in the second paragraph is plainly the testimony taken at the trial or hearing. The words "or when the defendant has failed to appear" likewise refer to a failure to appear at the trial or hearing.

The taking of the depositions in this case was in no sense a hearing or trial. The Department is not aware of any authority of law whereunder the register of a local office could set a hearing outside of his land district. Even if the stipulation forms signed by the special agent above referred to may be considered as a request to dispense with the subscription of the witnesses, the conditions under which such request could be granted were not existent.

It does not result, as apparently contended by the special agent, that if requests to dispense with the signature of witnesses, in accordance with Rule 39, are not applicable to oral depositions, such requests cannot be granted at hearings where defendants do not appear at trials or hearings ordered under Rule of Practice 28. In the latter instance the trial or hearing is held and neither party is permitted to submit further testimony thereafter except upon notice to the other party and proper order by the local register. *Dahlquist v. Cotter* (34 L. D. 396); *McEuen v. Quiroz* (50 L. D. 167), and if the defendant fails to appear at such a trial or participate in the hearing, the proviso in Rule 39 would clearly apply.

There is a very substantial difference in consequences between a failure to appear at the trial of a case duly and regularly ordered and a failure to appear at the taking of oral depositions on behalf of one of the parties. In the former instance defendant not only foregoes his right to present his case, cross-examine the plaintiff's witnesses, but also his right to object to the testimony offered. In the latter instance it would not seem that he foregoes anything but the right of cross-examination. He does not lose his rights, if the ordinary rules of procedure are enforced, to object to the form, competency, or materiality of a deposition, and certainly neither the notice issued to him nor rules of practice advise him to the contrary.

The statement in the brief of the special agent that Rule of Practice 28 derives its authority from the act of January 31, 1903, is error. The essentials of Rule 28 were embodied in Rule 35 of former existing rules of practice and in force long before the said act was passed, and the inaptness of the words "by deposition" in that rule was recognized by their elimination in the amended rule. (Circular 1172, 52 L. D. 503.)

In the brief of the special agent it is alleged that the Department has accepted, without objections, depositions on oral interrogatories

in proceedings by the Government where the testimony was not signed by the witness, but where so-called waivers by the special agent, such as in this case, were presented, and it is contended, in effect, that such action created an established custom and usage that should not be overturned. As to this contention, it suffices to say that as the adverse party made no complaint, it may be presumed that he waived his objections, and no reason appears why the Department should take notice of the omission on its own motion.

Much stress is laid upon the inconvenience and expense of detaining witnesses and the special agent until the shorthand notes are transcribed and ready for signature of the witnesses, if the requirement of signature is insisted upon. But that circumstance does not seem sufficient to justify dispensing with the safeguards designed to procure a true and correct deposition. The defendant should not be forced to an election between the considerable expense and trouble of going long distances to participate in the taking of such depositions, or surrendering the benefits and protection that observance of the rules affords. Of course, if he is willing to stipulate, whether present or not, at the taking of the deposition, that the transcribed record of the shorthand notes of the testimony, properly verified and certified, may be received as evidence and the signature of the witnesses dispensed with, and does so, no reason is seen why the stipulation should not be given effect, even though such a stipulation is not one contemplated in the proviso to Rule 39.

The special agent further assigns as error consideration of the motion to dismiss the case, inasmuch as the motion was a mere general objection and no specific defects in the depositions were assigned until defendant's brief was presented some 30 days after hearing. There are no departmental rules relating to the time or manner in which objections to depositions may be taken other than the requirement that they be made at the hearing. As to the question of time, the rules of the court are that the objection should be made before trial (see Wigmore on Evidence, sec. 18), but in such cases the depositions must be offered before they become part of the case and defects may be reached by motion to suppress before the trial. The motion made at the trial should, however, be at the earliest opportunity, and should definitely state the grounds of objection in order that the party offering the deposition may have opportunity to decide whether he will stand on the regularity and competence of the depositions, or apply to have the defects alleged cured, or will offer additional testimony.

But in the present case the Commissioner has permitted the defects to be cured, notwithstanding that the Government closed its case. Furthermore, the Government had been informed of the defects

assigned before the register rendered his decision, and had insisted upon the validity of the depositions, and it is not perceived in what manner the Government was prejudiced by the delay in assigning specific grounds for the motion.

For the reasons stated above, the Commissioner's decision is

Affirmed.

**AMENDMENT OF REGULATIONS GOVERNING EXCHANGES OF
STATE LANDS UNDER SECTION 8, TAYLOR GRAZING ACT**

[Circular No. 1373]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 20, 1935.

REGISTERS, UNITED STATES LAND OFFICES:

It is stated in the last paragraph of section 12, under the title "Exchange of State Lands", of the regulations (Circular No. 1346, at page 192), dated February 8, 1935, governing land exchanges by the States under section 8 of the Taylor Grazing Law of June 28, 1934 (48 Stat. 1269), that—

Payment of fees will be required at the rate of \$2.00 for each selection of 160 acres or fraction thereof.

In lieu of the above-quoted instructions, you are instructed as follows:

Payment of fees will not be required in the case of an exchange by a State under said act.

FRED W. JOHNSON,
Commissioner.

Approved:

HAROLD L. ICKES,
Secretary.

SALTMOUNT OIL COMPANY (ON REHEARING)

Decided November 25, 1935

**OIL AND GAS LEASES—CONSTRUCTION OF STATUTES—MAXIMUM ACREAGE
ALLOWED.**

Where an act of Congress fixes a maximum of acreage of oil and gas lands which may be leased by the Government to any one applicant, a construction of the act which would permit of obtaining more than the maximum through the device of assignments of leases is unwarranted as being illogical and unreasonable.

OIL AND GAS LEASES—SECS. 27 AND 18, GENERAL LEASING ACT, CONSTRUED—
LIMITATION OF ACREAGE.

Section 27 of the General Leasing Act of 1920 reads in part as follows: "That if any of the lands or deposits leased under the provisions of this act shall be subleased, trusted, possessed, or controlled by any device permanently, temporarily, directly, indirectly, or in any manner whatsoever, so that they form part * * * 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." *Held*, That this language, being made applicable to any lease and any acreage limitation in the *act*, necessarily includes section 18 thereof, and accordingly, oil or gas leases in the hands of an assignee of the original holder or holders are subject to the acreage limitations of section 18 of the act.

WALTERS, *First Assistant Secretary*:

In a letter dated August 3, 1935, and addressed to Dines, Dines, and Holme, General Counsel for The Midwest Oil Company, Denver, Colorado, the Department expressed the opinion that the maximum of 3,200 acres fixed in section 18 of the Leasing Act of February 25, 1920 (41 Stat. 437), prohibited assignments of leases granted under said section in excess of that acreage.

The Midwest Oil Company, The Wyoming Associated Oil Corporation, and the Wyoming Oil Fields Company are the holders of section 18 oil and gas leases in the Salt Creek oil field, Wyoming, aggregating 4,519.25 acres. The production of oil in this field has fallen off greatly, the costs and difficulties of production have greatly increased, and these lease-holding companies have come to the conclusion that their leases can most economically and efficiently be operated if owned, controlled, and operated by one company: It was accordingly planned that all these leases should be assigned to The Saltmount Oil Company, capitalized at \$10,000,000.

It is conceded that the leases involved, which embrace the best part of the Salt Creek field, can most economically and satisfactorily be operated under one ownership and management, and the only question is whether the entire acreage involved can lawfully be held by one company or person.

The attorneys for the lessee companies requested reconsideration of the question involved, and an oral hearing was held on September 24, 1935. Since that time the attorneys have filed two memorandum briefs.

In the letter of August 3, 1935, the Department quoted a portion of the Solicitor's opinion of March 10, 1934, in the case of the Producers and Refiners Corporation (54 I. D. 371), and said:

In your letter you stress the distinction between the words "leasing", "granting", and "inuring" in section 18, and the words "taking" or "holding" in

section 27. It is pointed out that the words used in section 18 describe an act relating to a particular time rather than a continuing status.

In the language above quoted from the decision of March 10, 1934, the "inuring" clause is used as the basis for holding that the exemption of section 18 leases from the limitations of section 27 of the leasing act should be extended to assignees of the original lessees. This construction could not have been made unless based on the premise that the word "inuring" relates to a continuing status.

In their first brief on rehearing the attorneys state:

It is our contention that the only words of acreage limitation found in section 18 of the act apply to the acreage which might be *granted to a single claimant* or which, through leases, contracts, or other similar commitments of the claimant, could *at the same time inure to the benefit* of another person or corporation. There is no limit in section 18 upon the number or acreage of the leases which may hereafter be *owned or held* by a single operator, nor is there any limit upon the number or acreage of leases that may be *assigned* to any operator when all the leases in question have their origin under section 18 of the act.

Section 27 of the act does contain a limit upon the acreage of leases which any person or corporation may *take or hold*. These are words having a continuing effect, but section 18 is expressly excepted from section 27 and no similar words are to be found in section 18 itself.

In the second brief the attorneys devote themselves to a contention that the final proviso of the last proviso to section 27 of the act has nothing to do with the acreage limitation of section 18.

The Department cannot agree with this interpretation of the law. Section 18 of the act reads in part as follows:

Provided, That not more than one-half of the area, but in no case to exceed three thousand two hundred acres, within the geologic oil or gas structure of a producing oil or gas field shall be leased to any one claimant under the provisions of this section when the area of such geologic oil structure exceeds six hundred and forty acres. Any claimant or his successor, subject to this limitation, shall, however have the right to select and receive the lease as in this section provided for that portion of his claim or claims equal to, but not in excess of, said one-half of the area of such geologic oil structure, but not more than three thousand two hundred acres.

* * * * *

Provided further, That no lease or leases under this section shall be granted, nor shall any interest therein inure, to any person, association, or corporation for a greater aggregate area or acreage than the maximum in this section provided for.

The last proviso to section 27 of the act of 1920 reads in part as follows:

That if any of the lands or deposits leased under the provisions of this act shall be subleased, trustee, possessed, or controlled by any device permanently, temporarily, directly, indirectly, or in any manner whatsoever, so that they form part * * * 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.

It would be utterly without reason to hold that the above-quoted portion of section 27 has no application to section 18. In the first part of section 27 oil and gas leasehold interests are limited for one person, association, or corporation to not more than 2,560 acres within the geologic structure of one producing oil or gas field. Then follows the first proviso, "That nothing herein contained shall be construed to limit sections 18, 18 (a), 19, and 22." That is to say, those relief sections contain acreage limitations of their own which exceed 2,560 acres, so that the 2,560-acre limitation, or any lesser area of *one* lease, is provided not to limit said sections 18, 18a, 19, and 22. But said first proviso clearly does not govern, control, or apply to the last proviso to section 27. Had that been the intention, the first proviso would have been placed last. The last proviso is made applicable to any lease and any acreage limitation in the *act*, which clearly includes section 18.

It would be an illogical and unreasonable construction to give to the Leasing Act to hold that at the date of the act claimants and interested persons, associations, and corporations under section 18 were strictly limited to a maximum of 3,200 acres, but that this limitation could immediately after the issuance of leases be nullified by the simple device of assignments.

The Department adheres to its ruling of August 3, 1935.

But since said date of August 3, 1935, Congress has passed the Act of August 21, 1935 (49 Stat. 674), which is an amendment of parts of the Leasing Act of 1920. Section 17 of said amendatory act reads in part as follows:

The Secretary of the Interior, for the purpose of more properly conserving the oil or gas resources of any area, field, or pool, may require that leases hereafter issued under any section of this Act be conditioned upon an agreement by the lessee to operate, under such reasonable cooperative or unit plan for the development and operation of any such area, field, or pool as said Secretary may determine to be practicable and necessary or advisable, which plan shall adequately protect the rights of all parties in interest including the United States: *Provided*, That all leases operated under such plan approved or prescribed by said Secretary shall be excepted in determining holdings or control under the provisions of any section of this Act.

If the lessee companies and the Saltmount Oil Company, proposed assignee, shall submit an acceptable cooperative or unit plan for the development and operation of the field there will be no objection to approval of assignments as proposed.

The Director of the Geological Survey has advised the Department that the Survey considers necessary in any agreement for the

cooperative or unit development in the Salt Creek field the following provisions:

Enabling Act and Regulations.—That the said Act of February 25, 1920, as amended, and all pertinent regulations heretofore or hereafter issued thereunder are accepted and made a part of this agreement, and all operations hereunder shall be subject to the operating regulations approved by the Secretary of the Interior provided that no regulation hereafter issued shall be binding on the parties to the extent of modifying the annual rental or per centum of royalty to be paid to the United States.

Conservation.—That operations shall be conducted by the operator so as to provide for the most economical and efficient recovery of unitized substances to the end that a maximum ultimate yield may be obtained without waste. For the purpose of more properly conserving the natural resources of the lands embraced within this agreement, the production of unitized substances shall at all times be without waste as defined by State or Federal law; shall be limited to such production as can be put to beneficial use with adequate realization of fuel values; and in the discretion of the Secretary of the Interior shall be limited by the beneficial demand for gas or by the beneficial demand for oil, whichever would tend to avoid excessive production of either oil or gas.

Leases Conformed to Agreement.—That in consideration of the approval of this unit agreement by the Secretary of the Interior, the parties hereto holding Government leases or permits subject to this agreement agree and consent to the Secretary of the Interior altering, changing, or revoking the drilling and producing and royalty requirements of such leases or permits, and/or the regulations in respect thereof, to conform said provisions of said leases or permits to the provisions of this agreement.

Rate of Prospecting, Development and Production.—That all production and the disposal thereof shall be in conformity with allocations, allotments, and quotas made or fixed by any duly authorized person or regulatory body under any Federal or State statute provided, that the Secretary of the Interior is vested with authority, pursuant to the amendatory acts of March 4, 1931, and of August 21, 1935, to alter or modify from time to time in his discretion, the rate of prospecting and development and the quantity and rate of production under this agreement, such authority being hereby limited to altering or modifying the rate of prospecting and development and the quantity and rate of production in the public interest, the purpose thereof and the public interest to be served thereby to be stated in the order of alteration or modification.

In addition to the foregoing, other provisions for crediting production to lands entitled thereto, development and operation of the area, payment of royalties and rentals to the United States, and other details should be discussed with the oil and gas supervisor, Casper, Wyoming, and a preliminary draft of the plan should be submitted through the supervisor for approval as to form by the Department before the agreement is executed. It is also suggested that the attention of other lessees and operators in the Salt Creek field be called to the benefits of unit operation.

The ruling of August 3, 1935, is modified in accordance with the foregoing.

Modified.

EXECUTIVE ORDER

AMENDMENT OF EXECUTIVE ORDER No. 6910, OF NOVEMBER 26, 1934, AS AMENDED,
WITHDRAWING PUBLIC LANDS IN CERTAIN STATES

By virtue of and pursuant to the authority vested in me by the Act of June 25, 1910, ch. 421, 36 Stat. 847, as amended by the Act of August 24, 1912, ch. 369, 37 Stat. 497, and the Act of June 28, 1934, ch. 865, 48 Stat. 1269, Executive Order No. 6910, of November 26, 1934, as amended, withdrawing public lands in certain States, is hereby further amended so as to permit the sale under section 14, and the leasing under section 15, of the said Act of June 28, 1934, of any lands covered by the said order which the Secretary of the Interior shall determine to be properly subject to such sale or lease and not needed for any public purpose; and it is further ordered that the said withdrawal shall not debar recognition or allowance of *bona fide* nonmetalliferous mining claims.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
November 26, 1935.

LAW AND ORDER REGULATIONS, INDIAN SERVICE

OFFICE OF INDIAN AFFAIRS,
Washington, D. C., November 27, 1935.

Application of Regulations.

The following regulations relative to Courts of Indian Offenses shall apply to all Indian reservations on which such courts are maintained.

It is the purpose of these regulations to provide adequate machinery of law enforcement for those Indian tribes in which traditional agencies for the enforcement of tribal law and custom have broken down and for which no adequate substitute has been provided under Federal or State law.

No Court of Indian Offenses will be established on reservations where justice is effectively administered under State laws and by State law enforcement agencies. Neither will these regulations apply to any tribe organized under the Act of June 18, 1934, except in so far as specific provisions thereof may be adopted and embodied in the constitution, by-laws, or ordinances of such an organized tribe.

CHAPTER 1

COURTS OF INDIAN OFFENSES

SEC. 1. *Jurisdiction.*

A Court of Indian Offenses shall have jurisdiction over all offenses enumerated in Chapter 5, when committed by any Indian, within the reservation or reservations for which the Court is established.

With respect to any of the offenses enumerated in Chapter 5 over which Federal or State courts may have lawful jurisdiction, the jurisdiction of the Court of Indian Offenses shall be concurrent and not exclusive. It shall be the

duty of the said Court of Indian Offenses to order delivery to the proper authorities of the State or Federal Government or of any other tribe or reservation, for prosecution, any offender, there to be dealt with according to law or regulations authorized by law, where such authorities consent to exercise jurisdiction lawfully vested in them over the said offender.

For the purpose of the enforcement of these regulations, an Indian shall be deemed to be any person of Indian descent who is a member of any recognized Indian tribe now under Federal jurisdiction, and a "reservation" shall be taken to include all territory within reservation boundaries, including fee patented lands, roads, waters, bridges, and lands used for agency purposes.

All Indians employed in the Indian Service shall be subject to the jurisdiction of the Court of Indian Offenses but any such employee appointed by the Secretary of the Interior shall not be subject to any sentence of such Court, unless such sentence shall have been approved by the Secretary of the Interior.

SEC. 2. *Appointment of Judges.*

A Court of Indian Offenses established for any reservation or group of reservations, shall consist of one or more chief judges, whose duties shall be regular and permanent, and two or more associate judges, who may be called to service when occasion requires, and who shall be compensated on a per diem basis.

Each judge shall be appointed by the Commissioner of Indian Affairs, subject to confirmation by a two-thirds vote of the Tribal Council.

Each judge shall hold office for a period of four years, unless sooner removed for cause or by reason of the abolition of the said office, but shall be eligible for reappointment.

A person shall be eligible to serve as judge of a Court of Indian Offenses only if he (1) is a member of a tribe under the jurisdiction of the said court; and (2) has never been convicted of a felony, or, within one year then last past, of a misdemeanor.

No judge shall be qualified to act as such in any case wherein he has any direct interest or wherein any relative by marriage or blood, in the first or second degrees, is a party.

SEC. 3. *Removal of Judges.*

Any Judge of the Court of Indian Offenses may be suspended, dismissed or removed, by the Commissioner of Indian Affairs, for cause, upon the recommendation of the Tribal Council.

SEC. 4. *Court Procedure.*

Sessions of the Court of Indian Offenses for the trial of cases shall be held by the Chief Judge, or, in case of his disability, by one of the associate judges selected for the occasion by all of the judges.

The time and place of court sessions, and all other details of judicial procedure not prescribed by these regulations, shall be laid down in Rules of Court approved by the Tribal Council and by the superintendent of the reservation.

It shall be the duty of the judges of each Court of Indian Offenses to make recommendations to the Tribal Council for the enactment or amendment of such Rules of Court in the interests of improved judicial procedure.

SEC. 5. *Appellate Proceedings.*

All the judges of the reservation shall sit together, at such times and at such places as they may find proper and necessary for the dispatch of business, to hear appeals from judgments made by any judge at the trial sessions. There shall be established by Rule of Court the limitations, if any, to be

placed upon the right of appeal both as to the types of cases which may be appealed and as to the manner in which appeals may be granted, according to the needs of their jurisdiction. In the absence of such Rule of Court any party aggrieved by a judgment may appeal to the full court upon giving notice of such appeal at the time of judgment and upon giving proper assurance to the trial judge, through the posting of a bond or in any other manner, that he will satisfy the judgment if it is affirmed. In any case where a party has perfected his right to appeal as established herein or by Rule of Court, the judgment of the trial judge shall not be executed until after final disposition of the case by the full court. The full court may render judgment upon the case by majority vote.

SEC. 6. *Juries.*

In any case where, upon preliminary hearing by the court, a substantial question of fact is raised, the defendant may demand a jury trial.

A list of eligible jurors shall be prepared by the Tribal Council each year. In any case, a jury shall consist of six residents of the vicinity in which the trial is held, selected from the list of eligible jurors by the judge. Any party to the case may challenge not more than three members of the jury panel so chosen.

The judge shall instruct the jury in the law governing the case and the jury shall bring a verdict for the complainant or the defendant. The judge shall render judgment in accordance with the verdict and existing law. If the jury is unable to reach a unanimous verdict, verdict may be rendered by a majority vote.

Each juror who serves upon a jury shall be entitled to a fee of fifty cents a day for each day his services are required in court.

SEC. 7. *Witnesses.*

The several judges of the Courts of Indian Offenses shall have the power to issue subpoenas for the attendance of witnesses either on their own motion or on the request of the Police Commissioner or Superintendent or any of the parties to the case, which subpoena shall bear the signature of the judge issuing it. Each witness answering such subpoena shall be entitled to a fee of fifty cents a day for each day his services are required in court. Failure to obey such subpoena shall be deemed an offense as provided in Chapter 5, Sec. 36, of these regulations. Service of such subpoenas shall be by a regularly acting member of the Indian Police or by an Indian appointed by the Court for that purpose.

Witnesses who testify voluntarily shall be paid by the party calling them, if the court so directs, their actual traveling and living expenses incurred in the performance of their function.

SEC. 8. *Professional Attorneys.*

Professional attorneys shall not appear in any proceeding before the Court of Indian Offenses unless Rules of Court have been adopted as set forth in Section 4 of this Chapter prescribing conditions governing their admission and practice before the Court.

SEC. 9. *Clerks.*

The Superintendent shall detail a clerk of court for each Court of Indian Offenses. The clerk of the Court of Indian Offenses shall render assistance to the Court, to the police force of the reservation and to individual members of the tribe in the drafting of complaints, subpoenas, warrants, and commitments and any other documents incidental to the lawful functions of the

Court. It shall be the further duty of said clerk to attend and to keep a written record of all proceedings of the Court, to administer oaths to witnesses, to collect all fines paid and to pay out all fees authorized by these regulations, and to make an accounting thereof to the disbursing agent of the reservation and to the Tribal Council.

SEC. 10. *Records.*

Each Court of Indian Offenses shall be required to keep, for inspection by duly qualified officials, a record of all proceedings of the Court, which record shall reflect the title of the case, the names of the parties, the substance of the complaint, the names and addresses of all witnesses, the date of the hearing or trial, by whom conducted, the findings of the Court or jury, and the judgment, together with any other facts or circumstances deemed of importance to the case. A record of all proceedings shall be kept at the agency office, as required by United States Code, Title 25, sec. 200.

SEC. 11. *Copies of Laws.*

Each Court of Indian Offenses shall be provided with copies of all Federal and State laws and Indian Office regulations applicable to the conduct of Indians within the reservation.

Whenever the Court is in doubt as to the meaning of any law, treaty, or regulation it may request the Superintendent to furnish an opinion on the point in question.

SEC. 12. *Complaints.*

No complaint filed in any Court of Indian Offenses shall be valid unless it shall bear the signature of the complainant or complaining witness, witnessed by a duly qualified Judge of the Court of Indian Offenses or by the Superintendent or by any other qualified employee of such reservation.

SEC. 13. *Warrants to Apprehend.*

Every Judge of a Court of Indian Offenses shall have the authority to issue warrants to apprehend, said warrants to issue in the discretion of the Court only after a written complaint shall have been filed, bearing the signature of the complaining witness. Service of such warrants shall be made by a duly qualified member of the Indian Police or other police officer of the United States Indian Service. No warrant to apprehend shall be valid unless it shall bear the signature of a duly qualified Judge of the Court of Indian Offenses.

SEC. 14. *Arrests.*

No member of the Indian Police shall arrest any person for any offense defined by these regulations or by Federal law, except when such offense shall occur in the presence of the arresting officer or he shall have reasonable evidence that the person arrested has committed an offense or the officer shall have a warrant commanding him to apprehend such person.

SEC. 15. *Search Warrants.*

Every Judge of the Court of Indian Offenses of any Indian reservation shall have authority to issue warrants for search and seizure of the premises and property of any person under the jurisdiction of said Court. However, no warrant of search and seizure shall issue except upon a duly signed and written complaint based upon reliable information or belief and charging the commission of some offense against the tribe. No warrant for search and seizure shall be valid unless it contains the name or description of the person or property to be searched and describes the articles or property to be seized and bears the signature of a duly qualified Judge of the Court of Indian Offenses.

Service of warrants of search and seizure shall be made only by members of the Indian Police or police officers of the United States Indian Service.

No policeman shall search or seize any property without a warrant unless he shall know, or have reasonable cause to believe, that the person in possession of such property is engaged in the commission of an offense under these regulations. Unlawful search or seizure will be deemed trespass and punished in accordance with Chapter 5, Section 15, of these regulations.

SEC. 16. *Commitments.*

No Indian shall be detained, jailed or imprisoned under these regulations for a longer period than thirty-six (36) hours unless there be issued a commitment bearing the signature of a duly qualified Judge of the Court of Indian Offenses. There shall be issued, for each Indian held for trial, a temporary commitment and for each Indian held after sentence a final commitment on the forms prescribed in these regulations.

SEC. 17. *Bail or Bond.*

Every Indian charged with an offense before any Court of Indian Offenses may be admitted to bail. Bail shall be by two reliable members of any Indian tribe who shall appear before a Judge of the Court of Indian Offenses where complaint has been filed and there execute an agreement in compliance with the form provided therefor and made a part of these regulations. In no case shall the penalty specified in the agreement exceed twice the maximum penalty set by these regulations for violation of the offense with which the accused is charged.

SEC. 18. *Definition of Signature.*

The term "signature" as used in these regulations shall be defined as the written signature, official seal, or the witnessed thumb print or mark of any individual.

SEC. 19. *Definition of Tribal Council.*

The term "Tribal Council", as used in these regulations, shall be construed to refer to the council, business committee or other organization recognized by the Department of the Interior as representing the tribe, or where no such body is recognized, to the adult members of the tribe in council assembled.

SEC. 20. *Relations with the Court.*

No field employee of the Indian Service shall obstruct, interfere with or control the functions of any Court of Indian Offenses, or influence such functions in any manner except as permitted by these regulations or in response to a request for advice or information from the Court.

Employees of the Indian Service, particularly those who are engaged in social service, health, and educational work, shall assist the Court, upon its request, in the preparation and presentation of the facts in the case and in the proper treatment of individual offenders.

CHAPTER 2

CIVIL ACTIONS

SEC. 1. *Jurisdiction.*

The Courts of Indian Offenses shall have jurisdiction of all suits wherein the defendant is a member of the tribe or tribes within their jurisdiction, and of all other suits between members and nonmembers which are brought before the Courts by stipulation of both parties. No judgment shall be given on any

suit unless the defendant has actually received notice of such suit and ample opportunity to appear in court in his defense. Evidence of the receipt of the notice shall be kept as part of the record in the case. In all civil suits the complainant may be required to deposit with the Clerk of the Court a fee or other security in a reasonable amount to cover costs and disbursements in the case.

SEC. 2. *Law Applicable in Civil Actions.*

In all civil cases the Court of Indian Offenses shall apply any laws of the United States that may be applicable, any authorized regulations of the Interior Department, and any ordinances or customs of the tribe, not prohibited by such Federal laws.

Where any doubt arises as to the customs and usages of the tribe the Court may request the advice of counsellors familiar with these customs and usages.

Any matters that are not covered by the traditional customs and usages of the tribe, or by applicable Federal laws and regulations, shall be decided by the Court of Indian Offenses according to the laws of the State in which the matter in dispute may lie.

SEC. 3. *Judgments in Civil Actions.*

In all civil cases, judgment shall consist of an order of the Court awarding money damages to be paid to the injured party, or directing the surrender of certain property to the injured party, or the performance of some other act for the benefit of the injured party.

Where the injury inflicted was the result of carelessness of the defendant, the judgment shall fairly compensate the injured party for the loss he has suffered.

Where the injury was deliberately inflicted, the judgment shall impose an additional penalty upon the defendant, which additional penalty may run either in favor of the injured party or in favor of the tribe.

Where the injury was inflicted as the result of accident, or where both the complainant and the defendant were at fault, the judgment shall compensate the injured party for a reasonable part of the loss he has suffered.

SEC. 4. *Costs in Civil Actions.*

The Court may assess the accruing costs of the case against the party or parties against whom judgment is given. Such costs shall consist of the expenses of voluntary witnesses for which either party may be responsible under Section 7 of Chapter 1, and the fees of jurors in those cases where a jury trial is had, and any further incidental expenses connected with the procedure before the Court as the Court may direct.

SEC. 5. *Payment of Judgments from Individual Indian Moneys.*

Whenever the Court of Indian Offenses shall have ordered payment of money damages to an injured party and the losing party refuses to make such payment within the time set for payment by the Court, and when the losing party has sufficient funds to his credit at the agency office to pay all or part of such judgment, the Superintendent shall certify to the Secretary of the Interior the record of the case and the amount of the available funds. If the Secretary shall so direct, the disbursing agent shall pay over to the injured party the amount of the judgment, or such lesser amount as may be specified by the Secretary, from the account of the delinquent party.

A judgment shall be considered a lawful debt in all proceedings held by the Department of the Interior or by the Court of Indian Offenses to distribute decedents' estates.

CHAPTER 3

DOMESTIC RELATIONS

SEC. 1. *Recording of Marriages and Divorces.*

All Indian marriages and divorces, whether consummated in accordance with the State law or in accordance with tribal custom, shall be recorded within three months at the agency of the jurisdiction in which either or both of the parties reside.

SEC. 2. *Tribal Custom Marriage and Divorce.*

The Tribal Council shall have authority to determine whether Indian custom marriage and Indian custom divorce for members of the tribe shall be recognized in the future as lawful marriage and divorce upon the reservation, and if it shall be so recognized, to determine what shall constitute such marriage and divorce and whether action by the Court of Indian Offenses shall be required. When so determined in writing, one copy shall be filed with the Court of Indian Offenses, one copy with the Superintendent in charge of the reservation, and one copy with the Commissioner of Indian Affairs. Thereafter, Indians who desire to become married or divorced by the custom of the tribe shall conform to the custom of the tribe as determined. Indians who assume or claim a divorce by Indian custom shall not be entitled to remarry until they have complied with the determined custom of their tribe nor until they have recorded such divorce at the agency office.

Pending any determination by the Tribal Council on these matters, the validity of Indian custom marriage and divorce shall continue to be recognized as heretofore.

SEC. 3. *Tribal Custom Adoption.*

The Tribal Council shall likewise have authority to determine whether Indian custom adoption shall be permitted upon the reservation among members of the tribe, and if permitted, to determine what shall constitute such adoption and whether action by the Court of Indian Offenses shall be required. The determination of the Tribal Council shall be filed with the Court of Indian Offenses, with the Superintendent of the reservation and with the Commissioner of Indian Affairs. Thereafter all members of the tribe desiring to adopt any person shall conform to the procedure fixed by the Tribal Council.

SEC. 4. *Determination of Paternity and Support.*

The Courts of Indian Offenses shall have jurisdiction of all suits brought to determine the paternity of a child and to obtain a judgment for the support of the child. A judgment of the Court establishing the identity of the father of the child shall be conclusive of that fact in all subsequent determinations of inheritance by the Department of the Interior or by the Courts of Indian Offenses.

SEC. 5. *Determination of Heirs.*

When any member of the tribe dies leaving property other than an allotment or other trust property subject to the jurisdiction of the United States, any member claiming to be an heir of the decedent may bring a suit in the Court of Indian Offenses to have the Court determine the heirs of the decedent and to divide among the heirs such property of the decedent. No determination of heirs shall be made unless all the possible heirs known to the Court, to the Superintendent, and to the claimant have been notified of the suit and given full opportunity to come before the Court and defend their interests. Possible heirs who are not residents of the reservation under the jurisdiction

of the Court must be notified by mail and a copy of the notice must be preserved in the record of the case.

In the determination of heirs the Court shall apply the custom of the tribe as to inheritance if such custom is proved. Otherwise the Court shall apply State law in deciding what relatives of the decedent are entitled to be his heirs.

Where the estate of the decedent includes any interest in restricted allotted lands or other property held in trust by the United States, over which the Examiner of Inheritance would have jurisdiction, the Court of Indian Offenses may distribute only such property as does not come under the jurisdiction of the Examiner of Inheritance, and the determination of heirs by the Court may be reviewed, on appeal, and the judgment of the Court modified or set aside by the said Examiner of Inheritance, with the approval of the Secretary of the Interior, if law and justice so require.

SEC. 6. *Approval of Wills.*

When any member of the tribe dies, leaving a will disposing only of property other than an allotment or other trust property subject to the jurisdiction of the United States, the Court of Indian Offenses shall, at the request of any member of the tribe named in the will or any other interested party, determine the validity of the will after giving notice and full opportunity to appear in court to all persons who might be heirs of the decedent, as under Section 5 of this chapter. A will shall be deemed to be valid if the decedent had a sane mind and understood what he was doing when he made the will and was not subject to any undue influence of any kind from another person, and if the will was made in accordance with a proved tribal custom or made in writing and signed by the decedent in the presence of two witnesses who also sign the will. If the Court determines the will to be validly executed, it shall order the property described in the will to be given to the persons named in the will or to their heirs; but no distribution of property shall be made in violation of a proved tribal custom which restricts the privilege of tribal members to distribute property by will.

CHAPTER 4

SENTENCES

SEC. 1. *Nature of Sentences.*

Any Indian who has been convicted by the Court of Indian Offenses of violation of a provision of the Code of Indian Tribal Offenses shall be sentenced by the Court to work for the benefit of the tribe for any period found by the Court to be appropriate; but the period fixed shall not exceed the maximum period set for the offense in the Code, and shall begin to run from the day of the sentence. During the period of sentence the convicted Indian may be confined in the agency jail if so directed by the Court. The work shall be done under the supervision of the Superintendent or of an authorized agent or committee of the Tribal Council as the Court may provide.

Whenever any convicted Indian shall be unable or unwilling to work, the Court shall, in its discretion, sentence him to imprisonment for the period of the sentence or to pay a fine equal to \$2 a day for the same period. Such fine shall be paid in cash, or in commodities or other personal property of the required value as may be directed by the Court. Upon the request of the convicted Indian, the disbursing agent may approve a disbursement voucher chargeable to the Indian's account to cover payment of the fine imposed by the Court.

In addition to any other sentence, the Court may require an offender who has inflicted injury upon the person or property of any individual to make restitution or to compensate the party injured, through the surrender of property, the payment of money damages, or the performance of any other act for the benefit of the injured party.

In determining the character and duration of the sentence which shall be imposed, the Court shall take into consideration the previous conduct of the defendant, the circumstances under which the offense was committed, and whether the offense was malicious or wilful and whether the offender has attempted to make amends, and shall give due consideration to the extent of the defendant's resources and the needs of his dependents. The penalties listed in Chapter 5 of these regulations are maximum penalties to be inflicted only in extreme cases.

SEC. 2. *Probation.*

Where sentence has been imposed upon any Indian who has not previously been convicted of any offense, the Court of Indian Offenses may in its discretion suspend the sentence imposed and allow the offender his freedom on probation, upon his signing a pledge of good conduct during the period of the sentence upon the form provided therefor and made a part of these regulations.

Any Indian who shall violate his probation pledge shall be required to serve the original sentence plus an additional half of such sentence as penalty for the violation of his pledge.

SEC. 3. *Parole.*

Any Indian committed by a Court of Indian Offenses who shall have without misconduct served one-half the sentence imposed by such Court shall be eligible to parole. Parole shall be granted only by a Judge of the Court of Indian Offenses where the prisoner was convicted and upon the signing of the form provided therefor and made a part of these regulations.

Any Indian who shall violate any of the provisions of such parole shall be punished by being required to serve the whole of the original sentence.

SEC. 4. *Juvenile Delinquency.*

Whenever any Indian who is under the age of 18 years is accused of committing one of the offenses enumerated in the Code of Indian Offenses, the judge may in his discretion hear and determine the case in private and in an informal manner, and, if the accused is found to be guilty, may in lieu of sentence place such delinquent for a designated period under the supervision of a responsible person selected by him or may take such other action as he may deem advisable in the circumstances.

SEC. 5. *Deposit and Disposition of Fines.*

All money fines imposed for the commission of an offense shall be in the nature of an assessment for the payment of designated court expenses. Such expenses shall include the payment of the fees provided for in these regulations to jurors and to witnesses answering a subpoena. The fines assessed shall be paid over by the Clerk of the Court to the disbursing agent of the reservation for deposit as a "special deposit, court funds" to the disbursing agent's official credit in the Treasury of the United States. The disbursing agent shall withdraw such funds, in accordance with existing regulations, upon the order of the Clerk of the Court signed by a judge of the Court, for the payment of specified fees to specified jurors or witnesses. The disbursing agent and the Clerk of the Court shall keep an accounting of all such deposits and withdrawals for the inspection of any person interested. Whenever such fund shall exceed the

amount necessary with a reasonable reserve for the payment of the court expenses before mentioned; the Tribal Council shall designate, with the approval of the Superintendent, further expenses of the work of the Court which shall be paid by these funds, such as the writing of records, the costs of notices or the increase of fees, whether or not any such costs were previously paid from other sources.

Wherever a fine is paid in commodities, the commodities shall be turned over, under the supervision of the Clerk of the Court, to the custody of the Superintendent to be sold, or, if the Tribal Council so directs, to be disposed of in other ways for the benefit of the tribe. The proceeds of any sale of such commodities shall be deposited by the disbursing agent in the special deposit for court funds and recorded upon the accounts.

CHAPTER 5

CODE OF INDIAN TRIBAL OFFENSES

SEC. 1. *Assault.*

Any Indian who shall attempt or threaten bodily harm to another person through unlawful force or violence shall be deemed guilty of assault, and upon conviction thereof shall be sentenced to labor for a period not to exceed five days or shall be required to furnish a satisfactory bond to keep the peace.

SEC. 2. *Assault and Battery.*

Any Indian who shall wilfully strike another person or otherwise inflict bodily injury, or who shall by offering violence cause another to harm himself, shall be deemed guilty of assault and battery, and upon conviction thereof shall be sentenced to labor for a period not to exceed six months.

SEC. 3. *Carrying Concealed Weapons.*

Any Indian who shall go about in public places armed with a dangerous weapon concealed upon his person, unless he shall have a permit signed by a Judge of a Court of Indian Offenses and countersigned by the Superintendent of the reservation, shall be deemed guilty of an offense, and upon conviction thereof shall be sentenced to labor for a period not to exceed 30 days, and the weapons so carried may be confiscated.

SEC. 4. *Abduction.*

Any Indian who shall wilfully take away or detain another person against his will or without the consent of the parent or other person having lawful care or charge of him shall be deemed guilty of abduction, and upon conviction thereof shall be sentenced to labor for a period not to exceed six months.

SEC. 5. *Theft.*

Any Indian who shall take the property of another person, with intent to steal, shall be deemed guilty of theft and upon conviction thereof shall be sentenced to labor for a period not to exceed six months.

SEC. 6. *Embezzlement.*

Any Indian who shall, having lawful custody of property not his own, appropriate the same to his own use with intent to deprive the owner thereof, shall be deemed guilty of embezzlement and upon conviction thereof shall be sentenced to labor for a period not to exceed six months.

SEC. 7. *Fraud.*

Any Indian who shall by wilful misrepresentation or deceit, or by false interpreting, or by the use of false weights or measures, obtain any money or

other property, shall be deemed guilty of fraud and upon conviction thereof shall be sentenced to labor for a period not to exceed six months.

SEC. 8. Forgery.

Any Indian who shall, with intent to defraud, falsely sign, execute or alter any written instrument, shall be deemed guilty of forgery and upon conviction thereof shall be sentenced to labor for a period not to exceed six months.

SEC. 9. Misbranding.

Any Indian who shall knowingly and wilfully misbrand or alter any brand or mark on any livestock of another person, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed six months.

SEC. 10. Receiving Stolen Property.

Any Indian who shall receive or conceal or aid in concealing or receiving any property, knowing the same to be stolen, embezzled, or obtained by fraud or false pretense, robbery or burglary, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed three months.

SEC. 11. Extortion.

Any Indian who shall wilfully, by making false charges against another person or by any other means whatsoever, extort or attempt to extort any moneys, goods, property, or anything else of any value, shall be deemed guilty of extortion and upon conviction thereof shall be sentenced to labor for a period not to exceed thirty days.

SEC. 12. Disorderly Conduct.

Any Indian who shall engage in fighting in a public place, disturb or annoy any public or religious assembly, or appear in a public or private place in an intoxicated and disorderly condition, or who shall engage in any other act of public indecency or immorality, shall be deemed guilty of disorderly conduct and upon conviction thereof shall be sentenced to labor for a period not to exceed thirty days.

SEC. 13. Reckless Driving.

Any Indian who shall drive or operate any automobile, wagon, or any other vehicle in a manner dangerous to the public safety, shall be deemed guilty of reckless driving, and upon conviction thereof shall be sentenced to labor for a period not to exceed 15 days and may be deprived of the right to operate any automobile for a period not to exceed six months. For the commission of such offense while under the influence of liquor, the offender may be sentenced to labor for a period not to exceed three months.

SEC. 14. Malicious Mischief.

Any Indian who shall maliciously disturb, injure, or destroy any livestock or other domestic animal or other property, shall be deemed guilty of malicious mischief and upon conviction thereof shall be sentenced to labor for a period not to exceed six months.

SEC. 15. Trespass.

Any Indian who shall go upon or pass over any cultivated or enclosed lands of another person and shall refuse to go immediately therefrom on the request of the owner or occupant thereof, or who shall wilfully and knowingly allow livestock to occupy or graze on the cultivated or enclosed lands, shall be deemed guilty of an offense, and upon conviction shall be punished

by a fine not to exceed \$5, in addition to any award of damages for the benefit of the injured party.

SEC. 16. *Injury to Public Property.*

Any Indian who shall, without proper authority, use or injure any public property of the tribe, shall be deemed guilty of an offense, and upon conviction thereof shall be sentenced to labor for a period not to exceed thirty days.

SEC. 17. *Maintaining a Public Nuisance.*

Any Indian who shall act in such a manner, or permit his property to fall into such condition as to injure or endanger the safety, health, comfort, or property of his neighbors, shall be deemed guilty of an offense, and upon conviction thereof shall be sentenced to labor for a period not to exceed five days, and may be required to remove such nuisance when so ordered by the Court.

SEC. 18. *Liquor Violations.*

Any Indian who shall possess, sell, trade, transport, or manufacture any beer, ale, wine, whisky, or any article whatsoever which produces alcoholic intoxication, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 60 days.

SEC. 19. *Cruelty to Animals.*

Any Indian who shall torture or cruelly mistreat any animal, shall be deemed guilty of an offense and shall be sentenced to labor for a period not to exceed thirty days.

SEC. 20. *Game Violations.*

Any Indian who shall violate any law, rule, or regulation adopted by the Tribal Council for the protection or conservation of the fish or game of the reservation, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed thirty days; and he shall forfeit to the Court for the use of any Indian institution such game as may be found in his possession.

SEC. 21. *Gambling.*

Any Indian who shall violate any law, rule, or regulation adopted by the Tribal Council for the control or regulation of gambling on any reservation, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed thirty days.

SEC. 22. *Adultery.*

Any Indian who shall have sexual intercourse with another person, either of such persons being married to a third person, shall be deemed guilty of adultery and upon conviction thereof shall be sentenced to labor for a period not to exceed thirty days.

SEC. 23. *Illicit Cohabitation.*

Any Indian who shall live or cohabit with another as man and wife not then and there being married shall be deemed guilty of illicit cohabitation and upon conviction thereof shall be sentenced to labor for a period not to exceed thirty days.

SEC. 24. *Prostitution.*

Any Indian who shall practice prostitution or who shall knowingly keep, maintain, rent, or lease, any house, room, tent, or other place for the purpose of prostitution shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed six months.

SEC. 25. *Giving Venereal Disease to Another.*

Any Indian who shall infect another person with a venereal disease shall be deemed guilty of an offense, and upon conviction thereof shall be sentenced to labor for a period not to exceed three months. The Court of Indian Offenses shall have authority to order and compel the medical examination and treatment of any person charged with violation of this section.

SEC. 26. *Failure to Support Dependent Persons.*

Any Indian who shall, because of habitual intemperance or gambling or for any other reason, refuse or neglect to furnish food, shelter, or care to those dependent upon him, including any dependent children born out of wedlock, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed three months, for the benefit of such dependents.

SEC. 27. *Failure to Send Children to School.*

Any Indian who shall, without good cause, neglect or refuse to send his children or any children under his care, to school, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed ten days.

SEC. 28. *Contributing to the Delinquency of a Minor.*

Any Indian who shall wilfully contribute to the delinquency of any minor shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed six months.

SEC. 29. *Bribery.*

Any Indian who shall give or offer to give any money, property, or services, or anything else of value to another person with corrupt intent to influence another in the discharge of his public duties or conduct, and any Indian who shall accept, solicit, or attempt to solicit any bribe, as above defined, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed six months; and any tribal office held by such person shall be forfeited.

SEC. 30. *Perjury.*

Any Indian who shall wilfully and deliberately, in any judicial proceeding in any Court of Indian Offenses, falsely swear or interpret, or shall make a sworn statement or affidavit knowing the same to be untrue, or shall induce or procure another person so to do, shall be deemed guilty of perjury and upon conviction thereof shall be sentenced to labor for a period not to exceed six months.

SEC. 31. *False Arrest.*

Any Indian who shall wilfully and knowingly make, or cause to be made, the unlawful arrest, detention, or imprisonment of another person, shall be deemed guilty of an offense, and upon conviction thereof shall be sentenced to labor for a period not to exceed six months.

SEC. 32. *Resisting Lawful Arrest.*

Any Indian who shall wilfully and knowingly, by force or violence, resist or assist another person to resist a lawful arrest shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed thirty days.

SEC. 33. *Refusing to Aid Officer.*

Any Indian who shall neglect or refuse, when called upon by any Indian Police or other police officer of the United States Indian Service, to assist in the arrest of any person charged with or convicted of any offense or in securing such offender when apprehended, or in conveying such offender to the nearest place of confinement, shall be deemed guilty of an offense, and upon conviction, shall be sentenced to labor for a period not to exceed ten days.

SEC. 34. *Escape.*

Any Indian, who, being in lawful custody, for any offense, shall escape or attempt to escape or who shall permit or assist or attempt to permit or assist another person to escape from lawful custody shall be deemed guilty of an offense, and upon conviction thereof shall be sentenced to labor for a period not to exceed six months.

SEC. 35. *Disobedience to Lawful Orders of Court.*

Any Indian who shall wilfully disobey any order, subpoena, warrant, or command duly issued, made or given by the Court of Indian Offenses or any officer thereof, shall be deemed guilty of an offense and upon conviction thereof shall be fined in an amount not exceeding \$180 or sentenced to labor for a period not to exceed three months.

SEC. 36. *Violation of an Approved Tribal Ordinance.*

Any Indian who violates an ordinance designed to preserve the peace and welfare of the tribe, which was promulgated by the Tribal Council and approved by the Secretary of the Interior, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced as provided in the ordinance.

CHAPTER 6

THE INDIAN POLICE

SEC. 1. *Superintendent in Command.*

The Superintendent of each Indian reservation shall be recognized as commander of the Indian Police force and will be held responsible for the general efficiency and conduct of the members thereof. It shall be the duty of the Superintendent, or his duly qualified representative, to keep himself informed as to the efficiency of the Indian Police in the discharge of their duties, to subject them to a regular inspection, to inform them as to their duties, and keep a strict accounting of the equipment issued them in connection with their official duties. It shall be the duty of the Superintendent to detail such Indian policemen as may be necessary to carry out the orders of the Court of Indian Offenses and to preserve order during the court sessions. The Superintendent shall investigate all reports and charges of misconduct on the part of Indian policemen and shall exercise such proper disciplinary measures as may be consistent with existing regulations. No Superintendent of any Indian reservation shall assign or detail any member of the Indian Police force for duty as janitor or chauffeur or for any duty not connected with the administration of law and order.

SEC. 2. *Police Commissioners.*

The Superintendent of any Indian reservation may, with the approval of the Commissioner of Indian Affairs, designate as Police Commissioner any qualified person. Wherever any special or deputy special officer is regularly employed in any Indian jurisdiction, he shall be Police Commissioner for that jurisdiction. Such Police Commissioner shall obey the orders of the Superintendent of the reservation where employed and shall see that the orders of the

Court of Indian Offenses are properly carried out. The Police Commissioner shall be responsible to the Superintendent for the conduct and efficiency of the Indian Police under his direction and shall give such instruction and advice to them as may be necessary. The Police Commissioner shall also report to the Superintendent all violations of law or regulation and any misconduct of any member of the Indian Police.

SEC. 3. *Police Training.*

It shall be the duty of the Superintendent to maintain from time to time as circumstances require and permit classes of instruction for the Indian policemen. Such classes shall familiarize the policemen with the manner of making searches and arrests, the proper and humane handling of prisoners, the keeping of records of offenses and police activities, and with court orders and legal forms and the duties of the police in relation thereto, and other subjects of importance for efficient police duty. It shall further be the purpose of the classes to consider methods of preventing crime and of securing cooperation with Indian communities in establishing better social relations.

SEC. 4. *Indian Policemen.*

The Superintendent of any Indian reservation may, with the approval of the Commissioner of Indian Affairs, employ and appoint Indians as Indian Police whose qualifications shall be as follows:

(a) A candidate must be in sound physical condition and of sufficient size and strength to perform the duties required.

(b) He must be possessed of courage, self-reliance, intelligence, and a high sense of loyalty and duty.

(c) He must never have been convicted of a felony, nor have been convicted of any misdemeanor for a period of one year prior to appointment.

The duties of an Indian Policeman shall be:

(a) To obey promptly all orders of the Police Commissioner or the Court of Indian Offenses when assigned to that duty.

(b) To lend assistance to brother officers.

(c) To report and investigate all violations of any law or regulation coming to his notice or reported for attention.

(d) To arrest all persons observed violating the laws and regulations for which he is held responsible.

(e) To inform himself as to the laws and regulations applicable to the jurisdiction where employed and as to the laws of arrest.

(f) To prevent violations of the law and regulations.

(g) To report to his superior officers all accidents, births, deaths, or other events or impending events of importance.

(h) To abstain from the use of intoxicants or narcotics and to refrain from engaging in any act which would reflect discredit upon the police department.

(i) To refrain from the use of profane, insolent, or vulgar language.

(j) To use no unnecessary force or violence in making an arrest, search, or seizure.

(k) To keep all equipment furnished by the Government in reasonable repair and order.

(l) To report the loss of any and all property issued by the Government in connection with official duties.

SEC. 5. *Dismissal.*

The Superintendent of any Indian reservation may remove any Indian Policeman for any noncompliance with the duties and requirements as set out in Sec. 4 of these regulations or for neglect of duty.

SEC. 6. Return of Equipment.

Upon the resignation, death, or discharge of any member of the Indian Police, all articles or property issued him in connection with his official duties must be returned to the Superintendent or his representative.

CHAPTER 7

LEGAL FORMS

FORM NO. 1

CRIMINAL COMPLAINT

COURT OF INDIAN OFFENSES

JURISDICTION
UNITED STATES INDIAN SERVICE

Name of tribe.
vs.
Defendant.

The above-named defendant is charged by this complaint with the offense of _____ in violation of Sec. _____, Code of Indian Tribal Offenses, to wit: the said defendant did on or about the ____ day of _____, 19____ in the _____ jurisdiction, _____ contrary to the regulations made and provided and against the peace and dignity of the _____.

(Signed) _____
Complaining Witness.

Witnessed:

Judge of the Court of Indian Offenses
or Employee of the Indian Service.

Title.

Jurisdiction.

Dated: _____

Personal History of Defendant:
(To be filled out by Clerk of Court)

Married or Single _____ Occupation _____

No. of Dependents _____ Age _____

Condition of Health _____ Address _____

Previous Arrests and Convictions

Names and addresses of witnesses:

NOTICE OF ACTION

COURT OF INDIAN OFFENSES
----- JURISDICTION { -----
UNITED STATES INDIAN SERVICE { ----- Defendant

To -----, Defendant:

You are hereby notified that the attached complaint has been filed against you and are herewith ordered to appear in Court to answer to such complaint on the ___ day of _____, 19___.

Dated: -----

Judge of the Court of Indian Offenses

----- Jurisdiction
I have this day served the above order upon the above-named defendant.

Dated: -----

Officer's signature.

Title

FORM NO. 2
CIVIL COMPLAINT

COURT OF INDIAN OFFENSES
----- JURISDICTION { ----- Complainant
UNITED STATES INDIAN SERVICE { ----- Defendant

The above-named complainant, complaining of the defendant, declares:

By reason of the foregoing facts, the complainant demands that the defendant shall be adjudged to make just redress.

Complainant

Witnessed:

Judge of the Court of Indian Offenses
or Employee of the Indian Service

Title

Jurisdiction

Dated: -----

FORM NO. 3

SUBPOENA

COURT OF INDIAN OFFENSES

JURISDICTION

UNITED STATES INDIAN SERVICE

vs.
-----, Defendant

To -----:

You are hereby commanded to appear before the above-entitled court at ----- on the ----- day of -----, 19-----, at ----- o'clock ----- M., to serve as ----- in the above-entitled case. Failure to obey this subpoena, without good cause, makes you liable to prosecution.

Dated: -----

Judge of the Court of Indian Offenses

Jurisdiction

Clerk of the Court of Indian Offenses

Jurisdiction

FORM NO. 4

WARRANT TO APPREHEND

COURT OF INDIAN OFFENSES

JURISDICTION

UNITED STATES INDIAN SERVICE

vs.
-----, Defendant

To any Indian Police or Police Officer of the United States Indian Service:

Whereas a complaint having been filed in the above-entitled court charging that the offense of ----- in violation of Sec. -----, Code of Indian Tribal Offenses, has been committed and accusing the above-named defendant thereof, you are commanded to apprehend and bring the said defendant before a judge of this Court to show cause why he should not be held for trial.

Dated: -----

Judge of the Court of Indian Offenses

Jurisdiction

Received the within warrant on the ----- day of -----, 19----- and executed the same on the ----- day of -----, 19-----, by arresting the within-named defendant at ----- and now have him before the court as commanded.

Officer's Signature

Title

Dated: -----

FORM NO. 5

SEARCH WARRANT

COURT OF INDIAN OFFENSES

JURISDICTION

UNITED STATES INDIAN SERVICE

To any Indian Police or Police Officer of the United States Indian Service:
A complaint having been filed before me by _____ charging
that certain property, to wit:

is in the possession of _____ at the following described place,
to wit:

in violation of Sec. _____, Code of Indian Tribal Offenses.

You are therefore commanded to make immediate search of the person or
premises described above for the following described property, to wit:

and if the same be found or any part thereof, to arrest the said _____
and bring him and the property before a judge of this court to show cause
why he should not be held for trial.

Dated: _____

Judge of the Court of Indian Offenses

Jurisdiction

RETURN

Received the within warrant on the _____ day of _____, 19____, and
executed the same on the _____ day of _____, 19____.

Title

Dated this _____ day of _____, 19____

FORM NO. 6

BOND

COURT OF INDIAN OFFENSES

JURISDICTION

UNITED STATES INDIAN SERVICE

vs.

Defendant

Be it remembered, that the undersigned bondsmen upon their word of
honor promise and agree:

That if the above named defendant fails to appear personally before the
above entitled court, on the _____ day of _____, 19____, there to answer
to a complaint duly filed against him, and at such other time or times as he

may be ordered by the Court until final disposition of the case, the undersigned bondsmen will serve ----- days in jail without trial or pay a fine of \$-----

(Signed) -----

(Signed) -----

Signed and agreed to before me this ____ day of _____, 19____.

Judge of the Court of Indian Offenses

Jurisdiction

FORM NO. 7

TEMPORARY COMMITMENT

COURT OF INDIAN OFFENSES

----- JURISDICTION {

UNITED STATES INDIAN SERVICE

vs.

-----, Defendant

To the Keeper of the Jail of the ----- Jurisdiction:

Whereas the above-named defendant has been lawfully arrested and is now before the Court; and whereas good cause has been shown why he should be detained until the final hearing and decision of his case, you are hereby commanded to receive the above-named defendant in custody and hold him until the next session or further order of the court.

Judge of the Court of Indian Offenses

Jurisdiction

Dated: -----

FORM NO. 8

FINAL COMMITMENT

COURT OF INDIAN OFFENSES

----- JURISDICTION {

UNITED STATES INDIAN SERVICE

vs.

-----, Defendant

To the Keeper of the Jail of the ----- Jurisdiction:

The above-named defendant having this day been found guilty of violation of Sec. _____, Code of Indian Tribal Offenses, by committing the offense of _____, I have adjudged that he serve ----- in jail. You are therefore commanded to receive him in custody for the period stated unless otherwise ordered by the court.

Judge of the Court of Indian Offenses.

Jurisdiction.

Dated: -----

FORM NO. 9

JUDGMENT ORDER

COURT OF INDIAN OFFENSES
 ----- JURISDICTION { -----
 UNITED STATES INDIAN SERVICE { -----, Defendant

The above-entitled case having been heard before this court, judgment is this day rendered to the following effect:

Dated: -----
 ----- Judge of the Court of Indian Offenses.
 ----- Jurisdiction.

SATISFACTION OF JUDGMENT

Satisfaction of the above judgment is hereby acknowledged.

Dated: -----
 ----- Name of Party, Policeman, or Jailer.

Recorded: -----

Dated: -----
 ----- Clerk of the Court.

FORM NO. 10

PROBATION PLEDGE

COURT OF INDIAN OFFENSES
 ----- JURISDICTION { -----
 UNITED STATES INDIAN SERVICE { -----, Defendant

I, the undersigned, having been sentenced by the above court on this day, the ___ day of _____, 19___, for violation of Sec. _____, Code of Indian Tribal Offenses, for committing the offense of _____, and not having been previously sentenced by this court for any offense, agree, upon the suspension of this sentence, not to violate any law or regulation of the tribe, or of the United States, or otherwise wilfully engage in any misconduct during the term of this probation, which shall expire on the ___ day of _____, 19___.

Agreed,

 Prisoner

ORDER OF THE COURT:

The above-named prisoner having signed the foregoing agreement, is hereby allowed his freedom under the terms set forth.

Dated: -----
 ----- Judge of the Court of Indian Offenses
 ----- Jurisdiction.

FORM NO. 11

PAROLE AGREEMENT

COURT OF INDIAN OFFENSES _____
 _____ JURISDICTION _____ vs. _____
 UNITED STATES INDIAN SERVICE _____, Defendant

I, the undersigned, having served one half the sentence imposed upon me by the above court on the _____ day of _____, 19____, for violation of Sec. _____, Code of Indian Tribal Offenses, for committing the offense of _____, agree, upon release, not to violate any law or regulation of the tribe, or of the United States, or otherwise wilfully engage in any misconduct during the term of this parole, which shall expire on the ____ day of _____, 19____.

Agreed,

Prisoner

ORDER OF THE COURT:

To the Keeper of the Jail of the _____ Jurisdiction:

The above-named prisoner having signed the foregoing agreement, you are hereby ordered to release him from custody, forthwith.

Dated: _____

 Judge of the Court of Indian Offenses
 _____ Jurisdiction

FORM NO. 12

RELEASE

COURT OF INDIAN SERVICE _____
 _____ JURISDICTION { _____ vs. _____
 UNITED STATES INDIAN SERVICE _____ } _____, Defendant

To the Keeper of the Jail of the _____ Jurisdiction:

The above-named defendant having ^{pleaded guilty to} _{been convicted of} violation of Sec. _____, Code of Indian Tribal Offenses, and sentenced to _____

_____ having served _____ days and having paid a fine in the amount of \$ _____, and/or _____

_____ you are hereby directed to release him forthwith from custody.

 Judge of the Court of Indian Offenses.
 _____ Jurisdiction.

Dated: _____

JOHN COLLIER,
Commissioner.

Approved:

HAROLD L. ICKES,
 Secretary of the Interior.

RECOGNITION OF ATTORNEYS AND AGENTS TO PRACTICE BEFORE
DISTRICT LAND OFFICERS AND THE DEPARTMENT OF THE
INTERIOR

REGULATIONS

[Circular No. 1374]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 29, 1935.

REGISTERS, UNITED STATES LAND OFFICES:

Rule of Practice 87 provides:

Every attorney, before practicing before the Department of the Interior and its bureaus, must comply with the requirements of the regulations prescribed by the Secretary of the Interior pursuant to Section 5 of the Act of July 4, 1884 (23 Stat. 101).

The laws and regulations governing the recognition of agents, attorneys, and others representing claimants before the Department of the Interior and the bureaus thereof, approved September 27, 1917, are printed in Circular 1-367 and reported in 46 L. D. 206. The regulations governing the recognition of agents and attorneys before the district land offices as approved April 20, 1907, are reported in 35 L. D. 534, and paragraph 8 thereof, as amended April 16, 1923, provides:

Every attorney must, either at the time of entering his appearance for a claimant or contestant or within 10 days thereafter, file written authority for such appearance, signed by said claimant or contestant, and setting forth his or her present post-office address. Upon a failure to file such written authority, it is the duty of the Register and Receiver to no longer recognize him as agent in the case.

By Department Order No. 615 issued under authority conferred by section 5 of the Act of July 4, 1884 (23 Stat. 101), promulgated March 24, 1933 (54 I. D. 194), said regulations of September 27, 1917, governing the recognition of attorneys, agents, and others to practice before the Department of the Interior and its bureaus, were amended by the addition of paragraph 8-a as follows:

8-a. No person who has been employed or has held any office or place of trust or profit in the Department of the Interior shall be permitted to practice, appear, or act as an attorney or agent in any case, claim, contest, or other proceeding before the Department or before any bureau, board, division, or other agency thereof, until two years shall have elapsed after the separation of the said person from the said service; and no attorney or agent admitted to practice before the Department shall employ or retain any such person for the purpose of making any personal appearance in any such case, claim, contest, or other proceeding, before the expiration of the said two-year period.

This order is regarded as applicable also with respect to applications to practice before the district land offices.

These laws and regulations are called to your attention because of the increasing number of cases coming to this office in which it is found that appeals, pleadings, briefs, motions, or other papers or communications are submitted in behalf of claimants to public lands by agents or attorneys who have not been admitted to practice before the Department or any of the bureaus thereof, or before the district land office in some instances.

You are instructed not to recognize as an attorney or agent any person who enters his appearance for a claimant or contestant in any case pending before you, unless you find that such attorney or agent has been admitted to practice before your office, or before the Department and its bureaus, which carries with it the right to practice before district land offices.

Reports from the Special Agent in Charge must be obtained by you on all applications for admission to practice before the district land office and reports made to this office on Form 4-285. (See Circular 947).

In case of an appeal to this office from action in the district land office, where your records fail to show the attorney or agent has been admitted to practice before the Department or its bureaus, you will decline to forward the appeal unless the attorney or agent can produce a certificate showing he has been so admitted, except as hereinafter provided.

You will allow such attorney or agent 15 days from receipt of notice within which to file an application for admission to practice before the Department and its bureaus, in which case he may exercise the rights and privileges of an admitted attorney while his application is pending, in accordance with Rule 2 of the "Laws and Regulations Governing the Recognition of Agents, Attorneys, and Other Persons to Represent Claimants before the Department of the Interior and the Bureaus Thereof." (46 L. D. 206.) With such notice you will send all necessary instructions for making application for admission to practice before the Interior Department and its bureaus, including Circular 1-367 and Form 1-281, containing form of oath required of applicants for admission to practice.

If the attorney or agent does not file an application for admission within the time allowed, you will notify the applicant or entryman thereof and allow him 30 days from notice within which to either file a personal appeal or one through an attorney or agent properly admitted to practice before the Department. If no action is taken, you will forward the papers in the case to this office for final action.

In cases where an appeal has been signed by an attorney not admitted to practice and also by the claimant, you will notify the attorney as above indicated and that if he takes no action within the time allowed, the appeal, because it is signed by the claimant, will be transmitted to the General Land Office for such action as may be deemed proper. In such cases only the claimant will be entitled to notice of action taken by this office or the Department on the appeal.

FRED W. JOHNSON,
Commissioner.

Approved:

T. A. WALTERS,
First Assistant Secretary.

EDWARD HAGLIN

Decided December 6, 1935

ISOLATED TRACTS OF PUBLIC LAND—ORDER FOR SALE—AUTHORITY OF SECRETARY—
WITHDRAWAL—"VALID EXISTING RIGHTS."

An isolated tract application upon which no order authorizing sale had been issued did not except the land applied for from the withdrawal made by the Executive order of February 5, 1935.

WALTERS, *First Assistant Secretary:*

By decision of March 4, 1935, the Commissioner of the General Land Office rejected the isolated tract application of Edward Haglin, filed August 29, 1934, for the SW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 24, T. 12 N., R. 30 W., 5th P. M., Arkansas, on the ground that, as such an application did not segregate the land involved until an order authorizing a sale had been issued and noted on the records, and as no such authorization had been issued, the Executive order of withdrawal dated February 5, 1935, had attached to said land.

The applicant filed an informal appeal.

Section 14 of the act of June 28, 1934 (48 Stat. 1269, 1274), amended Section 2455 of the Revised Statutes, and as this application was filed in August, 1934, it must be considered as having been filed under the new act. The grounds of rejection stated by the Commissioner are probably not entirely correct. In amended Circular No. 684, approved November 23, 1934 (55 I. D. 76), the Department has prescribed:

The filing of an application under the section in conformity with these regulations will segregate the lands applied for from other disposition under the public land laws, subject to any prior valid right which had attached under any pending entry or location.

It is provided in said amended Section 2455 that "it shall be lawful for the Secretary of the Interior to order into market and sell at pub-

lic auction * * * any isolated or disconnected tract * * * which, in his judgment, it would be proper to expose for sale." It thus rests in the discretion of the Secretary whether isolated tracts are to be offered for sale. In the present case there had been no determination that the land should be offered for sale at the time that the withdrawal by the Executive order of February 5, 1935, was made. That withdrawal excepted valid existing rights, but this applicant had no right to the land. He had merely requested that the tract be ordered sold. It would have been possible for some other bidder to purchase the land. The applicant had no exclusive claim thereto and the Department had not set aside or reserved the same so that it could be held to be excepted from the withdrawal.

For the reasons stated, the decision appealed from is

Affirmed.

ESTATE OF YELLOW HAIR, UNALLOTTED NAVAJO

Opinion, December 17, 1935

INDIAN PERSONAL ESTATE—DISTRIBUTION—TRIBAL CUSTOM—STATE LAWS AND DEPARTMENTAL REGULATIONS.

The personal estate of a deceased member of the Navajo Tribe should be distributed according to tribal custom, regardless of any law of the State of domicile or any regulation of the Department inconsistent therewith.

INDIAN ESTATES—INDIAN INHERITANCE LAWS AND CUSTOMS—EXTENT OF RECOGNITION.

With respect to all property other than allotments of land made under the General Allotment Act, the inheritance laws and customs of Indian tribes, except where otherwise provided by Congress, are of supreme authority, and this is clearly recognized by the Supreme Court (citing *Jones v. Meehan*, 175 U. S. 1, and other cases).

NAVAJO INDIANS—PERSONAL ESTATE—DEPARTMENTAL REGULATION OF INHERITANCE OF PERSONAL PROPERTY OF NAVAJO INDIANS.

No necessity appears on grounds of law or public policy for regulation of the inheritance of personal property of Navajo Indians, and the Department's regulations adopted May 31, 1935 (55 I. D. 263), relating to the determination of heirs and approval of wills, specifically restrict departmental supervision over the inheritance of personal property of Indians to reservations which have been allotted; also, the law and order regulations adopted November 27, 1935, provide that Indian judges shall apply tribal custom in the distribution of personal property.

MARGOLD, *Solicitor*:

The attached probate papers relating to the estate of Yellow Hair, an unallotted Navajo Indian, are referred to you [Assistant Secretary of the Interior] for special consideration in view of the importance of the issues of law and policy raised by the proposed decision.

The facts are briefly: An unallotted Navajo Indian died leaving personal property to the value of \$1,919 in addition to agency accounts amounting to \$387.50. The personal property not in the agency was distributed in accordance with tribal custom. The local stockman, Mr. Carl Beck, reports:

Judge Segeni Sosni, of Keams Canyon, was present and took charge of the distribution of this property, and whether or not he was acting in an official capacity, I can not say. However, the property was divided as is the custom with the Navajos, which is very unlike our inheritance laws. They do not regard the direct descendants as being entitled to the property, but instead, as in this case, cousins or some other relatives on the mother's side of the family who for some reason the deceased should be obligated receives large portions of the property. This is a custom which I would not try to change, in as much as the Indians involved as a rule are satisfied, and it possibly works out just as well as our laws.

The Probate Division of the Indian Office, however, recommends:

Since the distribution by the said Indian judge was not authorized by the Department, it is believed that said property so distributed should now be included as a part of the estate, and that the Superintendent should be instructed to recover the property or its equivalent, and distribute same in accordance with the Departmental order determining the heirs of the decedent.

This recommendation assumes that the inheritance of personal property of an unallotted member of the Navajo Tribe should be governed by the laws of Arizona.

I believe that this conclusion is unjustified either as a matter of strict law or as a matter of policy. On the legal question I call your attention to the following paragraphs in the opinion of this Department, approved October 25, 1934, on "Powers of Indian Tribes" (M-27781) [See 55 I. D. 14]:

* * * With respect to all property other than allotments of land made under the General Allotment Act, the inheritance laws and customs of the Indian tribe are still of supreme authority.¹

The authority of an Indian tribe in the matter of inheritance is clearly recognized by the United States Supreme Court in the case of *Jones v. Meehan* (175 U. S. 1), in which it was held that the eldest male child of a Chippewa Indian succeeded to his statutory allotment in accordance with tribal law. The court declared:

"The Department of the Interior appears to have assumed that, upon the death of Moose Dung the elder, in 1872, the title in his land descended by law to his heirs general, and not to his eldest son only.

"But the elder Chief Moose Dung being a member of an Indian tribe whose tribal organization was still recognized by the Government of the United States, the right of inheritance in his land, at the time of his death, was controlled by the laws, usages, and customs of the tribe, and not by the law of the

¹ The foregoing general analysis is inapplicable to the Five Civilized Tribes, Congress having expressly provided that State probate courts shall have jurisdiction over the estates of allotted Indians of the Five Civilized Tribes leaving restricted heirs (Act of June 14, 1918, ch. 101, sec. 1; 40 Stat. L. 606; U. S. Code, Title 25, sec. 375).

State of Minnesota, nor by any action of the Secretary of the Interior." (At page 29.)

In reaching this conclusion the Supreme Court relied upon the following cases: *United States v. Shanks* (15 Minn. 369); *Dole v. Irish* (2 Barb. [N. Y.] 639); *Hastings v. Farmer* (4 N. Y. 293, 294); *The Kansas Indians* (5 Wall. 737); *Waupemanqua v. Aldrich* (28 Fed. 489); *Brown v. Steele* (23 Kansas, 672); *Richardville v. Thorp* (28 Fed. 52).

In the case of *Jones v. Meehan*, *supra*, the tribal authority was exercised through immemorial usage. Other tribes, however, have exercised a similar authority through written laws.

In the case of *Gray v. Coffman* (3 Dill. 393, 10 Fed. Cases No. 5714), the court held that the validity of the will of a member of the Wyandot tribe depended upon its conformity with the written laws of the tribe. The court declared:

"The Wyandot Indians, before their removal from Ohio had adopted a written constitution and laws, and among others, laws relating to descent and wills. These are in the record, and are shown to have been copied from the laws of Ohio, and adopted by the Wyandot tribe, with certain modifications, to adapt them to their customs and usages. One of these modifications was that only living children should inherit, excluding the children of deceased children, or grandchildren. The Wyandot council, which is several times referred to in the treaty of 1855, was an executive and judicial body, and had power, under the laws and usages of the nation, to receive proof of wills, etc.; and this body continued to act, at least to some extent, after the treaty of 1855.

"* * * under the circumstances, the court must give effect to the well established laws, customs, and usages of the Wyandot tribe of Indians in respect to the disposition of property by descent and will."

In the case of *O'Brien v. Bugbee* (46 Kan. 1, 26 Pac. 428), it was held that a plaintiff in ejectment could not recover without positive proof that under tribal custom he was lawful heir to the property in question. In the absence of such proof, it was held that title to the land escheated to the tribe, and that the tribe might dispose of the land as it saw fit.

Tribal autonomy in the regulation of descent and distribution is recognized in the case of *Woodin v. Seeley* (141 Misc. 207; 252 N. Y. Supp. 818). In this case, and in the case of *Patterson v. Council of Seneca Nation* (245 N. Y. 433; 157 N. E. 734), the supremacy of tribal law in matters of inheritance and membership rights is defended on the ground:

"That when Congress does not act no law runs on an Indian reservation save the Indian tribal law and custom."

In the case of *Y-Ta-Tah-Wah v. Rebock* (105 Fed. 257), the plaintiff, a medicine-man imprisoned by the federal Indian agent and county sheriff for practicing medicine without a license, brought an action of false imprisonment against these officials, and died during the course of the proceedings. The court held that the action might be continued, not by an administrator of the decedent's estate appointed in accordance with state law, but by the heirs of the decedent by Indian custom. The court declared, per Shiras, J.:

"If it were true that, upon the death of a tribal Indian, his property, real and personal, became subject to the laws of the state directing the mode of distribution of estates of decedents, it is apparent that irremediable confusion would be caused thereby in the affairs of the Indians * * *." (At page 262.)

In a case involving the right of an illegitimate child to inherit property, the authority of the tribe to pass upon the status of illegitimates was recognized in the following terms:

"The Creek Council, in the exercise of its lawful function of local self-government, saw fit to limit the legal rights of an illegitimate child to that of sharing in the estate of his putative father, and not to confer upon such child generally the status of a child born in lawful wedlock." (*Oklahoma Land Company v. Thomas*, 34 Okla. 681, 127 Pac. 8).

See, to the same effect, *Butler v. Wilson*, (54 Okla. 229, 153 Pac. 823).

In the case of *Dole v. Irish* (2 Barb. 639) it was held that a surrogate of the State of New York has no power to grant letters of administration to control the disposition of personal property belonging to a deceased member of the Seneca tribe. The court declared:

"I am of the opinion that the private property of the Seneca Indians is not within the jurisdiction of our laws respecting administration; and that the letters of administration granted by the surrogate to the plaintiff are void. I am also of the opinion that the distribution of Indian property according to their customs passes a good title, which our courts will not disturb; and therefore that the defendant has a good title to the horse in question, and must have judgment on the special verdict." (At pages 642-643.)

In *George v. Pierce* (148 N. Y. Supp. 230), the distribution of real and personal property of the decedent through the Onondaga custom of the "dead feast" is recognized as controlling all rights of inheritance.

In the case of *Mackey v. Cox* (18 How. 100), the Supreme Court held that letters of administration issued by a Cherokee court were entitled to recognition in another jurisdiction, on the ground that the status of an Indian tribe was in fact similar to that of a Federal territory.

In the case of *Meeke v. Kaelin* (173 Fed. 216), the court recognized the validity of tribal custom in determining the descent of real and personal property and indicated that the tribal custom of the Puyallup band prescribed different rules of descent for real and for personal property.

On the policy question involved I can see no necessity for departmental regulation of inheritance of personal property of Navajo Indians. The recently promulgated departmental regulations relating to the determination of heirs and the approval of wills specifically restrict departmental supervision over the inheritance of personal property to reservations which have been allotted. (Sections 13 and 22.) Likewise, the recently approved law and order regulations provide that Indian judges shall apply tribal custom in the distribution of personal property.

I therefore recommend that instead of returning this case for the purpose of redistributing in accordance with Arizona law the personal property which has been distributed in accordance with tribal custom, it should be returned so that the entire estate may be distributed in accordance with tribal custom. The Examiner of Inheritance should take testimony as to such customs of inheritance, in their application to the facts of this case, and submit a revised order determining heirs for departmental approval.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

JOHN ROBERTS

Decided December 19, 1935

MINING CLAIM—LOCATION—SECTION 2332, REVISED STATUTES.

Subject to the exception embodied in section 2332 of the Revised Statutes, the rule is well settled that the right of possession to a mining claim results only from a location made in conformity with the mining laws.

MINING CLAIM—TITLE UNDER SECTION 2332, REVISED STATUTES—REQUISITES—VALID POSSESSION.

Section 2332 of the Revised Statutes, which provides that where a mining claim has been held and worked for a period equal to the time prescribed by the local State or Territorial statute of limitations for mining claims, evidence of such possession and working for such period shall be sufficient to establish a right to a patent, in the absence of any adverse claim, contemplates valid possession of the land, and is without application where the land is at the time within a railroad grant or otherwise not subject to mining location.

MINING CLAIM—LOCATION—VOID AB INITIO—INCURABLE DEFECT.

An attempted mining location absolutely void when made, because upon land to which the United States was without title, is not later rendered valid by reason of the revestment of title in the United States followed by the opening of the land to location under the mining laws.

MINING CLAIM—VOID LOCATION—ELEMENTS ESSENTIAL TO POSSESSORY TITLE—FEDERAL WATER POWER ACT.

Mere possession and working under a void mining location for a period insufficient to acquire a possessory title under the provisions of section 2332, Revised Statutes, is insufficient to prevent the operation of the Federal Water Power Act.

MINING CLAIM—OREGON AND CALIFORNIA RAILROAD LANDS—REVESTMENT OF TITLE IN UNITED STATES—POWER SITE LANDS.

The provisions of section 3 of the Act of June 9, 1916 (39 Stat. 218), revesting in the United States title to lands forfeited by the Oregon and California Railroad Company, expressly refrained from extending the mining laws to power site lands.

WALTERS, First Assistant Secretary:

John Roberts has appealed from a decision of the Commissioner of the General Land Office dated April 26, 1935, which held his application (Roseburg 021718), filed December 7, 1934, for patent to the Iron Dike and Iron Prince lodes for rejection subject to the right to show discovery of mineral on that part of the claims not in lots 2 and 3; Sec. 3, T. 12 S., R. 3 E., W. M.

L. D. Probst has filed a motion to dismiss the appeal on the ground that no notice of appeal was served on him. Probst filed a protest alleging an interest in the land covered by the Iron Prince under another location but filed no adverse claim during the period of publication of the application. He also alleged invalidity of the

claims of Roberts upon several grounds. In the decision of the Commissioner the protest of Probst was dismissed on the ground that he had no interest that he could protect by contest and that the other matters alleged were such as the Commissioner was in duty bound to determine irrespective of a protest. The basis for dismissal appears sufficient. Probst did not appeal. He is not therefore entitled to notice of applicant's appeal. His motion is denied.

The plat of mineral survey of claims (No. 841) shows the Iron Dike and Iron Prince cover parts of lots 2 and 3, Sec. 34, T. 11 S., R. 3 E. and parts of lots 1, 2, and 3, Sec. 3, T. 12 S., R. 3 E. These claims were located January 3, 1927. The Iron Prince was amended June 28, 1930. All of Sec. 3 was patented to the Oregon and California Railroad Company on May 7, 1896, title to which reverted in the United States under the Act of June 9, 1916 (39 Stat. 218). Lots 1 and 2 were included in Power Site Withdrawal No. 661 on December 12, 1917. Pursuant to the authority in section 24 of the Federal Water Power Act, on July 24, 1931, the Federal Power Commission determined that the value of the land in such lots would not be injured or destroyed for purposes of power development by location, entry, or selection under the public land laws, and on April 10, 1935, the Secretary declared such lands subject to location and entry subject to the provisions of section 24 of said act.

Roberts, in substance, alleges that he located the Iron Dike lode in October 1903, properly marked the boundaries, and posted his notices of location thereof at that time, and on November 23, 1903, recorded his location notice and made discovery of a vein or lode in place, while the land was owned by the railroad company, under the belief that the mineral lands within the grant were reserved to the Government; that when title to the land was reverted in the United States by the Act of June 9, 1916, he was in actual, quiet, and undisturbed possession of the Iron Dike and Iron Prince quartz mines with boundaries marked and notices posted, under the belief that he was the owner of said claims and that such claim and possession were continuous without adverse claim until the location aforesaid of January 3, 1927, and that applicant has held and worked said claims and has been in exclusive possession of said claims ever since and has expended more than \$2,750 in developing and improving the same.

Applicant admits that between the date of the locations in 1903 and 1927 he did not post on the claims any formal notices of location and did not record such notices, but contends that, by virtue of his continuous, exclusive, and adverse possession of the ground within the claims for a period of more than 10 years, equal to the time under which one may acquire title by adverse possession to real

property in the State of Oregon (Sec. 1-202, Oregon Code of 1930), he is entitled to the benefits of section 2332, Revised Statutes, which provides that where a person or association of persons and their grantors have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to patent in the absence of any adverse claim.

The applicant expresses his willingness, however, to take patent subject to the provisions of section 24 of the Federal Water Power Act.

The Commissioner, speaking of the locations in 1927 and 1930 upon which the application for patent was based, held that lots 1 and 2, Sec. 3, being in Power Site Withdrawal No. 661, were not then subject to location; that—

The restoration of the land subject to section 24 of the Federal Water Power Act having been made April 10, 1935, long after the location of said claims, did not validate such locations which, as they were made upon land not subject thereto, were absolutely void and could not thereafter acquire validity under any circumstances. Therefore the application based upon the above locations is a nullity to the extent it covers land in lots 1 and 2, section 3.

Speaking of the location in 1903, the Commissioner held that as the location was made before revestment of title in the United States, the location was void,

and no valid rights could be predicated on them, and no attempt was shown to have been made to initiate a valid possessory title to the claims by location during the period between the date of revestment in the United States of title to the land, and the date of its withdrawal for power-site purposes, the only period since May 7, 1896, the date of patent to the railroad company, that the land was subject to location under the United States mining laws; that as the claimed discoveries were within the power site withdrawal, the remainder of the claim was properly rejected, with right to show that discoveries had been made on portions of the claims outside the power site withdrawal. It was further held that as possession was based upon an invalid location, section 2332, Revised Statutes, had no application.

It is needless to inquire whether under the then prevailing practice the patent to the railroad grantee contained an exception of mineral land. Such exception inserted in the patent was without authority of law, the patent conveying an absolute title in the absence of fraud. *Burke v. Southern Pacific R. R. Co.* (234 U. S. 669, 701); *Joseph E. McClorry* (50 L. D. 623).

Under the provisions of section 2 of the revestment act of June 9, 1916, the lands the railroad grantee forfeited thereunder were to

be classified into three classes: (1) Power sites, (2) Timberlands, and (3) Agricultural lands. As to power-site lands it was provided that they "shall be subject to withdrawal and such use and disposition as has been or may be provided by law for other public lands of like character." By section 3 of said act it was provided:

That the classification provided for by the preceding section shall not operate to exclude from exploration, entry, and disposition, under the mineral-land laws of the United States, any of said lands, except power sites, which are chiefly valuable for the mineral deposits contained therein, and the general mineral laws are hereby extended to all of said lands, except power sites.

For the declared purpose of carrying out the provisions of the revestment act and to protect the interests of the Government, the railroad, and the public, all of the odd-numbered sections within the primary and indemnity limits of the former grant and not excepted by the terms of the act were by Executive order of July 31, 1916, under the authority of the Act of June 25, 1910 (36 Stat. 847), as amended by the Act of August 24, 1912 (37 Stat. 497), withdrawn from settlement, entry, or other disposition until otherwise directed, excepting, however, from the force of the withdrawal any land embraced in a prior claim existing at the date of the order, so long as the said claim should be maintained in accordance with the law and regulations whereunder it was asserted. The act as amended furthermore left open the appropriation of the land under the mining laws so far as the same applied to metalliferous minerals.

As above stated, the land was classified and included in Power Site Withdrawal No. 661, which was in force when the land became subject to the Federal Water Power Act of June 10, 1920 (41 Stat. 1063). Unlike the Act of 1910 as amended, the Federal Water Power Act made no exception in favor of mineral location (*Coeur D'Alene Crescent Mining Company*, 53 I. D. 531, 537), but section 24 thereof contained the proviso:

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 and patent under and subject to the limitations and conditions in this section contained.

In so far as the locations of 1927 and 1930 are concerned, the applicant acquired no rights thereby (*Coeur D'Alene Crescent Mining Co.*, *supra*), nor on restoration of the land as provided by section 24 of the Water Power Act is he entitled to a preference right or to preferential treatment (Instructions, 47 L. D. 595, 597). The question remains then, whether he had a location prior to said act under prior laws as above set forth, which he is entitled to perfect, irrespective of, or subject to, the Federal Water Power Act. It is

clear that the location made in 1903 upon land to which then the United States had no title, was absolutely void, and in view of the provisions of section 3 of the revestment act above set forth, which expressly refrained from extending the mining laws to power site lands, notwithstanding the subsequent withdrawal under the act that permitted metalliferous mining location, it may be seriously doubted whether there was any interval of time between the date of the revesetment act and the date of restoration from the power site withdrawal when rights to minerals could be initiated. (See *Dawley Clay Products Company*, on rehearing 48 L. D. 431.) But assuming without conceding the correctness of the holding in the case of *Walter W. Hall et al.* (50 L. D. 656), that a mining location made during the period of the withdrawal of July 31, 1916, and the creation of power site reserve of December 12, 1917, could be retroactively validated by the proviso above quoted in section 24 of the Federal Water Power Act, it still seems clear that no location was made nor any possessory right acquired to the lands within the claims during such period.

Section 2324, Revised Statutes, makes the manner of locating mining claims and recording them subject to the laws of the State or Territory and the regulations of each mining district, when they are not in conflict with the laws of the United States. *Kendall v. San Juan Silver Mining Company* (144 U. S. 658, 664). The rule is well settled that the right of possession to a mining claim comes only from a valid location; that mere possession not based upon a valid location does not prevent another from peaceably entering the land and effecting a valid location. Lindley on Mines, sections 216 to 219. The exception to this rule is where the claimant and his predecessors in interest have held and worked the claim for the period prescribed in section 2332, Revised Statutes, which holding and working are the legal equivalent of proof of acts of location, recording, and transfer. *Cole v. Ralph* (252 U. S. 286, 305).

Assuming as above stated that there was an interval between July 9, 1916, when title revested in the United States, and June 10, 1920, when the Federal Water Power Act became operative, when a location under the mining laws could be made of the land, the fact is that Roberts made no location within that time. He merely continued in possession, maintaining and operating the claim. His possession during this interval was not sufficient in length to acquire any possessory title under section 2332, and therefore insufficient to prevent the operation of the Federal Water Power Act. The facts bear a close analogy to the facts in the *Kendall* case above cited. There plaintiffs located the Bear lode September 3, 1872, while the

land was within the Ute Indian Reservation. The reservation was extinguished in March 1874, and defendant made his location of the same land August 29, 1874. Plaintiff made no record of his claim until October 1878. The law of Colorado required the discoverer of a lode to record his claim within three months from the date of discovery. The plaintiffs contended that "The fact of their remaining in possession and maintaining and operating the claim, and thereby adopting all that had been done, was just as efficacious as making a new location." (p. 661.)

The court said:

As they (the plaintiffs) failed to comply with the law in making a record of the location certificate of their lode; it does not lie with them to insist upon their wrongful entry upon the premises during the existence of the Indian reservation operated in their favor against parties who went upon the premises after they had become a part of the public domain, and made a proper certificate and record thereof, and complied in other particulars with the requirements of law.

Under the doctrine of this case there was no location initiated by mere possession that prevented a valid location of the land as public domain, and it is believed that the applicant herein had no location that defeated the classification and withdrawal of the land for a power site, or a location within the saving clause of the proviso to section 24 of the Federal Water Power Act.

The Commissioner's decision must be and is hereby

Affirmed.

GRAZING REGULATIONS, INDIAN TRIBAL LANDS

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, D. C., December 28, 1935.

AUTHORIZATION

It is within the authority of the Secretary of the Interior to protect Indian tribal lands against waste. Over-grazing, which threatens destruction of the soil, is properly considered waste. Subject to regulations authorized by law, the right exists for Indian tribes and individual Indians to lease or grant permits upon their own tribal land or individual allotments. The following statutory authorities are cited: Act of March 3, 1849 (9 Stat. 395); R. S. Sec. 441; 5 U. S. C. 485. Act of February 28, 1891, Sec. 3 (26 Stat. 795); 25 U. S. C. 397. Act of July 4, 1884, Sec. 1 (23 Stat. 94); 25 U. S. C. 195. Act of August 15, 1894, Sec. 1 (28 Stat. 305); 25 U. S. C. 402.

Act of June 7, 1897 (30 Stat. 85).

Act of May 31, 1900, Sec. 1 (31 Stat. 229); 25 U. S. C. 395.

Act of June 25, 1910, Sec. 4 (36 Stat. 856); 25 U. S. C. 403.

Act of May 18, 1916, Sec. 1 (39 Stat. 128); 25 U. S. C. 394.

Act of June 30, 1919 (41 Stat. 9); R. S. Sec. 2138; 25 U. S. C. 214.

Act of March 3, 1921, Sec. 1 (41 Stat. 1232); 25 U. S. C. 393.

Revised Statutes, Sec. 2127; 25 U. S. C. 192.

Act of February 15, 1929 (45 Stat. 1185); 25 U. S. C. 231.

Revised Statutes, Sec. 465; 25 U. S. C. 9.

With respect to reservations upon which the Act of June 18, 1934 (48 Stat. 984), is applicable, the action of the Secretary must follow the directions laid down in Section 6 of that act:

SEC. 6. The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

OBJECTIVES

It is the purpose of these regulations to aid the Indians in the achievement of the following objectives:

I. The preservation, through proper grazing practice, of the forest, the forage, the land, and the water resources on the Indian reservations, and the building up of these resources where they have deteriorated.

II. The utilization of these resources for the purpose of giving the Indians an opportunity to earn a living through the grazing of their own livestock.

III. The granting of grazing privileges on surplus range lands not needed by the Indians in a manner which will yield the highest return consistent with undiminished future use.

IV. The protection of the interests of the Indians from the encroachment of unduly aggressive and anti-social individuals.

REGULATIONS

The following grazing regulations are hereby made effective as of the date of approval hereof, for all Indian lands under the jurisdiction of the Office of Indian Affairs, except as these regulations may be superseded by special instructions to particular reservations or by provisions of any tribal constitution, by-laws, charter, heretofore or hereafter ratified, or any tribal action authorized thereunder.

1. The Commissioner of Indian Affairs will prescribe the maximum number of stock to be grazed on all Indian range lands. The number of stock authorized for each reservation will be based upon the most reliable estimate of the total carrying capacity which may be allowed without risking range deterioration. Any allotment may be used by the allottee for grazing or other purposes independently of the foregoing, but in case the use made thereof may threaten trespass upon or deterioration of adjacent Indian range lands that fact shall be submitted promptly by the Superintendent of the reservation for consideration and action by the Secretary of the Interior.

2. The conservation and effective utilization of grazing resources require a suitable division of the range area into range units. Such division shall be effected under the direction of the Superintendent and the Regional Forester, after consultation with the Indians, in accordance with the requirements of range management, land status, and Indian needs.

3. The total carrying capacity of each range unit will be expressed in terms of animal months, and such figures will be equivalent to the number of animals which may safely graze on a unit without risking deterioration multiplied by the average number of months of the season. In determining the carrying capacity of range units, alienated lands of any character, areas closed to grazing, allotted lands for the use of which the allottee has not given his consent, and fenced allotments excluded from range units should not be considered, except where arrangements have been made with the owners of alienated lands for a joint use. All livestock, regardless of ownership, and inclusive of wild horses and burros, will be counted against the total number of stock authorized for Indian lands under the jurisdiction of each agency.

4. It will be the duty of the local officials on each reservation to prepare and keep current a register containing the names of all users of the range, the number of each kind of stock being grazed, the carrying capacity of each grazing unit, the periods when grazing should be permitted, and the fees paid. Reports embodying these facts and other information will be submitted to the Commissioner of Indian Affairs and the Regional Forester. An annual stock census will be taken to insure that the carrying capacity fixed by the Commissioner is not being exceeded.

5. On reservations where sufficient contiguous tribal land is available, free grazing privileges may be granted to Indians. The number of livestock which may be grazed free of charge by any individual shall not exceed the number obtained by dividing the estimated

carrying capacity of the tribal range by the total enrollment on the reservation. A family may be granted free grazing privileges for a number of livestock not exceeding the number accruing to each individual member thereof times the number of members in the family. A stock association may be granted free grazing privileges for a number of livestock not exceeding the number accruing to each individual times the number of individuals included in the families belonging to the livestock association. Such free grazing privileges or any fraction thereof shall only be granted if they are authorized by the Indians in general council or their duly authorized representatives. Free grazing privileges thus determined may be commuted for other free land-use privileges or *vice versa*. No free grazing privileges may be allowed on allotted lands unless the allottee consents. Free grazing privileges on tribal lands within the boundaries of any unit shall not exceed the carrying capacity of the tribal lands in that unit.

6. Grazing privileges may be sold for all Indian land, other than tribal land required to meet the Indian free grazing privileges, provided that authority to do so has been granted in the following manner.

(a) Authority to sell grazing privileges on tribal lands shall be granted by a majority vote of the Indians in general council or their duly authorized representatives.

(b) Authority to sell grazing privileges on allotted land may be granted by the allottees, except those classes hereinafter described in subsections (c) and (d), by means of "Powers of Attorney" or "Authorities to Grant Grazing Privileges." In unorganized tribes these instruments may be made out to the Superintendent or to any tribal body that may be authorized by the Commissioner of Indian Affairs to receive such instruments. In organized tribes such instruments may be accepted by any tribal agency or officer authorized under the constitution, by-laws, and charter of the tribe, to receive the same, or by the Superintendent.

(c) Authority to grant grazing privileges on the allotments of minors, other than orphans, shall be given by the head of the family.

(d) The Superintendent shall have the authority to grant grazing privileges on the allotments or fractions thereof owned by orphan minors, Indians *non compos mentis*, inherited allotments where the heirs have not been officially determined, and inherited allotments after the heirs have been determined where a majority in interest of such heirs consent to the granting of grazing privileges.

(e) The person or persons granting the authority to sell grazing privileges shall also determine the minimum rate which will be accepted for the land over which he has authority.

7. Indian families, as defined in Section 21, who wish to run livestock in numbers not exceeding 250 head of cattle or 1,250 head of sheep, or a combined equivalent thereof in these proportions, may obtain grazing permits requiring payment therefor at rates not less

than those required by the provisions of Section 8. Indian families obtaining such permits will not be required to enter the open competitive market to secure grazing privileges. Indian families who wish to run more than 250 head of cattle or 1,250 head of sheep will be required to enter the open competitive market for their entire holdings, except those for which they may receive free grazing privileges.

8. The total appraised rates for an entire unit, whether charged to Indian graziers or incorporated as a minimum in advertisements for competitive bidding, cannot be less than the sum of what the allottees will get for their allotted lands and the tribe for the tribal lands according to the rates established as heretofore described; provided that if the Indians in general council or their duly authorized representatives allow free grazing privileges on tribal lands the total appraised value of the tribal range units shall be reduced accordingly to Indian graziers; provided further that the person authorized to award grazing privileges, as determined in Section 10, shall have authority to eliminate single allotments or small groups of allotments from a range unit if the rates established by the allottees are unreasonably high and the inclusion of such tract or tracts will jeopardize the sale of grazing privileges for the entire unit.

9. All surplus range units in which the sale of grazing privileges on the majority of the area has been authorized, as provided in Section 6, shall be advertised for sale of grazing privileges and proposals received under sealed bids, unless otherwise directed by the Commissioner of Indian Affairs. At least thirty days prior to any advertisement for the sale of grazing privileges under this competitive system, the Indians in general council or their duly authorized representatives, with the advice of the Superintendent and the Regional Forester, shall determine the following:

(a) The allocation of range units to Indian permittees and the rate upon which such allocations are authorized, provided that such rates shall yield an income on the unit at least sufficient to pay the allottees the minimum rental stipulated in the "Powers of Attorney" or the "Authorities to Grant Grazing Privileges";

(b) The class or classes of livestock which will be allowed to graze on each range unit;

(c) The average minimum rate per head which will be charged for tribal lands and recommended to the allottees for their lands;

(d) The number of years for which grazing privileges are to be authorized under both allocation and advertisement, subject to the maximum of five years prescribed by law, and subject further to the limitation that the period authorized must enable all permits to expire at the same time;

(e) The number of livestock which may be grazed free of charge by any individual, subject to the limitations of Section 5;

(f) Whether or not Indians shall be granted the privilege of meeting the high bid on ranges for which they compete;

(g) Whether or not the previous permittee shall be given the privilege of meeting the high bid on a given unit, and if so whether or not this shall be given precedence over Indian preference.

The matters determined at this meeting will be entered in the official minutes thereof, and the action taken will be final for the period concerned, unless authority to alter such action is granted by the Commissioner of Indian Affairs. A copy of the minutes of the meeting, a schedule of the allocations to the Indian permittees, a schedule of units authorized for advertisement, a copy of the form of advertisement, and a map showing the location of all range units shall be submitted to the Commissioner of Indian Affairs and to the Regional Forester within one week after the close of this meeting.

10. The sale of grazing privileges shall be advertised six months in advance of the expiration of existing permits. The minimum rate to be incorporated in the advertisement shall not be less than the one determined by the method provided in Section 8. The period of advertisement shall be thirty days, and proposals must be received under sealed bids unless otherwise authorized by the Commissioner of Indian Affairs. Proposals must be accompanied by a cashier's check, certified check, or draft drawn upon some solvent bank, payable to the Superintendent, for not less than 10 percent of the amount of the grazing fees due for the first year at the rate bid. Grazing privileges shall be awarded to the highest bidder, except when it appears to the person authorized to award such privileges that the best interests of the Indians would not be served by awarding the privilege to such bidder. Then the high bid shall be rejected and the second high bid given consideration, provided that Indians who compete on a given unit and former permittees may be given the privilege of meeting the high bid if the Tribal Council so decided previous to the advertisement. In unorganized tribes grazing privileges may be awarded by the Superintendent or other person or persons authorized to act by the Commissioner of Indian Affairs, and authority to reject the high bid may be granted to the same person or persons subject to the concurrence of the Regional Forester. In organized tribes these duties shall be performed by the person or persons duly authorized to grant grazing privileges.

11. Grazing privileges on range units shall be awarded through the medium of permits, executed in quintuplicate. Range control stipulations have been prepared to control the use of the range and shall be incorporated in and made a part of each grazing permit. A schedule of the allotted lands within the grazing unit and the amount to be paid on each allotment shall also be attached to and made a part of the permit.

12. Permits for unorganized tribes may be issued by the Superintendent or other authorized person or persons with the concurrence of the Regional Forester. Permits for organized tribes will be issued by the person or persons duly authorized to grant grazing privileges. In case of nonconcurrence an appeal may be taken to the Commissioner. Upon issuance, a copy of each permit executed will be forwarded promptly to the Commissioner of Indian Affairs and to the Regional Forester for their information and files. Any permit, by whomsoever issued, may be cancelled by the Commissioner of Indian Affairs when necessary for the conservation of the range. Any permit may also be modified in such manner as may be required for range conservation, subject to the provisions of Section 14.

13. Permits must provide that grazing fees shall be paid annually or semiannually in advance. All annual permits must be paid fully in advance. For longer permits, full performance shall be guaranteed by an acceptable corporate surety or other satisfactory bond in a penal sum of not less than the total payment due in any one year under the terms of the permit. However, the Superintendent, with the concurrence of the Regional Forester, may in his discretion waive the bond requirement for permits issued to Indian livestock associations, provided that the members of such associations brand their livestock with the government I. D. brand, sign agreements to sell such livestock in accordance with the regulations, and authorize the Superintendent to deduct from the proceeds of such sales sufficient funds to pay the grazing fees on their livestock grazed under permit. In lieu of corporate surety or other satisfactory bond a permittee who is given a permit for a longer period than one year may pay his grazing fees annually in advance and in addition deposit at the time of the first payment one half of the annual grazing fees to be held as a cash penal bond. This amount may be applied to grazing fees due for the last six months of the grazing permit. Except for the first year, the grazing fees will be due and payable at least three months prior to the commencement of each annual period of the grazing permit.

14. No permit shall be assigned, sublet, modified, or transferred without the written consent of the contracting parties, of the sureties, and of the officials approving the original permit; provided that nothing herein shall be construed as preventing the Commissioner of Indian Affairs from taking any action necessary, without further consent of the parties, properly to regulate the range so as to prevent its deterioration. A copy of each assignment, subletting, modification, or transfer shall be promptly forwarded to the Commissioner of Indian Affairs.

15. Nothing contained in the foregoing sections relating to the issuance of permits by Superintendents or other authorized persons shall preclude any Indian tribe, individual, or group of individuals from leasing land for grazing purposes in accordance with law, without the use of powers of attorney. Any such lease shall contain proper clauses restricting the number of livestock grazed to the proper carrying capacity of the leased land, and otherwise safeguarding the interests of the lessors and other Indians of the reservation, and shall be submitted to the Superintendent of the Reservation and the Regional Forester for approval prior to execution, provided the leasing of such lands does not interfere with a balanced use of the range of the whole reservation.

16. On-and-off grazing permits will be granted to persons owning livestock which will graze on a range unit where only a part of such unit is Indian land. This permit will be granted for the total number of livestock to be grazed on the entire unit, but the permittee will be required to pay grazing fees only for the estimated carrying capacity of the Indian lands involved.

17. "Every person who drives or otherwise conveys any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of \$1.00 for each animal of such stock. This section shall not apply to Creek lands" (25 U. S. C., Sec. 179).

Under the foregoing statute any Indian tribe may, with the approval of the Superintendent, grant a crossing permit to persons wishing to drive stock across any part of an Indian reservation and charge therefor such fees as it deems proper.

18. Whenever livestock on Indian lands become infected with contagious or infectious diseases, or has been exposed thereto, it must be dipped or treated and the movement thereof restricted to such extent as may be necessary to control and eradicate the disease.

19. The Act of February 14, 1920 (41 Stat. 415; U. S. C., p. 720, sec. 413), provides:

That hereafter in the sale of all Indian allotments, or in leases, or assignment of leases covering tribal or allotted lands for mineral, farming, grazing, business, or other purposes, or in the sale of timber thereon, the Secretary of the Interior be, and he is hereby, authorized and directed, under such regulations as he may prescribe, to charge a reasonable fee for the work incident to the sale, leasing, or assigning of such lands, or in the sale of the timber, or in the administration of Indian forests, to be paid by vendees, lessees, or assignees, or from the proceeds of sales, the amounts collected to be covered into the Treasury as miscellaneous receipts.

Under authority of this act a fee must be paid to the agency by the permittee to cover the approximate estimated cost to the Gov-

ernment of preparing and issuing the permit. If the total payment to be made under a permit does not exceed one hundred dollars, the fee will be one dollar; if the total payment under the permit will exceed one hundred dollars but not exceed two hundred and fifty dollars, the fee will be two dollars and fifty cents; and if the total payment under the permit will exceed two hundred and fifty dollars, the fee will be five dollars.

20. Request for court action on permits to collect delinquent payments, damages, etc., shall be made by the Superintendent directly to the United States Attorney, accompanied by a copy of the permit. If, thereafter and prior to the actual filing of the case in court, the payment is made, the United States Attorney should be advised immediately. When a compromise is offered after suit has been filed, whether before or after judgment, the Superintendent should submit the matter to the United States Attorney. If the amount due is \$500 or less and the United States Attorney approves, the Superintendent, with the approval of the interested Indians, may accept the compromise. However, if it is over \$500, the Superintendent should refer the case with recommendations to the Commissioner of Indian Affairs for further action. All compromise offers must be exclusive of costs. Copies of all letters from a Superintendent to the United States Attorney should be forwarded promptly to the Commissioner of Indian Affairs and to the Regional Forester and a report of the final disposition of the case should be made.

21. In the event of a nonconcurrence between the Superintendent and the Regional Forester with respect to any matters pertaining to the granting of grazing privileges in which joint authority is vested in these officers, such matters shall be referred to the Commissioner of Indian Affairs for final decision.

22. The following definitions shall apply wherever used in these regulations: The term "Regional Forester" refers to the officer in charge of a regional forestry office or any of his subordinates whom he authorizes in writing to act for and in behalf of himself. The term "Superintendent" refers to the officer in charge of an Indian agency or any of his subordinates whom he authorizes in writing to act for and in behalf of himself. An "Organized Tribe" refers to a tribe organized under the provisions of the Indian Reorganization Act (48 Stat. 984). An "Unorganized Tribe" is one not so organized. A "family" comprises all persons occupying a single habitation, or living in a single domestic group, whatever the age or relationship of the persons may be; provided that the Indians in general council or their duly authorized representatives may determine

in cases of doubt who are members of a given family; provided that such determination may be appealed by any aggrieved Indians to the Commissioner of Indian Affairs; provided further, that the Indians in general council or their duly authorized representatives, subject to the approval of the Commissioner of Indian Affairs, may establish a different definition of a family, which must be generally applicable to all Indians of a reservation.

JOHN COLLIER,

Commissioner of Indian Affairs.

Approved:

OSCAR L. CHAPMAN,

Assistant Secretary of the Interior.

AMENDMENT OF EXECUTIVE ORDER NO. 6910, OF NOVEMBER 26, 1934, AS AMENDED, WITHDRAWING PUBLIC LAND IN CERTAIN STATES

EXECUTIVE ORDER

By virtue of and pursuant to the authority vested in me by the act of June 25, 1910, ch. 421, 36 Stat. 847, as amended by the act of August 24, 1912, ch. 369, 37 Stat. 497, Executive Order No. 6910, of November 26, 1934, as amended, withdrawing public land in certain States, is hereby further amended by excluding from the operation thereof all lands which are now, or may hereafter be, included within grazing districts duly established pursuant to the provisions of the act of June 28, 1934, ch. 865, 48 Stat. 1269, so long as such lands remain a part of any such grazing district.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,

January 14, 1936.

TED L. HAMMER

Decided January 23, 1936

ISOLATED TRACT—APPLICATION TO PURCHASE—LAND WITHIN GRAZING DISTRICT.

Land which was withdrawn in October 1934, for a proposed grazing district and was included in a grazing district established in April 1935, was not subject to sale under an isolated tract application filed in July, 1933.

WALTERS, *First Assistant Secretary:*

By decision of March 28, 1935, the Commissioner of the General Land Office rejected the isolated tract application of Ted L. Hammer, filed July 12, 1933, for the E $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 28, T. 13 S., R. 102

W., 6th P. M., Colorado, for the reason that Executive Order No. 6910 of November 26, 1934, withdrew all public lands in Colorado, subject to existing valid rights, and that by the mere filing of an application to purchase, under the Isolated Tract Law, an applicant acquired no right to the land applied for which would bring him within the protecting clause of the withdrawal.

The applicant appealed, contending that he had a right to the land because his filing preceded the withdrawal, and stating that he was willing to have his application considered under section 14 of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269).

It is shown that the land in question is within the former Ute Indian Reservation, and that it was temporarily withdrawn by the Secretary of the Interior on September 19, 1934, "from disposal of any kind, subject to any and all existing valid rights until the matter of their permanent restoration to tribal ownership, as authorized by section 3 of the Act of June 18, 1934 (48 Stat. 984), can be given appropriate consideration."

It is also shown by the records of the General Land Office that the township involved was withdrawn on October 9, 1934, for the proposed Grand Valley Grazing District, and that it has been included in Grazing District No. 3, established April 8, 1935.

The Commissioner correctly held that the mere application to purchase was not a segregation of the land which prevented the Government from withdrawing the same for a public purpose. The withdrawals having been made and the land being now a part of an established grazing district, said land cannot now be sold, even though isolated tracts may now be sold under section 14 and leased under section 15 of the Taylor Grazing Act.

The decision appealed from is

Affirmed.

HARLEY R. BLACK

Decided January 30, 1936

WITHDRAWAL OF PUBLIC LAND—VALID EXISTING RIGHTS OF STATE IRRIGATION DISTRICT—LIEN OF DISTRICT—EXEMPTION FROM WITHDRAWAL.

Public land included in a State irrigation district and burdened with an obligation to pay a proportionate share of irrigation charges is unaffected by the withdrawal order of November 26, 1934, which order declares its operation as a land withdrawal is subject to "existing valid rights."

WALTERS, *First Assistant Secretary:*

May 24, 1932, Harley R. Black made homestead entry (Phoenix 072011) for lots 13 and 14, Sec. 1, T. 6 S., R. 3 E., G. & S. R. M. In

order that the numbers of the lots should conform to a supplemental plat of survey, the description thereof was changed to lots 14 and 15, Sec. 1, T. 6 S., R. 3 E. On April 23, 1934, final proof was submitted, and final certificate issued May 22, 1934.

By decision of June 10, 1935, the Commissioner of the General Land Office held the entry for cancelation for the reason that the land was embraced in the prior patented entry (Phoenix 043395) of Jacob C. Lambert. It appears that Lambert obtained a reissued patent describing lots 14 and 15, but the same was not noted on the tract book of the local office, so that the land appeared to be opened to entry at the time of Black's filing.

July 11, 1935, Black filed an application for amendment of his entry to include in lieu of said lots 14 and 15 aforesaid, the NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 21, T. 6 S., R. 8 E., G. & S. R. M., accompanied by his duplicate final certificate and other papers. A prior desert entry covering this tract was canceled September 7, 1934.

By decision of September 3, 1935, the Commissioner held:

In view of the fact that the land in the application to amend is included in the Randolph Irrigation District, withdrawn under the act of August 11, 1916, and that this land was temporarily withdrawn by Executive order of November 26, 1934, the entryman never having resided or placed improvements thereon, said application to amend is hereby held for rejection subject to appeal to the Secretary of the Interior.

The entryman was allowed to show cause why his application should not be rejected, or to appeal. He appealed.

The record shows that the land was formerly included in a withdrawal for the San Carlos Irrigation Project, which was revoked July 12, 1928. The land was not restored for the reason that it was included in a withdrawal for resurvey, plat of which was accepted in 1930. July 1, 1931, a map of the Randolph Irrigation District was approved by the Department, the land here involved being included in the district, thus making the public lands within said district subject to entry and the entered lands upon which no final certificate had been issued subject to the provisions of the Act of August 11, 1916 (39 Stat. 506).

By the terms of such act, upon such approval, all public lands therein were made subject to the provisions of all of the laws of the State relating to organization, government and regulation of irrigation districts to the same extent as private lands. The cost of the irrigation works are to be apportioned equally against all lands, public and private, and all charges thus legally assessed "shall be a lien upon unentered lands and upon lands covered by unpatented entries included in said irrigation district." This lien may be enforced upon lands in unpatented entries by sale. In order to be

entitled to such lien the district must submit a map or plat and receive the approval of the Secretary of the Interior, as provided in section 3 of the act. Such approval devotes the land to the purposes of the act. It is expressly provided that the Secretary may, upon the expiration of ten years from the date of his approval, *release* from the lien any public lands for which irrigation works have not been constructed and water of such district not made available for the lands. If the necessary works have been constructed and water made available, there is no authority to *release*; and until the lands have been so released, they are subject to the interest acquired therein by the irrigation district and the lien imposed thereon resulting from the cost of irrigation development, similarly as lands reserved and embraced in Federal reclamation projects.

Section 5 of the said Act of August 11, 1916, provides that tax assessments against unentered lands in such irrigation district *shall be and continue a lien* upon such lands, and may be entered only upon payment of such charges and in such manner as therein provided. Section 6 provides that entered but unpatented lands therein may be sold to satisfy the irrigation assessments and may be patented to the purchaser. The irrigation district is given the privilege of bidding in the lands at such sale with a view to transferring them to individuals.

It appears that prior to the approval of the map of the district a bond issue in the sum of \$625,000 was authorized and district taxes were levied (letter "F", Phoenix 068235, June 29, 1931). Under the State law (Chap. 81, Revised Code, 1928, Article 2) all holders of land in the district are assessed their proportionate share of the bonded indebtedness, although the lien does not attach to the land until the title is complete. The bonds are to be paid out of the revenues derived from the assessment and levy of taxes, which are to be at a uniform rate. Both the entered and unentered public lands are subject to assessment and levy to the extent authorized by the Act of August 11, 1916. While the land is not bonded until the title to the land is complete, the owner of such incomplete title is required to pay his proportionate share of other assessments.

The last paragraph of section 6 of the Act of August 11, 1916, plainly recognized the right of the irrigation district to collect charges it had theretofore assessed against lands within entries canceled, by requiring the subsequent applicant to show they are satisfied before being allowed to enter the land, and that such lands should be subject to such reentry.

It seems clear that a withdrawal of the lands from entry in the district results in a reduction in the quantity of land from which

such prospective revenue may be anticipated for the payment of bonds and other expenses of the district and also diminishes the security behind the bonds.

It renders unavailable possible sources of revenue, contemplated by the law, reliance upon which was placed when the enterprise was undertaken. It seems, therefore, that the irrigation district had valid existing rights in the land at the date of the withdrawal of November 26, 1934, one of such rights being that the land remain free for the initiation and acquisition of title under the public-land laws in order that it would become burdened with its proportionate share of the obligations and liabilities of the district and contribute to their discharge.

It follows that the land is unaffected by the withdrawal of November 26, 1934, and is subject to entry by Black upon proper application therefor, provided he shows that all taxes and assessments properly levied by the irrigation district have been paid. His application for amendment of an entry that was a nullity was properly rejected.

As modified herein, the Commissioner's decision is affirmed.

Modified and Affirmed.

MILDRUFF H. YOUNG (ON REHEARING)

Decided January 30, 1936

STOCK-RAISING HOMESTEAD—APPLICATION—VESTED RIGHTS—PREFERENCE RIGHT—WITHDRAWAL

The right conferred upon an applicant by section 2 of the stock-raising homestead act, and that created by section 8 thereof, are not vested rights, but are mere preference rights, not attaching to the land unless and until it is designated as subject to said act. There can be no appropriation of the land, therefore, under either section of the law, prior to such designation. Accordingly, the Department of the Interior, in the face of the withdrawal of the land by the President's order of November 26, 1934, is without jurisdiction to designate it as subject to entry under said stock-raising homestead act.

FORMER INSTRUCTIONS AND DECISION CITED AND APPLIED.

Instructions of January 12, 1921 (47 L. D. 629), and case of *John F. Silver* (52 L. D. 499), cited and approved.

WALTERS, *First Assistant Secretary:*

By decision of September 26, 1935, the Department, in affirmance of a decision by the Commissioner of the General Land Office, rejected the stock-raising homestead application of Mildruff H. Young, stating that the appeal involved substantially the same question as

that in the case of Alton R. Pugh, decided September 14, 1935; that in the Pugh case a stock-raising homestead application was rejected in part; and that for the reason stated in the decision in the Pugh case Young's application was rejected.

In the Pugh case the Department, after giving consideration to reports by the Geological Survey and the Division of Grazing, declining to recommend designation of the land involved, said:

It is necessary, however, to reject the appellant's application as to the undesignated areas without regard to the character of the land involved. By Executive Order No. 6910 of November 26, 1934, the President withdrew from settlement, location, sale, or entry all of the vacant, unreserved, and unappropriated public land in the State of Utah and reserved the same for classification and pending determination of the most useful purpose to which such land may be put in consideration of the provisions of the Taylor Grazing Act, subject to valid existing rights. It is the well-settled holding of the Department that a stock-raising homestead application confers upon the applicant no right except a preference right to enter the land, as against others, when and if designated as subject to the provisions of the stock-raising homestead act, and a withdrawal prior to designation is operative as to the land covered by the application. *John F. Silver*. (52 L. D. 499). Therefore, the undesignated areas covered by the appellant's application were withdrawn by the Executive order of November 26, 1934, and are not subject to disposal under the stock-raising homestead act at this time.

The applicant filed a motion for rehearing. He devoted the first three assignments of error to questions relative to designation of the land. The Division of Grazing has given consideration to the motion and has again declined to recommend designation.

About one-half of the motion is devoted to arguments that the application should be considered an existing valid right which excepted the land applied for from the withdrawal. The applicant states that the Department has always held that the filing of an application accompanied by the proper fees and commissions and petitions for designation segregated the land and that if the land be of the character applied for by the application, the applicant's right attached to the land; that he knows of no law or regulation of the Department which supports the statement in the Pugh decision that the application must be rejected as to the undesignated land without regard to the character thereof; that the last portion of the Solicitor's opinion of February 8, 1935 (55 L. D. 205), must have been overlooked when this decision was prepared; that the stock-raising homestead act confers rights upon the applicant in addition to a preference right to enter when and if designated; that the cited Executive order affected only vacant, unreserved, and unappropriated public land; that the Department has always held that the filing of a valid application for homestead entry segregates the land; that the cited *Silver* case is not

applicable because there it was a first-form reclamation withdrawal, which was mandatory on the part of the Secretary of the Interior; and that designation is not prohibited in the present order of withdrawal.

The petitioner is in error in his contentions. In its instructions of January 12, 1921 (47 L. D. 629), the Department said:

The Department has repeatedly held that the right conferred upon the applicant by section 2 of the stock-raising act, and that created by section 8 thereof, are mere preference rights, neither of which attaches to the land unless and until designated and which, when in conflict, are to be determined by the dates of the original claims. Manifestly, therefore, there can be no appropriation, either under section 2 or section 8 of the stock-raising law, prior to designation of the land—in fact, such appropriation is forbidden—and this Department, in the face of a withdrawal, such as the one here under consideration, is without jurisdiction to designate under the stock-raising law, as subject to entry thereunder, land withdrawn from entry by competent authority.

The withdrawal there involved was for a national forest and lands legally appropriated were excepted.

This construction of the stock-raising homestead act does not appear to have been questioned or changed. By the Act of June 6, 1924 (43 Stat. 469), Congress amended section 2 of the stock-raising act to allow settlement and change of application in case of failure to obtain designation, but that did not give a mere stock-raising homestead applicant for undesignated land any right of appropriation.

The cited *Silver* case simply followed the instructions of January 12, 1921, *supra*, and it was not the particular kind of withdrawal involved which governed.

The withdrawal of November 26, 1934, excepted valid rights, but as has been shown from the departmental instructions, this petitioner had nothing more than a preference right to be exercised if and when the land should be designated. There was nothing to prevent the Government from withdrawing the land for a public purpose.

The cited Solicitor's opinion of February 8, 1935 (55 I. D. 205), did not contemplate or apply to stock-raising homestead applications for undesignated lands. Specific mention was made of "prior valid applications for entry which were substantially complete at the date of the withdrawal." It has been noted that the Department has said that after a withdrawal it may not designate land under the stock-raising law.

No error is found in the decision complained of and the motion for rehearing is denied.

Rehearing denied.

TITLE TO LANDS IN CHOCTAW AND CHICKASAW NATIONS MADE AVAILABLE FOR RAILROAD RIGHTS OF WAY UNDER ACT OF FEBRUARY 28, 1902

Opinion, January 30, 1935

INDIAN LANDS—RIGHT OF WAY—TITLE—CONDITION PRECEDENT UNFULFILLED.

Where an act of Congress authorized the condemnation and taking of Indian lands for a railroad right of way upon precedent compliance with certain requirements, among them full compensation for the lands acquired and a provision that claims for damages to persons holding title to the lands or having an interest therein should be first satisfied or secured, and these prerequisites were not fulfilled, title to such lands remains in the Indians or their successors in interest.

INDIAN LANDS—RIGHT OF WAY—TITLE.

A railroad company acquired the right to take and condemn lands for a railroad right of way in the Choctaw and Chickasaw Nations under an enabling act of general application to railroads, containing a provision that "before any railroad shall be constructed or any lands taken or condemned", full compensation should be made for all land taken and damage sustained. The road was not constructed by the company or any successor thereto, nor were lands condemned or damages paid in connection with a right of way. *Held*, that the conditions named in the act as precedent to acquirement of right of way not having been fulfilled, the lands involved remained lands of the Choctaw and Chickasaw Nations, and were not subject to the provisions of a later act of Congress making a particular disposition of Indian lands reserved from allotment "because of the right of any railroad or railway company therein in the nature of an easement."

MARGOLD, Solicitor:

You [the Secretary of the Interior] have requested my opinion concerning the status of title to lands within the Choctaw and Chickasaw Nations which were selected for railroad rights of way under the Act of February 28, 1902 (32 Stat. 43). Stated with more particularity, the question is whether title to those lands, after relinquishment or abandonment by the railroad, is vested in the Indian tribe or in the owner of the property abutting on the right of way. The inquiry is directed toward two different factual situations: one in which the railroad has not paid damages for the selected right of way and has never made use of it; the other in which the payment of damages was made and the railroad line actually built and used for a period of time.

It is my opinion that in the first situation—that in which no damages were paid and no use of the property made—the title to the lands comprising the selected right of way is in the Indian tribe, but that in the latter situation—that in which damages were paid and use of the property made—the title is in the owner of the abut-

ting land. I shall discuss these conclusions in the order in which I have stated them.

On November 11, 1902, the Secretary of the Interior approved maps of definite location filed by the Choctaw and Chickasaw Railroad Company covering certain strips of land in Tps. 1 and 2 S., R. 8 E., I. M., Oklahoma. That action was taken in conformity with the provisions of sections 13 *et seq.* of the Act of February 28, 1902, *supra*, one of the purposes of which was to provide a means for the acquisition of rights of way by any railroad through the Indian Territory. Although that statute required payment to the Indians of damages for the property taken by the railroad, no payment was ever made by the Choctaw and Chickasaw Railroad Company or its successors, and no construction was ever undertaken. On September 7, 1933, the Chicago, Rock Island and Pacific Railroad Company, successor in interest of the original claimant, filed a relinquishment to the Choctaw and Chickasaw Nations of all claim to the proposed right of way. That relinquishment was accepted by the Department of the Interior on November 1, 1933, it being stated, however, in the letter of acceptance, that under section 14 of the Act of April 26, 1906 (34 Stat. 137), the title to the right of way was vested in the owners of the legal subdivisions of which the land is a part, and not in the Choctaw and Chickasaw Nations.

Section 14 of the Act of April 26, 1906, *supra*, in so far as pertinent, is as follows:

That the lands in the Choctaw, Chickasaw, Cherokee, Creek, and Seminole nations reserved from allotment or sale under any Act of Congress for the use or benefit of any person, corporation, or organization shall be conveyed to the person, corporation, or organization entitled thereto: *Provided*, That if any tract or parcel thus reserved shall before conveyance thereof be abandoned for the use for which it was reserved by the party in whose interest the reservation was made, such tract or parcel shall revert to the tribe and be disposed of as other surplus lands thereof: *Provided further*, That this section shall not apply to land reserved from allotment because of the right of any railroad or railway company therein in the nature of an easement for right of way, depot, station grounds, water stations, stock yards, or other uses connected with the maintenance and operation of such company's railroad, title to which tracts may be acquired by the railroad or railway company under rules and regulations to be prescribed by the Secretary of the Interior at a valuation to be determined by him; but if any such company shall fail to make payment within the time prescribed by the regulations or shall cease to use such land for the purpose for which it was reserved, title thereto shall thereupon vest in the owner of the legal subdivision of which the land so abandoned is a part, except lands within a municipality the title to which, upon abandonment, shall vest in such municipality.

It is only under the second proviso of that section that title to the lands embraced in the proposed right of way can vest in the owners

of abutting lands. To invoke the operation of that proviso it is necessary that the facts show the land to have been (1) "reserved from allotment" and (2) so reserved "because of the right of any railroad or railway company therein in the nature of an easement." From the facts of the specific case presented to me it appears that the land selected by the Choctaw and Chickasaw Railroad Company was actually reserved from allotment and was expressly excluded from the patents issued for those allotments. It is more difficult, however, to determine whether that reservation was made because of the possession by the railroad of a right in the nature of an easement. To make that determination it is necessary to consider the Act of February 28, 1902, *supra*, under which the railroad's claim was initiated, for the purpose of discovering the nature of the right created.

The first twelve sections of the Act of 1902 provide specifically for a grant to the Enid and Anadarko Railway Company. The remaining sections set up a method by which any railroad might secure a right of way and supplemental properties in the Indian Territory. It was under these latter provisions that the Choctaw and Chickasaw Railroad Company initiated its claim.

Section 13 reads as follows:

That the right to locate, construct, own, equip, operate, use, and maintain a railway and telegraph and telephone line or lines into, in, or through the Indian Territory, together with the right to take and condemn lands for right of way, depot grounds, terminals, and other railway purposes, in or through any lands held by any Indian tribe or nation, person, individual, or municipality in said Territory, or in or through any lands in said Territory which have been or may hereafter be allotted in severalty to any individual Indian or other person under any law or treaty, whether the same have or have not been conveyed to the allottee, with full power of alienation, is hereby granted to any railway company organized under the laws of the United States, or of any State or Territory, which shall comply with this Act.

So far as land is concerned that section grants only the right to take and condemn. The following sections define more closely the nature and extent of that right. Thus, in section 14, the width of the right of way and the extent of the land acquired for other railroad purposes are limited. In section 15 it is provided:

That *before* any railroad shall be constructed or any lands taken or condemned for any of the purposes set forth in the preceding section, full compensation for such right of way and all land taken and all damage done or to be done by the construction of the railroad, or the taking of any lands for railroad purposes, shall be made to the individual owner, occupant, or allottee of such lands, and to the tribe or nation through or in which the same is situated: * * *. [Italics added.]

Section 15 further provides that, in case of failure to reach an amicable settlement concerning the damage and the compensation therefor, a board of referees shall make an award of damages, sub-

ject to review by the United States Court on appeal. The section then provides that—

When the award of damages is filed with the clerk of the court by the referees, the railway company shall deposit the amount of such award with the clerk of the court, to abide the judgment thereof, *and shall then have the right to enter upon and take possession of the property sought to be condemned: * * ** [Italics added.]

From those provisions of section 15 which I have quoted it is manifest that a railroad, even though it may have filed its maps of location and even though the Secretary of the Interior may have approved those maps, cannot take the property sought, enter into possession of it, or commence construction unless redress has first been made for the damage which will be occasioned by the taking of the property and the construction of the line. In such circumstances there is, in the absence of the payment of damages, no "right of any railroad or railway company therein in the nature of an easement" as required to bring into operation the second proviso of section 14 of the Act of April 26, 1906, *supra*. A right in the nature of an easement is a right in land, and the Choctaw and Chickasaw Railroad Company or its successors could, under the provisions of the Act of February 28, 1902, acquire an interest in the land of its proposed right of way only after the payment of damages. Those damages the Choctaw and Chickasaw Railroad Company and its successors never paid.

It is, consequently, my conclusion that the second proviso of section 14 of the Act of April 26, 1906, does not operate to vest in the abutting owners title to a proposed but abandoned railroad right of way, selected under the general grant contained in the Act of February 28, 1902, if the railroad paid no damages for the lands selected. In such a case the title to those lands which were reserved from allotment is vested in the Indian tribe.

This conclusion is not to be shaken by a consideration of the fact that section 14 of the 1906 act provides that title to the right of way shall vest in the owner of the legal subdivision of which the land abandoned is a part in the event of failure by the railroad company to make payment or of cessation of use. The payment to which reference is made is clearly that which is to be made by the railroad in order to secure a conversion of its easement into a fee title to the right of way. The abandonment of use to which reference is made is clearly an abandonment of a use theretofore validly acquired. In accordance with the terms of the 1902 act, however, no easement exists to be converted into a fee and no right to use has been validly acquired until damages for the taking of the right of way have been

paid. The reference to failure to pay and to abandonment of use in the second proviso of section 14 of the 1906 act is not, expressly or by implication, a modification or elimination of the provisions of the 1902 act, nor does it cause an extension of the application of the 1906 act to a case where the land included in a proposed right of way, although reserved from allotment, was not reserved because of the existence of a right in the nature of an easement.

The Act of 1902 differs from the Act of March 3, 1875 (18 Stat. 482, U. S. C., Tit. 43, Secs. 934 to 939, inclusive) and other special grants to railroads for a right of way over public lands where the effect of the filing and approval of the maps of definite location of the line of railroad vests the legal title in the railroad. *Oregon Short Line R. Co. v. Stalcker* (225 U. S. 142); *Rio Grande Western Ry. Co. v. Stringham* (239 U. S. 44). Grants of a railroad right of way over public lands are grants of lands that are subject to sale and disposition under general laws and free from prior valid appropriation (*Newhall v. Sanger*, 92 U. S. 761, 763; *Union Pacific Railroad Company v. Harris*, 215 U. S. 386), whereas the grant now under consideration authorized the taking and condemnation of lands title to which was vested in the Indians or their transferees, and prescribed as a prerequisite to the attachment of any rights to the land that the claims for damages by those holding the Indian title should be first satisfied or secured. These prerequisites not having been met, the title remained where it was before the filing of the map of location of the line.

II

From the discussion already presented it is obvious in whom is vested title to the abandoned right of way acquired under the general grant contained in the Act of 1906 if the damages were paid and the railroad actually constructed. In such a case a right in the nature of an easement exists. *Missouri, Kansas and Texas Railway Company* (34 L. D. 504). If the railroad company then failed to make payments to convert the easement into a fee as required by the Act of 1906 and the Department's regulations of June 12, 1908, or abandoned the right of way, the second proviso of section 14 of the 1906 act would operate to vest title "in the owner of the legal subdivision of which the land so abandoned is a part."

Approved:

T. A. WALTERS,

First Assistant Secretary.

TITLE TO LANDS IN CHOCTAW AND CHICKASAW NATIONS MADE AVAILABLE FOR RAILROAD RIGHTS OF WAY UNDER ACT OF FEBRUARY 28, 1902 (ON REHEARING)

Opinion, April 23, 1936

INDIAN LANDS—CHOCTAW AND CHICKASAW NATIONS—TITLE TO RIGHT-OF-WAY LANDS.

The Choctaw and Chickasaw Nations are invested with the title to land selected by the Choctaw and Chickasaw Railroad Company for a railroad right of way under the Act of February 28, 1902 (32 Stat. 43), since said railroad company has never paid compensation for such right of way nor made use of it.

INDIAN LANDS—TITLE—RAILROAD RIGHT OF WAY.

An act of Congress provided that title to certain Indian lands reserved from allotment because of the "right of any railroad * * * company therein in the nature of an easement for right of way" shall vest in the owners of the abutting lands if the railroad company "shall cease to use such land for the purpose for which it was reserved." *Held*, That such act did not have application to Indian lands which by the terms of an earlier act of Congress were made available for railroad rights of way upon the fulfillment of certain prescribed conditions, which conditions were never fulfilled, and that title to such lands consequently remained in the Indians.

Case of *Noble et al. v. City of Oklahoma City* (296 U. S. 560), cited.

INDIAN LANDS—RIGHT OF WAY—TITLE—ACT OF APRIL 26, 1906.

The second proviso to section 14 of the Act of April 26, 1906 (34 Stat. 137), is operative, according to its own terms, only where a railroad has theretofore acquired an interest in the land in the nature of an easement, the lands permitted to be acquired by abutting land owners being Indian lands "reserved from allotment because of the right of any railroad * * * company therein in the nature of an easement for right of way", etc. It follows from this that the act does not operate to vest title to the land of a proposed right of way irrespective of whether or not a railroad company has acquired an interest in the land.

INDIAN LANDS—RIGHT OF WAY—TITLE—PAYMENT OF DAMAGES—ACTS OF FEBRUARY, 28, 1902, AND APRIL 26, 1906.

The payment of money for right of way, damage, etc., required by the Act of April 26, 1906, was made a condition precedent whereby a railroad company might obtain the fee estate in land *over which it had acquired a right, in the nature of an easement*, by the payment of damages as prescribed by the Act of February 28, 1902; and such payment under the Act of April 26, 1906, has no reference to the payment of damages already prescribed by the Act of 1902. Accordingly, nonpayment of damages under the earlier act does not make operative that clause of the 1906 act which vests title in the owners of abutting lands.

INDIAN LANDS—ACTS OF FEBRUARY 28, 1902, AND APRIL 26, 1906—DEPARTMENTAL CONSTRUCTION.

There has been a continuous and long-standing departmental construction of the Acts of February 28, 1902 (32 Stat. 43), and April 26, 1906 (34 Stat. 137), in harmony with the conclusion reached in the opinion of January 30, 1935.

INDIAN LANDS—CONVEYANCE—LANDS RESERVED—VESTING OF TITLE.

Where a deed of conveyance recited that the grantors (the Choctaw and Chickasaw Nations) conveyed to the grantee a certain tract "less 6.26 acres occupied as a right of way" by a certain railway, and the railway company failed to occupy the tract thus excepted, title to the 6.26 acres did not pass to the grantee under the conveyance.

MARGOLD, *Solicitor*:

You [the Secretary of the Interior] have asked that I consider certain protests against the conclusion reached in my former opinion, No. M.27814, which was approved by you on January 30, 1935. [See page 451.] In that opinion it was held that the Choctaw and Chickasaw Nations were invested with the title to land selected for railroad rights of way under the Act of February 28, 1902 (32 Stat. 43), where the railroad has never paid compensation for the selected right of way and has never made use of it.

The protests have been made by the oil and gas lessees of a part of the homestead allotment of one Laura Burris, an enrolled member of the Chickasaw Nation. At the time the allotment to Laura Burris was made the Choctaw and Chickasaw Railroad Company had filed a map of definite location of its proposed line of railroad for the purpose of securing a right of way in conformity with the provisions of the Act of February 28, 1902, *supra*. Consequently, the deed issued to Laura Burris by the Choctaw and Chickasaw Nations granted the homestead allotment "less 6.26 acres occupied as a right of way by the Choctaw and Chickasaw Railway." The railway company, however, did not pay damages for the right of way as required by the statute and has never made use of the land. In those circumstances it would follow from the opinion of January 30, 1935, that the fee estate in the land embraced within the selected right of way is vested, not in the owners of the abutting lands contained in Laura Burris' allotment, but in the Choctaw and Chickasaw Nations.

The oil and gas lessees of the abutting allotted lands maintain that the fee estate in the land of the right of way is vested in their lessors. Their claim is based on three contentions: (1) That under the provisions of section 14 of the Act of April 26, 1906 (34 Stat. 137), the fee estate passes, on abandonment of the right of way, to the "owner of the legal subdivision of which the land so abandoned is a part"; (2) that the Department has long interpreted that statute in the manner contended for, and that there is consequently an established

administrative construction on which the claimants and others have relied and which cannot now be lightly overthrown; and (3) that in any event the original allotment deed to Laura Burris conveyed to her the interest in the land covered by the proposed right of way which the Indian tribes had, and thus that any abandonment or relinquishment of the right of way by the railroad company must as a matter of law inure to the benefit of the allottee or her assigns. It is my opinion that none of those contentions is well founded, but I shall discuss them at some length in the order in which I have stated them.

I

The opinion of January 30, 1935, contained a detailed analysis of the 1906 act as well as the granting act of 1902. The conclusion was reached that the 1902 act granted only a right to acquire a right of way after, among other things, the payment of compensation to the Indians, and that the 1906 act operated to invest the abutting property owners with title to abandoned rights of way only if, among other things, the rights of way had actually existed as interests in the land in the nature of easements. In those circumstances, of course, title to the right of way would not pass to the abutting landowners in a situation of the type now presented where no payment of damages was ever made by the railroad company to make possible the creation in it of an interest in the land.

I have thoroughly re-examined the bases of that conclusion concerning the interpretation of the statutes and, in doing so, I have carefully considered the arguments which have been presented both orally and in written briefs on behalf of the oil and gas lessees of the abutting lands. I have, however, found nothing to create doubt concerning the correctness of the conclusion or the soundness of the analysis by means of which the conclusion was reached. The interpretation placed on the granting act of 1902 is not seriously questioned by the claimants, nor can it well be questioned. In a recent opinion of the Supreme Court of the United States in the case of *Noble et al. v. City of Oklahoma City*, 296 U. S. 560, 56 S. Ct. 562, the court squarely decided that, under a grant substantially similar to that contained in the 1902 act, a railroad obtained only a right to acquire a right of way on payment of damages. Consequently there can be no doubt that the Choctaw and Chickasaw Railroad Company, failing as it did to pay the required damages, acquired no actual interest of any kind in the land of its proposed right of way.

The claimants' primary contention, however, is that the act of 1906 operates to vest title to the land of the proposed right of way in the abutting owners irrespective of whether the railroad had acquired an interest in the land. In section 14 of that act it is provided that a

railroad may, on making payment to be prescribed by the Secretary of the Interior, acquire title to lands over which it has a "right * * * in the nature of an easement for right of way." By that same section it is prescribed that if the railroad should fail to make the payment, title to the right of way will vest in the owner of the abutting lands. The claimants argue, that since the railroad in this instance made no payments, the title to the right of way has vested in the abutting owners under that statutory provision. That argument, in my opinion, is fallacious for two reasons. In the first place, the provision in section 14 of the 1906 act is operative according to its own terms only where the railroad had already acquired an interest in the land "in the nature of an easement", and it has already been pointed out that, under the 1902 act, no interest in the land could be acquired by the railroad in the absence of a payment of damages for the taking of that interest, which payment was never made in this case. In the second place, the payment for which provision is made in the 1906 act is a payment in addition to and independent of that required by the act of 1902. The payment prescribed by the 1906 act is one whereby the railroad might acquire the fee estate in the land over which it already had acquired a right in the nature of an easement by the payment of the damages prescribed by the 1902 act. Clearly a railroad which had paid the damages and acquired a right to build and operate its road under the 1902 act could not be required to make a further payment on penalty of losing its vested easement for failure so to make payment. Consequently, it is manifest that the payment required by the 1906 act is a payment for the servient estate so that the entire fee estate in the land may be acquired by the railroad, in default of which the servient estate is to vest in the owner of the abutting land. In those circumstances it is clear that the payment contemplated by the 1906 act is for a purpose entirely distinct from the purpose of the payment required by the 1902 act, and that the former payment is in addition to and independent of the latter.

That conclusion is inescapable when the legislative history of the act is considered. The legislative bill which subsequently became the act of 1906, without alteration of the provisions contained in section 14, was drafted in the Department of the Interior and was submitted to the Congress for its consideration by the Secretary of the Interior with his letter of December 7, 1905, to the Speaker of the House of Representatives. With that letter was also included an explanatory statement prepared by the special committee which the Secretary had appointed to prepare the bill. Those documents are all reproduced in House Document No. 74, 59th Congress, 1st Session. In explanation of section 14 the Department's committee stated:

Section 14 provides for conveyance of all land in said nations reserved from allotment or sale for the use or benefit of any person, corporation or organiza-

tion, and that this section shall not apply to land reserved from allotment because of the right of any railroad company in the nature of an easement, which the company is permitted to purchase at a valuation to be determined by the Secretary of the Interior.

A similar explanation was made by the Committee on Indian Affairs of the House of Representatives when it reported favorably on the bill (House Report No. 183, 59th Congress, 1st Session). In that report it was stated:

Section 14 authorizes persons, corporations, or organizations for whom lands have been reserved to buy the same and secure an absolute title therefor.

In those circumstances there can be no substantial doubt that the payment, on default in which the title to lands covered by rights of way are to vest in abutting owners under the 1906 act, is a payment for the fee estate in the lands and not the payment required to create the easement, or right "in the nature of an easement", to which the fee estate is servient. Consequently it is my opinion that the act of 1906 has no reference to the payment of damages already prescribed by the act of 1902, and that non-payment of those damages does not make operative that clause of the 1906 act which vests title in the owners of the subdivisions of which the abandoned rights of way are a part.

II

I find no substantiation for the contention that the Department has consistently placed a contrary interpretation on the acts of 1902 and 1906 by holding that the title to abandoned rights of way reserved under the act of 1902 vested in the owners of the abutting property where the railroad had never paid the damages necessary to the creation of an interest in the land covered by the selected right of way. On the contrary, I find that prior to the present controversy the Department has consistently held that the title to such abandoned rights of way is vested in the Indian tribes and not in the abutting owners.

In support of their contention on this point the claimants rely expressly on an undated longhand memorandum by Mr. Meritt of the Indian Office to Mr. Layne of that office, the letter of the Acting Commissioner of Indian Affairs to the Secretary of the Interior under date of March 28, 1913, Assistant Secretary Laylin's letter of April 19, 1913, to James S. Davenport, Second Assistant Commissioner Hauke's letter of May 6, 1913, to L. H. Burton, and Commissioner Sells' letter of July 9, 1919, to Hon. Robert L. Owen. Mr. Meritt's undated memorandum and the Acting Commissioner's letter of March 28, 1913, which was prepared as a result of the memorandum, unquestionably express the conclusion that whether or not

the railroad ever paid the damages required by the act of 1902, the title to the right of way vests, on abandonment, in the abutting owners under the provisions of section 14 of the act of 1906. But the Acting Commissioner's letter failed to meet with the approval of the Department. Under date of April 19, 1913, Assistant Secretary Laylin wrote to the Commissioner of Indian Affairs concerning the Acting Commissioner's letter. Although the Assistant Secretary approved the conclusion that, if the railroad had paid the damages required by the 1902 act, the title passed on abandonment to the abutting owners, he expressly repudiated the conclusion that a similar result followed where the railroad had not paid the damages. In that latter situation he clearly held that the title to the right of way was vested in the Indian tribes. The Laylin letter of April 19, 1913, to James S. Davenport was written in conformity with the letter of even date to the Commissioner, a copy of which was enclosed. The Hauke letter of May 6, 1913, to L. H. Burton also was written pursuant to the Assistant Secretary's letter of April 19, 1913, and had reference only to a right of way for which the railroad had paid the damages required by the act of 1902. Likewise, Commissioner Sells' letter of July 9, 1919, to Hon. Robert L. Owen, which also recognized title to be in the abutting owners, is shown by the files of the Indian Office to have had reference only to a right of way for which the railroad had paid the necessary damages.

It is true, however, that three Indian Office letters of recent date, one of which was approved by the Department, have squarely taken the position that, even though the damages had not been paid, the title to the land of the right of way vested in the abutting landowners by reason of the provisions of section 14 of the act of 1906. All of those letters had reference to the precise controversy now under consideration and all of them were overruled and nullified by the former opinion in this controversy. In such circumstances those letters clearly cannot be relied on to establish a contrary departmental construction.

Actually I find that there has been a continuous and long-standing departmental construction of the statutes in accordance with the conclusion reached in the opinion of January 30, 1935. The records of the Indian Office show that over a period of years some 69 deeds have been executed by the tribes conveying tracts included in abandoned railroad rights of way for which damages had never been paid by the railroads. Those conveyances were, of course, predicated on the proposition that, under the statutes, title to those lands was vested in the tribes. For convenience I cite a few of the Indian Office letters authorizing those conveyances, each of which letters expressly enunciates the conclusion flowing from that construction

of the statutes which is now attacked: Letter of May 13, 1916 (90912-15), approved by the Assistant Secretary of the Interior on May 15, 1916; letter of May 21, 1918 (43901-18), approved by the Assistant Secretary on July 17, 1918; letter of May 21, 1918 (43902-18), approved by the Assistant Secretary on July 17, 1918; letter of December 12, 1918 (98915-18), approved by the Assistant Secretary on February 13, 1919; letter of December 17, 1918 (100753-18), approved by the Assistant Secretary on February 14, 1919; letter of March 26, 1919 (27665-19), approved by the Assistant Secretary on April 19, 1919; and letter of May 5, 1919 (39593-19), approved by the Assistant Secretary on May 19, 1919.

In those circumstances it appears that the long-established interpretation of the Department has been exactly to the contrary of that suggested by the claimants.

III

Perhaps the most serious question raised by the claimants is whether the original allotment and conveyance of land to Laura Burris by the Choctaw and Chickasaw Nations conveyed to her the entire estate which the nations had in the land covered by the right of way. If the conveyance was that inclusive, of course, the allottee and her assigns would have vested in them the fee to the land covered by the abandoned right of way irrespective of the provisions of the act of 1906, and no interest would or could remain in the Indian tribes.

The conveyance to Laura Burris was, in form, similar to all of the conveyances made to members of the Five Civilized Tribes in fulfillment of allotments. The described parcel of land was conveyed "less 6.26 acres" included in the selected right of way of the Choctaw and Chickasaw Railroad. There would seem to be little doubt that such a deed conveyed no interest of any kind in the 6.26 acres which were expressly excluded. Yet in a recent case decided by the United States Circuit Court of Appeals for the 10th Circuit (*Shell Petroleum Corp. v. Hollow*, 70 Fed. (2d) 811), it was held that a deed conveying a tract "excepting one acre", which had been conveyed to a school district for so long as the property was used for school purposes, operated to convey the grantor's reversionary interest in the one acre and to invest the grantee with the fee title to that acre upon its abandonment for school purposes. In arriving at that conclusion the court relied heavily on the common law presumption, created as a matter of public policy, that a conveyance of land carries with it the grantor's interest in strips or gores and small parcels which have been carved out of it by prior conveyances of interests less than a fee simple absolute. Yet

even that presumption must fall if the intent of the parties is shown to be otherwise, for the effect of an exception in a conveyance is dependent on that intent. *Chicago, Rock Island and Pacific Railway Co. v. Denver and Rio Grande Railroad Co.* (143 U. S. 596, 614). It may be both reasonable and desirable to imply an intent to convey the grantor's interest in an abutting street (*Paine et al. v. Consumers' Forwarding & Storage Co. et al.*, 71 Fed. 629) or an abutting river bed (*United States v. Hayes et al.*, 20 Fed. (2d) 873) where the description of the conveyed property does not include the street or river bed but where it is not expressly excluded. But a very different situation exists where, as here, the deed expressly states that it conveys a certain tract "less" a designated parcel or strip. Where such language is used many courts have decided that there is an express intention to retain all interest in the excepted parcel or strip, and that, in fact, no interest therein is conveyed. *Hartwig et ux. v. Central-Gaither Union School District et al.*, 253 Pac. 733 (Sup. Ct. of California); *Moakley et al. v. Blog et al.*, 265 Pac. 548 (Dist. Ct. of App. of California); *Dickman v. Madison County Light and Power Co.*, 304 Ill. 470, 136 N. E. 790; *Appleby et al. v. City of New York et al.*, 199 App. Div. 539, 192 N. Y. Supp. 211, *affirmed*, 235 N. Y. 351, 139 N. E. 474; *Voss v. Thompson et al.*, 105 Okla. 238, 232 Pac. 392.

If we accept as good law the holding in the case of *Shell Petroleum Corp. v. Hollow, supra*, that the words "less" or "excepting" when used in a conveyance are not a conclusive manifestation of the grantor's intent to retain whatever interest he may have in the excepted tract, it nevertheless does not follow that, in the instant case, the allottee acquired the interest of the Choctaw and Chickasaw Nations in the land covered by the proposed right of way. In the *Shell* case the court recognized that the words "less" and "excepting" might indicate an intent not to convey any interest in the excepted parcel, but held that not necessarily to be true in the case before it, since the conveyance was by warranty deed and the exception may have been intended only to protect the grantor from any liability on his warranties because of the existence of the dominant estate in the excepted parcel. Actually, then, the existence of the warranties was the controlling factor in the determination that the servient estate in the excepted parcel passed to the grantee. But the conveyances from the Choctaw and Chickasaw Nations to the various allottees, including Laura Burris, contain no warranties; consequently the decision in the *Shell* case is not applicable here.

It appears, then, that the Indian tribes did not convey to Laura Burris their interest in the selected right of way unless there is some other manifestation of intent so to convey or some other circumstance to explain the express exception contained in the conveyance. No

other circumstance explanatory of the exception has been suggested and I know of none. Certainly it cannot be said that the purpose of the exception was merely to exclude the interest which the railroad had in the right of way. If that were the purpose it might easily have been accomplished by omitting any exception at all or by expressing the exception in appropriate language. It certainly is not accomplished by an exception of the land itself. See *Moakley et al. v. Blog et al.*, *supra*, and the cases therein cited by the court.

It has been suggested that a manifestation of an intent to convey the servient estate in the land is to be found in the circumstances surrounding the execution of the deed. The case of *United States v. Hayes et al.*, *supra*, has been relied on in support of that suggestion. In that case the court held that deeds in satisfaction of allotments made to members of the Creek Nation conveyed the tribal interests in the beds of the Arkansas and Cimarron rivers on which the deeded lands abutted. The court found an intention so to convey the river beds from an analysis of the treaties and Congressional enactments which led to and which authorized the making of allotments to members of the Five Civilized Tribes. The purpose of those treaties and enactments was said to be to divest the tribal organizations of all property preparatory to disbanding those organizations. In those circumstances the court thought it manifest that the tribe intended to divest itself of its river bed land as a part of the abutting land in accordance with the usual common law concept. But, as has been already pointed out, that situation is vastly different from that in the instant case, where the deed, instead of being silent concerning the land in controversy, actually excepted it from conveyance.

Furthermore, the reasoning on which the intent was established in the *Hayes* case is not applicable in the present controversy. The very fact that section 14 of the act of 1906 provided that, if damages for the creation of the easement had already been paid, the fee title might be acquired by the railroad or allowed to pass to the abutting owners on abandonment clearly shows that it was not contemplated that the servient estate in the rights of way had passed to the abutting owners under the allotment deeds. If that servient estate had passed there would be no occasion for the provisions vesting title in the abutting owners on termination of the dominant estate by abandonment. In those circumstances the statutes and treaties cannot be said to manifest an intent on the part of the tribes that the servient estate in rights of way pass to the allottees under the allotment deeds despite the expression of a contrary intent in the exception contained in the deeds. Since, for the purpose of determining the intent on which the exceptions were founded, it is obviously immaterial whether the railroad had or had not paid the damages necessary for the creation of an interest in the land under the 1902 act, it is my opinion

that there is no indication of any intent sufficient to defeat the operation of the exception contained in the deed to Laura Burris.

It has also been suggested that even though the exception may have been otherwise valid and sufficient to prevent the passage to Laura Burris of title to the right of way, it nevertheless was inoperative because of indefiniteness of description of the land excepted. It is true, of course, that the parcel excepted must be capable of identification, else the exception will fail. But in this instance it appears that the excepted land covered by the proposed right of way can be readily identified. The deed itself refers to the specific right of way which is involved. In accordance with the requirements of the act of 1902 granting the right to take the right of way the railroad must file a map of its selected right of way with the Department of the Interior, with the "United States Indian agent for Indian Territory" and with the principal chief or governor of the Indian tribe. In this instance those maps were filed prior to the allotment to Laura Burris and they are still filed. From those maps it is possible, according to the report made by the Superintendent for the Five Civilized Tribes Agency on January 11, 1936, to locate the right of way on the ground with precision. In those circumstances there is no basis for the suggestion that the exception has failed because of indefiniteness. The exception stands valid and operative.

I may point out that a similar interpretation of the exceptions contained in allotment deeds, as well as an interpretation of the statutes similar to that set forth in Part I of this opinion, form the basis for the numerous conveyances of abandoned right of way tracts which have been made over a long period of years by the tribes. Those interpretations have consequently become the foundations of real property titles and cannot lightly be overthrown.

IV

In accordance with the detailed analysis which I have made, it is my conclusion that the title to the land covered by the selected right of way for which the railroad company never paid damages does not vest in the abutting landowners under the provisions of section 14 of the act of 1906, that the Department has long and continuously interpreted those statutory provisions in that manner, and that the allotment deed to Laura Burris did not convey to her any interest in the land covered by the selected right of way. It is therefore my opinion that the title to the abandoned right of way is now vested in the Choctaw and Chickasaw Nations.

Approved:

T. A. WALTERS,

First Assistant Secretary.

STATE OF NEW MEXICO

Decided February 27, 1936

WATER RESERVE—WITHDRAWAL OF PUBLIC LANDS.

A spring or water hole on public land is none the less within the meaning and contemplation of the withdrawal order of April 17, 1926, and the regulations thereunder, because developed or brought into being by human agency, in the absence of rights on the part of the State concerned incompatible with such withdrawal.

WATER RESERVE—STATE SELECTION—INTERPRETATIVE ORDER—EFFECT.

The fact that a State selection list was filed prior to an interpretative order holding that a definite legal subdivision of public land was found to contain springs or water holes of the type intended by the withdrawal order to be withdrawn does not render said order inoperative as to such land, since the said withdrawal order embraced all subdivisions of the "vacant, unappropriated, unreserved public lands" containing the waters described in said order. The interpretative order is in effect an official finding that a certain tract described in terms of legal subdivision is of the character and has the status defined in the withdrawal order and is subject thereto.

WITHDRAWALS OF PUBLIC LANDS—CONTINUING OPERATION OF ORDER—LANDS LATER AFFECTED.

Withdrawals of public lands under authority of the Executive order of April 17, 1926, in keeping with constructions of other withdrawal orders of public lands, are deemed continuing in operation in the absence of words of limitation, and attach not only to lands which at the time of issuance of the order are known to be of the character and status defined therein, but also to public lands subsequently found to be of said character and status.

WALTERS, First Assistant Secretary:

On December 23, 1930, the State of New Mexico selected the $N\frac{1}{2}NW\frac{1}{4}$, $SW\frac{1}{4}NW\frac{1}{4}$, Sec. 22, T. 18 N., R. 10 W., and $SE\frac{1}{4}NE\frac{1}{4}$ Sec. 26, T. 17 N., R. 7 W., assigning as base $NW\frac{1}{4}$ Sec. 36, T. 8 S., R. 18 W., within the Datil National Forest.

By decision of January 16, 1935, the Commissioner of the General Land Office declared the base invalid, inasmuch as the $N\frac{1}{2}$ of said section 36 had been used as base in selection list 041030, approved in 1923; that by reason of such invalidity the selection was fatally defective, and could not be amended by the substitution of valid base in view of the Executive order of withdrawal of November 26, 1934. Advertising to Interpretative Order of November 19, 1934 (No. 211), holding that the $NW\frac{1}{4}NW\frac{1}{4}$ Sec. 22, T. 18 N., R. 10 W., was included in Public Water Reserve No. 107, dated April 17, 1926, by reason of a flowing well thereon valuable as a public watering place, the Commissioner declared that by reason of such water reserve, the said tract was not subject to selection, and in view of the invalidity of the base offered the entire selection was held for rejection.

The State has appealed, and invites attention to the fact that the SW $\frac{1}{4}$ Sec. 12, T. 18 N., R. 9 W., for which the NW $\frac{1}{4}$ of Sec. 36 was tendered as base in selection 041030, was reconveyed to the United States on December 17, 1930, on advice from the Commissioner that the approval of the list for that tract was inadvertent, inasmuch as it should have been conveyed by patent to an Indian allottee. The letter from the Commissioner of September 5, 1935, transmitting the appeal, substantiates the statement that the SW $\frac{1}{4}$ Sec. 12, T. 18 N., R. 9 W., was reconveyed to the United States and accepts and concurs in the view of the appellant that thereby the said NW $\frac{1}{4}$ of Sec. 36 was made available as base for the present indemnity selection 063027.

Appellant quotes correspondence to show that the flowing artesian well on the NW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 22, T. 18 N., R. 10 W., was drilled by the Inland Oil Corporation; that drilling thereof commenced June 10, 1927, and was discontinued in July 1928, at a depth of 1,407 feet. Contention is made that such well is not affected by the withdrawal of April 17, 1926, first, because it is not a spring or water hole within the meaning of the withdrawal order or regulations thereunder, and second, that the Interpretative Order No. 211, approved November 19, 1934, is only applicable to selections made subsequently to its rendition and the present list was filed prior to such order; and third, that the well was not in existence on April 17, 1926, the date of withdrawal, and therefore could not have been intended to be included therein.

The rejection of the selection *in toto* was based upon a mistake of fact as to the unavailability of the base tendered, therefore, the selection, regardless of any question whether new base could be substituted in the face of the withdrawal of November 26, 1934, must be held valid in so far as not affected by the water hole withdrawal of April 17, 1926.

As to the question whether the land is reserved by the order of April 17, 1926, it is not believed that there is any language in the order or regulations thereunder that restricts the terms "spring or water hole" to those created solely by the forces of nature. The springs or water holes withdrawn are, as the regulations state, "springs and water holes capable of providing enough water for general use for watering purposes." A water hole may be created by a flow from a well as from a spring or natural seep, and the fact that it was developed or brought into being by human agency, if rights thereto do not exist under the laws of the State, would not take it out of the letter or spirit of the order. It is true that in *Santa Fe Railroad Company* (53 I. D. 210), a tract upon which a reservoir in a dry draw was constructed to conserve run-off water, and which the constructor had obtained a right of appropriation under State law, was

held subject to selection by the railroad company and that the order of April 17, 1926, did not contemplate withdrawal of such a tract; but it has also been held in the case of *Charles Lewis*, decided July 29, 1935 (unreported), that water on a tract developed by tunnels, conveyed by pipes and flumes and conserved by dams, but the use thereof abandoned by those who originally developed and conserved it, was within the terms of the order. The facts in the present case are more analogous to the facts in the *Lewis* case.

The fact that the selection list was filed prior to the interpretative order does not render the water hole withdrawal inoperative as to the land in question. The withdrawal took effect as to all subdivisions of the "vacant unappropriated unreserved public lands" containing the waters described in the order. The interpretative order is in effect an official finding that a certain tract described in terms of legal subdivision is of the character and has the status defined in the order and is subject thereto.

Finally, the fact that the wells were nonexistent at the date of the order does not seem to be of much moment. In keeping with constructions of other withdrawals this is deemed to be a continuing withdrawal and attaches to any lands that were at the time of its issuance or subsequently become of the character and status defined in the order.

In conformity with the views above expressed, the Commissioner's decision is affirmed to the extent it rejects the selection of NW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 22, and reversed as to the remaining land selected.

Modified.

OLIVER v. WRIGHT

Decided March 12, 1936

CONTEST—NEW GROUNDS—SECOND CONTEST—PROCEDURE.

Matters arising subsequently to initiation of a contest may be made the grounds of a second contest, but proceedings thereon must be suspended to await termination of the first contest. A contest affidavit based on such matters is not subject to dismissal on the ground that it was premature.

PRACTICE—REPLICATIONS—PLEA IN CONFESSION AND AVOIDANCE.

While there is no specific rule for replications under the rules of practice of the Land Department, a plea in confession and avoidance as a defense requires a demurrer or reply.

POSSESSION—ENFORCEMENT OF RIGHT.

To enforce the right to possession of public lands, resort must be had to the local courts, the Land Department not possessing the instrumentalities necessary to effect this object.

WALTERS, *First Assistant Secretary*:

Littleton H. Oliver has appealed from a decision of the Commissioner of the General Land Office dated May 25, 1935, which dismissed his contest against the stock-raising homestead entry of Burrel Wright (Phoenix series 070841).

As more fully set forth in the Commissioner's decision, Wright's application was filed October 24, 1931. On June 18, 1932, Oliver instituted Contest 7841, charging part of the land was under irrigation and that he had a better right of entry by virtue of the ownership of certain buildings on the land. On August 18, 1933, the Department, upon evidence adduced at a hearing between the parties, affirmed the concurring decisions below in dismissing the contest.

Wright's entry was allowed on November 8, 1933. On September 26, 1933, Oliver filed Contest 8224 against the entry. On January 31, 1935, the Department affirmed the Commissioner's decision in dismissing Contest 8224, on the ground that the issues raised therein were either *res judicata* or immaterial. While the second contest was pending and undisposed of, Oliver, on November 17, 1934, filed a third contest, No. 8374, charging—

That said entryman has not resided on the land embraced in his patented homestead, nor on the land embraced in the above entry for more than one year last past; and that he has wholly abandoned the land for more than one year last past, and he has not complied with the homestead laws in any manner whatsoever; that said entryman was not residing on the original entry at the time of making said additional entry.

Wright filed a motion to dismiss and answer under oath, the motion being on the ground that the contest was premature, and it being averred that "Affiant could not get possession from the contestant." The register denied the motion on the ground that there was no denial of the charges, and held the entry for cancelation. Wright appealed from this action, in which he made a statement, not under oath, that—

As stated in my motion the reason for not residing on the land in question, during such time as I have not resided thereon, has been due to the action of the person protesting who made occupation impossible without force or conflict.

The Commissioner held that since September 8, 1932, Oliver has been aware of Wright's title to the land and improvements by reason of his homestead entry, yet Oliver had refused to yield possession thereof and appears to have continued on the premises to the present time; that such unlawful possession had prevented the entryman from establishing residence, and that he now contests, alleging failure to establish residence on the land; that long prior to and ever since the entry was made the entryman had been engaged in contests with

Oliver. The Commissioner invoked the rule in *Rice v. Simmons* (43 L. D. 343) holding:

Where a homestead entryman was prevented from establishing residence by persons in occupation of the land embraced in the entry, such persons will not be heard to say that the entryman did not establish residence at the time he attempted to do so and was prevented by them.

The contest was dismissed under the above-quoted rule and on the further ground that the contest was prematurely brought.

Disregarding immaterial matters, it is contended in support of the appeal that contestant filed a valid and sufficient charge; that no answer was made thereto; that it was error on the part of the Commissioner to accept Wright's unverified statement on appeal to the effect that he was prevented from establishing residence on the land by contestant, and that the Commissioner's statement to that effect is not supported by a scintilla of evidence.

Treating as surplusage conclusions of law therein, the charge above quoted stated new and sufficient facts to constitute a cause of action. Matters arising subsequently to initiation of a contest may be made the grounds of a second contest (*Mehler v. McBride*, 1 L. D. 184; *Gudmundson v. Morgan*, 5 L. D. 147; *Taschi v. Lester*, 6 L. D. 27; *D'Acres v. Tuthill*, 7 L. D. 468), but proceedings thereon must be suspended to await termination of the first. *Wade v. Sweeney* (6 L. D. 234). The contest affidavit was not therefore subject to dismissal on the ground that it was premature.

Wright's answer, however, that "Affiant could not get possession from the contestant", was in effect a plea in confession and avoidance, and if proven was a complete defense to the charge, and required a reply denying it before any issue was presented for trial. While there is no specific rule for replications under the rules of practice, a plea in confession and avoidance as a defense to the action in the courts requires a demurrer or reply. "Pleading," 49 C. J., sec. 393. Despite the elaboration of this defense on appeal, which was served on contestant, and the Commissioner's findings predicated on the truth of such allegation, nowhere has the contestant denied that he has prevented the entryman from obtaining possession of the land. On the contrary, he alleges in his appeal that "Affiant further states that he is now residing on the land in controversy * * *", which statement lends some probability to the entryman's defense. Furthermore, in an affidavit in response to the appeal the entryman relates the circumstances when he went to the homestead and demanded possession, which was refused by one Johnson who was in possession of the entry without orders to that effect from Oliver.

It is not believed that the entryman, who is alleged to be without funds and in straitened financial circumstances, should be vexed

with another contest by the same unsuccessful contestant without a showing that his contest rests on *prima facie* meritorious grounds. The contestant, as a condition to the allowance of his contest, will be therefore required to file an affidavit positively denying that the entryman's failure to establish and maintain residence on the land has been due to the detention of the land by the contestant or those claiming possession thereof by or under leave from him and to his or their refusal to yield possession thereof on demand. Upon the filing of such an affidavit, the contest may be allowed; otherwise, it will be dismissed. As to the entryman's request that the Register be directed to put him in possession of his homestead, as the Commissioner has said, the Department is not in possession of any instrumentalities to effect this purpose and resort must be had to the local courts to enforce the right to the possession.

As herein modified, the Commissioner's decision is affirmed and the case remanded for procedure as above indicated.

Modified.

RUDOLPH JOSEF FEHNLE

Decided March 31, 1936

DIVORCE—EFFECT UPON WIFE'S RIGHTS IN HUSBAND'S HOMESTEAD.

Divorce terminates a wife's rights in the homestead of her former husband.

DIVORCED WIFE—RIGHTS IN CONNECTION WITH ENTRY OF FORMER HUSBAND—ACT OF OCTOBER 22, 1914.

The wife of an entryman who has obtained a divorce from him for other cause than voluntary abandonment or desertion is not qualified as a deserted or abandoned wife within the terms of the Act of October 22, 1914 (38 Stat. 766), and accordingly is not entitled, under the provisions of said act, to submit proof upon and obtain patent to such an entry.

CONTEST—ABANDONMENT—JUDICIAL RESTRAINT.

An entryman's absence from the homestead due to judicial restraint is not an abandonment of the land, rendering the entry subject to contest, and final proof may be submitted during the statutory lifetime of the entry.

TITLE TO HOMESTEAD—COMPLIANCE WITH HOMESTEAD REQUIREMENTS—BY WHOM.

Where it is established that an entryman's wife supplied the money by which the relinquishment of a former entryman was obtained, and later, in reliance upon assurance from the entryman (at the time serving a term in the penitentiary for commission of crime, and a divorce being contemplated by both parties) that the entry was hers, returned to the land, improved it and has since maintained residence thereon, in the meantime obtaining a divorce from the entryman, her title to the land will be held superior to the entryman's although not derived from the marriage relation.

WALTERS, *First Assistant Secretary*:

Rudolf Josef Fehnle, showing proper evidence of intention to become a citizen, was allowed homestead entry under Section 2289, Revised Statutes, on March 12, 1932, for the SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 19, NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 30, T. 39 S., R. 11 E., W. M. He was convicted of larceny in the Circuit Court of Oregon for Klamath County and sentenced to two years' imprisonment in the State penitentiary on July 14, 1934, and has been since released on parole. May 6, 1935, Rose E. Zedwick, as divorced wife of Fehnle, submitted final proof on the entry, alleging the divorce was obtained by her on account of entryman's crime and sentence.

By decision of August 2, 1935, the Commissioner rejected the final proof, holding that Rose E. Zedwick was not qualified as a deserted or abandoned wife within the terms of the Act of October 22, 1914 (38 Stat. 766); that no intention to submit such proof was served on the entryman as said law prescribes; that with the divorce her rights in the homestead ended; that entryman's absence due to judicial restraint was not an abandonment of the land, and the entry was not subject to contest, and that upon the entryman's submitting proof that he is a citizen he can submit final proof before March 12, 1937, when the statutory life of the entry will expire.

Communications from the entryman to the General Land Office are to the effect that he resided continuously on the land from September 1, 1931, to July 6, 1934, the date of his arrest; that substantial improvements which are specified were made on the entry; that his wife filed suit for divorce in August 1934, and afterward moved back upon the entry and continues to reside there; that he has been assured by the parole officer that upon expiration of his sentence his citizenship will be restored.

Zedwick has appealed from the Commissioner's decision. Among other things she alleges that she furnished the money (\$175) to purchase the relinquishment of the former entryman and for the improvements on the land; that the land was reclaimed and cultivated with her own labor; that by reason of his crime, the commission of a felony, the entryman's citizenship will not be restored, and he is subject to deportation.

Letters purporting to come from the local United States Attorney and from the entryman to his wife are filed, the former expressing the opinion that the entryman would not make a desirable citizen, and the latter, dated July 22, 1934, among other things, stating: "The homestead is yours, also you can get a divorce now at very little cost." Appellant also contends that the husband being civilly dead, she as his widow may complete the entry, citing the case of *Belle Williams* (39 L. D. 151).

The special agent who investigated the entry expresses the opinion that the divorced wife is deserving of the place, as her money and labor improved it, and it was doubtful whether entryman could complete his citizenship.

Civil death in the case of Williams, *supra*, resulted, and in the State of Oregon (Code of Oregon, 1930, Sec. 14-1015), it would result, only from conviction of crime and sentence to life imprisonment. The courts have held that a divorced wife is not and cannot be the widow of him from whom she was divorced and a widow is a woman who has lost her husband by death. (See cases cited in 68 C. J. 267.) The statutes of Oregon (Code of 1930, Sec. 6-907) permit divorce for conviction of a felony. As entryman's former wife alleges she obtained the divorce on this ground, and not on account of abandonment or desertion, which it is uniformly held must be voluntary, and no such abandonment or desertion appearing, no basis is seen under the Act of October 22, 1914, for appellant's making proof as a deserted wife. The Commissioner's action rejecting such proof must therefore be sustained.

Although the appellant is mistaken in the view that she occupies the status of either a widow or deserted wife of the entryman, assuming the showings of fact made by her are true, it does not follow that she has not a better right to obtain title to the entry than the entryman.

According to these showings the entryman after his conviction assured her that the homestead was hers. That assurance was given though it is shown that a divorce between them was contemplated. It would seem that in reliance upon such assurance the wife resumed residence on the land and maintained residence to the present time and obtained the divorce. According to sworn averments in the unacceptable proof she has added substantially to the improvements and cultivation. She was not a trespasser, as the Commissioner holds, by returning to the land, as she had implied consent to take possession. The natural import of the language the entryman used was that he was abandoning and relinquishing his right of entry for her benefit. She having acted upon that assurance, it seems inequitable that he should now be permitted to insist on his rights because the record entry remains in his name. In the case of *Love v. Flahive* (205 U. S. 201), in 1882, Love settled on unsurveyed land with a view to homestead entry. In 1883 he sold his claim, at the same time retaining possession, to Rundell, who subsequently sold to Flahive. In 1889, after survey, Love filed homestead application for the land. Flahive contested his right. The Department held that the sale was conclusive evidence that Love asserted, at that time, no title in himself, or if he had prior to such time asserted title, that by such sale he

relinquished all claim in and to the tract in controversy, and that he is in equity and good faith estopped from asserting title against the vendee of the purchaser from him. The tract was held subject to Flahive's rights and his widow obtained patent. Love brought suit to have a trust declared in his favor. The court said (pp. 201-202) :

It is objected by the plaintiff that a sale of a homestead prior to the issue of patent is void under the statutes of the United States. *Anderson v. Carlins*, 135 U. S. 483. This is undoubtedly the law, and the ruling of the Secretary was not in conflict with it, but the fact that one seeking to enter a tract of land as a homestead cannot make a valid sale thereof is not at all inconsistent with his right to relinquish his application for the land, and so the Secretary of the Interior ruled. While public policy may prevent enforcing a contract of sale, it does not destroy its significance as a declaration that the vendor no longer claims any rights. He cannot sell and at the same time deny that he has made a sale. The Government may fairly treat it as a relinquishment, an abandonment of his application and entry. No man entering land as a homestead is bound to perfect his title by occupation. He may abandon it at any time, or he may in any other satisfactory way relinquish the rights acquired by his entry. Having done that, he is no longer interested in the title to the land.

On rehearing (206 U. S. 356) the court said:

A sale made to a party who is in possession of a tract of public land with an intent to thereafter enter it as a homestead is equivalent to a relinquishment of his right to enter, and the Department may properly treat him as having no further claims upon the land. * * * We are of the opinion therefore, that the sale in 1883 was rightfully held by the Department to estop the plaintiff from subsequent entry of the land, at least against one who was a purchaser from his vendee.

In *Hall v. Hughes* (28 L. D. 255), Hughes, who had filed a soldiers' declaratory statement for a certain tract, made a contract with Hall to relinquish his claim for \$25, thereby inducing Hall to purchase the claims of two settlers on the land with claims superior to Hughes, and after Hall had bought out the settlers, Hughes refused to carry out the agreement. Hall's protest against the subsequent homestead application of Hughes was denied by the local office on hearing thereof, and Hughes was allowed to make entry. The Department affirmed the Commissioner's action in canceling the entry of Hughes, and allowing Hall's entry to remain intact on the ground that Hughes had committed such a fraud as to estop him from setting up his claim. Likewise in *Phillips v. Matthews* (24 L. D. 297), Phillips made settlement on a tract, having purchased a claim of a railway company thereto that was subsequently held invalid and rejected by the Department. Matthews made entry of the land as a successful contestant against the railway company's claim. Matthews represented to Phillips, who was not a party to the contest, that he had not contested the company's claim

and denied that he laid any claim to land in the neighborhood and offered to relinquish his homestead right for \$15, which Phillips paid and Matthews used. The Department held that equitable considerations demanded that Matthews be prevented from denying the sale, and ordered the entry of Matthews canceled.

While there is no sale of rights in this case, the entryman agreed to relinquish and abandon his claim in favor of the appellant, acting upon which the latter has resided upon the land and substantially improved the claim under the belief that she could obtain title thereto. Assuming as above stated the genuineness of the renunciation, it would seem contrary to principles of equity to permit the entryman to deny it.

Prima facie, upon the appellant's settlement in reliance upon entryman's declaration that he relinquished his rights in her favor she secured a valid existing right, and a hearing should be ordered to afford her opportunity to establish the facts in support of her claim. In harmony with the views herein expressed the rejection of the final proof tendered is affirmed. The order permitting entryman to make final proof on a showing that he has been admitted to citizenship will be suspended awaiting the outcome of the proceedings and the case is remanded for proceedings as herein directed. Entryman may secure a postponement of the hearing should his attendance thereat be in violation of his parole.

As modified the Commissioner's decision is

Affirmed.

OWNERSHIP OF ISLAND WITHIN BOUNDARIES OF FORT BERTHOLD INDIAN RESERVATION

Opinion, March 31, 1936

INDIAN LANDS—RESERVATION—RIPARIAN RIGHTS—OWNERSHIP.

Where, prior to the admission of a Territory to statehood, an Indian reservation located therein had been established by the United States which included lands on both sides of a river traversing a portion of the reservation, and after the admission of the State into the Union an island formed in said river, the island is a part of the reservation and its status Indian property, and not the property of the State.

MARGOLD, *Solicitor*:

My opinion has been requested on the question of the ownership of part of an island in the Missouri River lying within the boundaries of the Fort Berthold Indian Reservation.

The land in question has been formed out of the bed of the Missouri River since 1889, according to the findings of the Commis-

sioner of the General Land Office. Prior to the formation of this island, North Dakota had been admitted to statehood. Act of February 22, 1889 (25 Stat. 676). The question arises: Did the island, upon its formation, become the property of the State of North Dakota, or did it become a part of the reservation held by the United States in trust for the Fort Berthold Indians?

As a general rule, islands formed in navigable streams belong to the sovereign State which owns the river bed. Section 5475 of the Compiled Laws of North Dakota, 1913, provides:

Islands and accumulation of lands formed in beds of streams which are navigable belong to the State, if there is no title or prescription to the contrary.

It is well established, however, that tide lands and beds of navigable streams which have been made part of an Indian reservation, by treaty or otherwise, do not pass to a State subsequently created. *United States v. Stotts* (49 Fed. (2d) 619); *Taylor v. United States* (44 Fed. (2d) 531).

The question in each case is whether prior to the admission of the Territory to statehood the land has been made part of an Indian reservation, or otherwise reserved for some public purpose of the Federal Government. In *United States v. Holt Bank* (270 U. S. 49, 55), the court declared:

It is settled law in this country that lands underlying navigable waters within a State belong to the State in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the States and with foreign nations, and subject to the qualification that where the United States, after acquiring the territory and before the creation of the State, has granted rights in such lands by way of performing international obligations, or effecting the use or improvement of the lands for the purposes of commerce among the States and with foreign nations, or carrying out other public purposes appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent creation of the State, but remain unimpaired, and the rights which otherwise would pass to the State in virtue of its admission into the Union are restricted or qualified accordingly. *Barney v. Keokuk*, 94 U. S. 324, 338; *Shively v. Bowlby*, 152 U. S. 1, 47-48, 57-58; *Scott v. Lattig*, 227 U. S. 229, 242; *Port of Seattle v. Oregon & Washington R. R. Co.*, 255 U. S. 56, 63; *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U. S. 77, 83-95. But, as was pointed out in *Shively v. Bowlby*, pp. 49, 57-58, the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future States, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.

The ownership of the island in question, therefore, turns upon the narrow issue: Was the bed of the Missouri River a part of that

territory which was reserved to the Fort Berthold Indians prior to the admission of North Dakota to the Union?

The steps in the creation of the present Fort Berthold Reservation are traced in detail in the case of *Fort Berthold Indians v. United States* (71 Ct. Cl. 308). The court's special findings of fact show that by the treaty of Fort Laramie, dated September 17, 1851 (11 Stat. 749), a large tract of land, of which the Missouri River at the point in question was a northeastern boundary, was recognized as "territory of the Gros Ventre, Mandan, and Arickaree Nations", and that "in making this recognition and acknowledgment, the aforesaid Indian Nations do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." Subsequently, by Executive order dated April 12, 1870, new boundaries were fixed for the reservation of the Arickaree, Gros Ventre, and Mandan Indians, since known as the Fort Berthold Reservation. These boundaries included territory on *both* sides of the Missouri River, at the point now in controversy. The Executive order made no express reference to the bed of the river. In this respect the facts here presented are different from those presented in *United States v. Stotts, supra*, where tide lands were expressly reserved to the Lummi Tribe, or in *Taylor v. United States, supra*, where the river bed had been transferred to the State of Washington prior to the creation of a reservation.

Again, the facts presented in the instant case are distinguishable from those involved in *Haight v. City of Keokuk* (4 Iowa, 199), and *Barney v. Keokuk* (94 U. S. 324), where the grant of land was made to individual Indians rather than to a political body, and was therefore construed to run to the river edge rather than to the *medium filum aquae*. In the instant case the grant of territory runs in favor of a political body, with which the United States dealt by treaty and which could, with entire propriety, receive a grant of title to the bed of a navigable stream. See *Taylor v. United States, supra*, at p. 534; *Fort Berthold v. United States, supra*; Solicitor's Opinion, "Powers of Indian Tribes", approved October 25, 1934, in 55 I. D., pp. 19-30.

Finally, the case is distinguishable from *United States v. Holt Bank, supra*, in which the court found the bed of Mud Lake had not been included as a part of the Red Lake Reservation. The court summarized the facts leading to this conclusion as follows:

* * * There was no formal setting apart of what was not ceded, nor any affirmative declaration of the rights of the Indians therein, nor any attempted exclusion of others from the use of navigable waters. The effect of what was done was to reserve in a general way for the continued occupation of the

Indians what remained of their aboriginal territory; and thus it came to be known and recognized as a reservation. *Minnesota v. Hitchcock*, 185 U. S. 373, 389. There was nothing in this which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy, before stated, of treating such lands as held for the benefit of the future State. [At page 58.]

In the instant case there was, very clearly, a formal setting apart to the Indians of territory on both sides of the river bed here in question. This was done under circumstances requiring an international agreement between the United States and the Indian nations concerned. The instant case thus falls fairly within the exception which the Supreme Court has recognized to the general policy above stated.

On the question of the intent of Congress, the words of the United States Supreme Court in *Donnelly v. United States* (228 U. S. 243) are applicable to the instant case. In the *Donnelly* case, a question of Federal jurisdiction turned on the issue of whether the river bed of the Klamath River was part of the Hoopa Valley Reservation. The language of the Executive order describing such reservation was essentially similar to the language used in the Executive order of 1870 defining the territory of the Fort Berthold Reservation. The court declared:

Does the reservation include the bed of the Klamath River? The descriptive words of the order are "a tract of country one mile in width on each side of the Klamath River and extending," etc. It seems to us clear that if the United States was the owner of the river bed, a reasonable construction of this language requires that the river be considered as included within the reservation. Indeed, in view of all the circumstances, it would be absurd to treat the order as intended to include the uplands to the width of one mile on each side of the river, and at the same time to exclude the river. As a matter of history it plainly appears that the Klamath Indians established themselves along the river in order to gain a subsistence by fishing. The reports of the local Indian agents and superintendents to the Commissioners of Indian Affairs abound in references to fishing as their principal subsistence, and the river is described as running in a narrow canyon through a broken country, the Indians as dwelling in small villages close to its banks. * * * [At page 259.]

The question of navigability of the Missouri River at the point in question is irrelevant to the question of ownership of the river bottom. Clearly neither the State of North Dakota nor any Indian tribe could interfere with commerce on a navigable stream, regardless of the ownership of the land under water. The question of such ownership should be considered in terms of its actual implications. It is well known that the Missouri River in the region of the Fort Berthold Reservation is a river of changing outlines, with banks generally moving in one direction or another and sometimes in both directions at once. Can it be plausibly declared that at the time of setting aside Fort Berthold Reservation the Government

intended to recapture islands or strips of land that might be formed from what was at the moment river bottom? Or did the Government simply reserve what it could not in any event alienate, namely, a public highway for navigation under Federal protection and control?

Viewed in this light, the intent of the Government appears clear. I am of the opinion that the river bed, at the point in question, was part of the Fort Berthold Indian Reservation prior to the admission of North Dakota to statehood. The State of North Dakota, on its admission to the Union, expressly disclaimed all right and title to Indian lands. (Constitution of North Dakota, Article XVI, section 203.) It follows that islands subsequently formed from the river bed, which belonged to the Indians of the Fort Berthold Reservation, retained the original status of the river bed and must now be recognized as part of the Fort Berthold Reservation.

Approved:

T. A. WALTERS,

First Assistant Secretary.

CORRECTION OF LAND TITLE RECORDS IN THE DISTRICT OF COLUMBIA

Opinion, April 13, 1936

TITLE—CORRECTION OF RECORDS—AUTHORITY OF DIRECTOR OF NATIONAL PARK SERVICE.

The Director of the National Park Service is clothed with authority, by virtue of Sec. 2 of the Act of March 3, 1899 (30 Stat. 1346), Secs. 3 and 4 of the Act of February 26, 1925 (43 Stat. 983), and Executive Order No. 6166, dated June 10, 1933, made pursuant to the Act of March 3, 1933 (47 Stat. 1517), to correct the United States title records therein referred to to show ownership in the occupant, provided the occupant submits sufficient proof of uninterrupted possession.

TITLE—RECORDS—DERAIGNMENT OF AUTHORITY.

Congress having conferred upon the Director of Public Buildings and Public Parks authority over "all official records, papers, etc., in the possession of the Secretary of War or Chief of Engineers of the United States Army" pertaining to the title to lot 810, square 825, District of Columbia, and having later transferred all said duties and records to the Director of the National Park Service, it follows that the Director is clothed with authority to correct a record pertaining to said lot 810.

TITLE—CORRECTION—SUFFICIENCY OF INSTRUMENT.

Where an act of Congress authorizing a correcting of land title records does not specify the method of correction, but merely requires that the records be so corrected that they shall show title in the occupant, and the purpose of the act is in effect to divest the United States of claim of title, a quitclaim deed is within the authority of the act and suffices.

TITLE—PROOF—AFFIDAVIT—ESSENTIALS.

Where a statute requires the occupant of land to file proof that he or his predecessors in claim have had actual possession of the land uninterrupted for 20 years, it is not sufficient that the facts as to such possession are stated on information and belief, but they must be within actual knowledge of the affiants.

MARGOLD, *Solicitor*:

You [the Secretary of the Interior] have submitted for my opinion several questions concerning the correction of land title records in the District of Columbia pursuant to the Act of March 3, 1899 (30 Stat. 1346), arising out of the case of the devisees of one Leopold Luchs.

The land in question, lot 810, square 825, District of Columbia, is claimed by one Norman Luchs, as life tenant, and Jane Luchs, remainderman, both claiming under the will of one Leopold Luchs, as shown by the abstract title submitted. Legal title to the land in question is vested in the United States although it has evidently long been claimed by private parties. An investigation of Government land titles in the District of Columbia established that this lot was never conveyed away by the United States nor, so far as records show, ever sold by the officer of the United States charged with the sales of land in the District of Columbia. Document No. 277, Sen. Doc., Vol. 22, 55th Cong., 2nd Sess.; and Report No. 907, Sen. Rep., Vol. 3, 62nd Cong., 2nd Sess.

Congress being advised by the report in Document 277, Sen. Doc., Vol. 22, *supra*, that legal title to square 825 was in the United States and without record of any sale thereof or payment of purchase price therefor, authorized the Secretary of War to correct the United States title records to show ownership in the occupant provided the occupant submitted sufficient proof of uninterrupted possession. Act of March 3, 1899 (30 Stat. 1346). Subsequently, Congress appointed a commission to make a complete investigation of this and other titles in the District of Columbia. Act of May 30, 1908 (35 Stat. 453). This commission reported on July 13, 1912, recommending among other things repeal of the authority granted by section 2 of the Act of March 3, 1899, *supra*, for the correction of records. (Report No. 907, Sen. Rep., Vol. 3, *supra*, page 47.) The authority was not repealed, however, and in an opinion by the Attorney General, it has been held that this authority continued in effect unimpaired by any of the provisions of the Act of May 30, 1908, *supra*. 29 Ops. Atty. Gen. 40.

In these circumstances, the present occupant, Norman Luchs, has made application to the Director of the National Park Service to have the Government title records corrected to show the present

status of title with respect to the interest of the United States. This application raises four questions:

1. As to the authority of the Director to correct the records.
2. As to the method of correction.
3. As to the sufficiency of form of quitclaim deed proposed to be used.
4. As to whether the applicant has sufficiently complied with the statutory requirements as to proof of occupancy.

I am of the opinion that the authority to correct records in this case is now vested in the Director of the National Park Service.

This authority was originally vested in the Secretary of War by section 2 of the Act of March 3, 1899, *supra*, which provides as follows:

Sec. 2. That the Secretary of War be, and he is hereby, authorized and directed to correct the records of the War Department in respect of any of the lots mentioned in Senate Document Numbered Two hundred and seventy-seven, Fifty-fifth Congress, second session (being a letter from the Secretary of War transmitting, in compliance with the resolution of the Senate of January twenty-seventh, eighteen hundred and ninety-eight, a letter from the Chief of Engineers, together with list of lots in the city of Washington, District of Columbia, the title to which the records of his office show to be in the United States, and list of lots in the city of Washington, District of Columbia, which are shown by the records of his office to have been donated by the United States), upon the filing by an actual occupant of any of the lots mentioned in said document sufficient proof that the said occupant or the party under whom he claims has been in actual possession of the said lot or lots for an uninterrupted period of twenty years, so that said records shall show the title to said lots to be in the said occupant.

At the time this law was enacted the records mentioned in the above act were in charge of the Chief of Engineers (Act of March 2, 1867, 14 Stat. 457, 466), an officer under the supervision of the Secretary of War. Thereafter Congress enacted the Act of February 26, 1925 (43 Stat. 983), which provides in part as follows:

Sec. 3. * * * all authority, powers, and duties conferred and imposed by law upon the Secretary of War or upon the Chief of Engineers of the United States Army in relation to the construction, maintenance, care, custody, policing, upkeep, or repair of public buildings, grounds, parks, monuments, or memorials in the District of Columbia, together with the authority, powers, and all duties and powers conferred and imposed by law upon the officer in charge of public buildings and grounds, shall be held, exercised, and performed by the Director of Public Buildings and Public Parks of the National Capital, under the general direction of the President of the United States.

Sec. 4. * * * and all official records, papers, files, furniture, supplies, and other property in use in or in the possession of the offices so consolidated are hereby transferred to the office hereby created. * * *

The latter act did not expressly confer on the newly created office of Director of Public Buildings and Public Parks of the National

Capital the authority given to the Secretary of War by the Act of March 3, 1899, *supra*, but I am of the opinion this authority was conferred by necessary implication. This implication arises out of the transfer to the newly created and independent office of all of the records formerly in charge of the Chief of Engineers of the Army, these being the records which the Secretary of War was empowered to correct by the Act of March 3, 1899. To hold that the authority was not so conferred by the Act of February 26, 1925, would result in the anomalous situation of having the records in charge of one independent officer and the authority to correct them in another independent officer, a result that ought not to be reached in the absence of a specific direction by Congress. Having found that Congress conferred the authority in question on the Director of Public Buildings and Public Parks, it follows that this same authority became vested in the Director of the National Park Service when all the duties and records of the former were transferred to the latter by Executive Order No. 6166, dated June 10, 1933, made pursuant to the Act of March 3, 1933 (47 Stat. 1517). *Of. Solicitor's Opinion, October 30, 1933, M. 27583.*

The Director of the National Park Service proposes to effect the correction of the records in this case by the execution of a quitclaim deed. This, I am of the opinion, is proper.

The Act of March 3, 1899, authorizes the correction of records "so that said records shall show a title to said lots to be in the said occupant." There is no direction in the act that the correction shall be accomplished by a quitclaim deed; and something less, such as a written statement that the occupant has filed the necessary proofs with the Director in accordance with the act, would be a compliance with the statute. But because the statute does not specify the method of correction and since the purpose of the act is in effect to divest the United States of its claim of title, I am of the opinion that the use of the quitclaim deed is within the authority given by the act and is in fact the best procedure for accomplishing the desired results.

The deed, a quitclaim deed, designates the grantee as the heirs, devisees, or assigns of Leopold Luchs. This designation is sufficient to cover the occupant, as life tenant, and the remainderman, both of whom claim as devisees under the Leopold Luchs will. The deed form will be in all other respects satisfactory, when corrected in accordance with the notations made thereon.

There remains the question as to whether the applicant has submitted sufficient proof of occupancy as required by the statute.

The statute requires that the occupant file sufficient proof that he or his predecessors in claim have had *actual* possession uninterupt-

edly for 20 years. To meet this requirement the applicant has submitted an abstract of title showing chain of title from September 25, 1878, down to date. This abstract shows that Leopold Luchs has had a record title since July 7, 1910. In addition there are submitted two affidavits purporting to show the actual uninterrupted possession. The first affidavit of one Grindley covers a period from 1910; the second affidavit of one Graves covers a period from 1919. In each instance, however, the facts as to possession are stated on the information and belief of the affiant. This, in my opinion, is not a sufficient compliance with the statute. The facts stated in these affidavits should be within the actual knowledge of the affiants, for the prerequisite to correction of the records is proof in the legal sense of actual possession for the 20-year period.

I conclude that when satisfactory affidavits are submitted, the Director of the National Park Service may correct the Government title records by the execution of a quitclaim deed in the proposed form.

Approved:

T. A. WALTERS,

First Assistant Secretary.

**FEEES TO ACCOMPANY APPLICATIONS FOR COAL, SODIUM, POTASH,
AND OTHER MINERAL LICENSES, PERMITS, AND LEASES**

[Circular No. 1383]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., April 14, 1936.

REGISTERS, UNITED STATES LAND OFFICES:

Circular No. 1004, dated May 2, 1925 (51 L. D. 138), as amended by Circular No. 1251, dated May 7, 1931 (53 I. D. 379), is hereby amended to read as follows:

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."

Such moneys paid in connection with applications for coal licenses, permits, or leases which are rejected will not be returned unless and until such return has been authorized by this office upon receipt of a report from the Division

of investigations or the applicant has furnished an affidavit stating that he has not mined any coal from the land embraced in the rejected application.

FRED W. JOHNSON,
Commissioner.

Approved:

T. A. WALTERS,
First Assistant Secretary.

**CONFLICTING APPLICATIONS UNDER SECTIONS 8, 14, AND 15, OF
TAYLOR GRAZING ACT**

[Circular No. 1384]

INSTRUCTIONS

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 15, 1936.

REGISTERS, UNITED STATES LAND OFFICES:

The ordering of public sales under section 14 of the Taylor Grazing Act, approved June 28, 1934 (48 Stat. 1269), and the granting of leases under section 15 of the act, are within the discretionary power of the Secretary of the Interior, whereas the granting of exchanges under section 8 of said act is mandatory on the part of the Secretary, if and when he finds such exchanges in the public interest. It follows that in adjudicating conflicting applications under these three sections of the act, it will be necessary for this office to give consideration to all rights and interests and to all attendant circumstances, including the date of filing.

In the future, you will not reject an application filed under any of the above-mentioned sections solely for conflict with a prior application under any one of said sections, but will suspend such an application and transmit same to this office, calling particular attention to the conflict.

In all other respects, the instructions contained in Circulars 684, 1346, and 1375 remain in full force and effect and you will continue to fully comply therewith as to all applications filed under the above-mentioned sections of the act.

FRED W. JOHNSON,
Commissioner.

Approved:

T. A. WALTERS,
First Assistant Secretary.

LOUIS M. POZAR

Decided April 23, 1936

HOMESTEAD—ALLEGED MINERAL CHARACTER OF LAND—SURVEY—SEGREGATION—MINING REGULATIONS, SECTION 37(c).

Section 37(c) of the Mining Regulations forbids the allowance of an agricultural claim for any portion of a lot, or legal subdivision of 40 acres, where there is no approved survey of the mining claims intruding therein; and even where there is such an approved survey, evidence is required of the agricultural applicant of the mineral character of the claim whose segregation is sought as a basis for the segregation of the residue of the land (citing *Roos v. Altman et al.* 54 I. D. 47, 55).

HOMESTEAD ENTRY—SEGREGATION SURVEY—MINING REGULATIONS, SECTION 37(c).

Upon tender of final proof upon an agricultural entry, final receipt and final certificate should not be issued where the land applied for includes an indefinite fraction of legal subdivisions, not susceptible of proper description without segregation survey, and no basis under paragraph 37(c) of the Mining Regulations has been shown for such survey. In such case the entryman should be called upon to make such showing.

HOMESTEAD ENTRY—VESTED RIGHT—CONFIRMATION OF TITLE UNDER SECTION 7, ACT OF MARCH 3, 1891—SUBSEQUENT ACTION BY LAND DEPARTMENT.

After the lapse of two years from the date of issuance of a receiver's receipt upon a final entry under a homestead law, if no contest or protest be then pending, the Land Department is required by section 7 of the Act of March 3, 1891, to issue a patent for the land embraced in the entry, and its action in thereafter canceling the entry for failure to comply with applicable regulations is without authority and has no effect on the rights of the entryman.

HOMESTEAD ENTRY—PROTEST—LACHES—BURDEN OF PROOF.

A protest against an existing homestead entry based upon an equitable title to the land under a prior entry, erroneously canceled after the lapse of two years from the date of final receipt, is insufficient where the prior entryman and his transferees have acquiesced in the erroneous cancelation until after the intervention of an adverse claim and the present entryman sets forth facts tending to show that neither the prior entryman nor his transferees have asserted any claim to the land since its erroneous cancelation and have exercised no rights of ownership thereover. The burden in such a case is on the protestant to show that the equitable title acquired by the prior entryman has not been abandoned and has not been lost by laches in asserting it.

WALTERS, *First Assistant Secretary*:

Louis M. Pozar has appealed from a decision of the General Land Office dated May 31, 1935, which held for cancelation in part his homestead entry (Sacramento 029303) made under Sec. 2289, Revised Statutes. Pozar filed his application for lots 2, 3 and E $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 33, T. 4 N., R. 13 E., M. D. M. on August 27, 1934. Entry was allowed January 28, 1935.

June 24, 1898, Fremont E. Burrows made homestead entry No. 6758 for lot 3 and SE $\frac{1}{4}$ NW $\frac{1}{4}$ together with NE $\frac{1}{4}$ SW $\frac{1}{4}$ and NW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Sec. 33, containing 157.54 acres. January 29, 1903, he submitted final proof with a relinquishment to the extent of the overlap of the Rojas and San Antone mining claims upon lot 3 and SE $\frac{1}{4}$ NW $\frac{1}{4}$, the land relinquished being described by metes and bounds. Final receipt and final certificate were issued to him on December 31, 1903, for the land entered less that relinquished. To the final proof the register appended a statement to the effect that the delay in issuing the receipt and certificate was for the reason that they were at a loss how to proceed in view of the relinquishment and the fact that the land relinquished had not been surveyed.

October 30, 1906, the Commissioner directed that Burrows be allowed to file a corroborated affidavit within 60 days as to the character of the land embraced in the mining claims and to advise him that if the showing as to mineral character of the ground embraced within the mining claims was satisfactory, a segregation as provided in paragraph 37 of the Mining Regulations would be made of the mining claims. No action was taken in response to these requirements by the entryman. Rule to show cause why his entry should not be canceled to the extent of the subdivisions upon which the mining claim was located was served on entryman June 4, 1907. Having made no response, the Commissioner, on November 20, 1907, canceled the entry to the extent of lot 3 and SE $\frac{1}{4}$ NW $\frac{1}{4}$, and on December 19, 1907, patent issued for the remaining tracts, namely, NE $\frac{1}{4}$ SW $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$. The above requirement was laid by the Commissioner to obtain compliance with section 37 (c) of the Mining Regulations, which forbids the allowance of an agricultural claim for any portion of a lot, or legal subdivision of 40 acres, where there is no approved survey of the mining claims intruding therein, and even where there is such an approved survey evidence is required of the agricultural applicant of the mineral character of the claims whose segregation is sought as a basis for the segregation of the residual area. Section 37 (c) states that in the absence of such a showing the "original lot or legal subdivision" shall be subject to agricultural appropriation only. See *Roos v. Altman et al.* (54 I. D. 47, 55).

It appears from documents that were supplied by a Mrs. Annie Baker that on November 19, 1907, Fremont E. Burrows and wife conveyed to John Baker, otherwise known as John Becher, lot 3, SE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 33, aforesaid, containing 157.54 acres, together with other land, and that on September 19, 1924, John Baker, or Becher, conveyed the land to Annie Becher or Baker. It also appears that the patent issued to Burrows Decem-

ber 19, 1907, aforementioned, was not delivered until March 18, 1935, when it was sent to Mrs. Annie Baker.

The Commissioner canceled the entry of Pozar as to lot 3 and SE $\frac{1}{4}$ NW $\frac{1}{4}$ on the ground that by virtue of the provisions of Sec. 7, Act of March 3, 1891 (26 Stat. 1093), the entry of Burrows, so far as not relinquished, was confirmed two years after the date of final receipt issued December 31, 1907; that on December 31, 1909, Burrows' right to a patent became vested; that thereafter the Land Department had no jurisdiction in the matter, except the ministerial duty to issue the patent, and consequently all proceedings after the last above mentioned date were without authority of law. In accordance with these views the Commissioner revoked the action of November 20, 1907, canceling the entry of Burrows in part, canceled the entry of Pozar as to lot 3 and SE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 33, and stated that upon his action becoming final, a segregation survey would be made to separate the land relinquished by Burrows from that he retained, and that patent in that event would be issued in the name of Burrows and delivered to Mrs. Baker.

In support of the appeal, a purported letter dated May 11, 1908, from one J. J. Agostino, alleged to be chief deputy in the office of the assessor for Calaveras County, California, to the register of the local land office at Sacramento, and the register's reply thereto, and certified as spread on the records of the assessor's office, have been filed. In the letter the chief deputy states that Mr. John Baker, who purchased the land within the entry of Burrows (No. 6758), desired to ascertain the particulars regarding the cancellation made November 20, 1907, to which the register appears to have replied in effect that the entry was patented as to NE $\frac{1}{4}$ SW $\frac{1}{4}$ and NW $\frac{1}{4}$ SE $\frac{1}{4}$ December 19, 1907, but canceled as to lot 3 and SE $\frac{1}{4}$ NW $\frac{1}{4}$ because no evidence of mineral character of the mining claims to be segregated was furnished as a basis of survey. Another letter, of June 22, 1935, purporting to be signed by the county assessor, is filed, which is to the effect that upon notice of the cancellation of the entry as to the two last described tracts, said tracts were stricken from the tax rolls and that no assessment has been made thereon since that time. It is further alleged by Pozar that no use of lot 3 or SE $\frac{1}{4}$ NW $\frac{1}{4}$ has been made by John Baker or Annie Baker, his wife, for many years last past.

The final receipt and final certificate were issued for an indefinite fraction of legal subdivisions, not susceptible of proper description without segregation survey, and no basis under paragraph 37 (c) had been shown for such survey. The entryman should have been called upon to make such showing. The issuance of final receipt and certificate eliminating the relinquished land was erroneous and

unauthorized. The action of the Commissioner on October 30, 1906, calling for such showing and the subsequent cancelation because of failure to furnish it, were not incompatible with the construction placed upon the effect of section 7 of the Act of March 3, 1891, *supra*, prevailing at that time in the Department. The land called for by the final receipt and certificate was unsurveyed. Under the doctrine, *Mee v. Hughert* (13 L. D. 484), entries of unsurveyed land were regarded as a nullity, and were held as not subject to confirmation under section 7 aforesaid. *Cobb v. Oregon and California R. R. Co.* (36 L. D. 268); *James A. Cobb et al.* (37 L. D. 181). The view and practice that after the lapse of two years after the issuance of the receiver's receipt all contests or protest based upon any charge whatsoever were barred without qualification or exception were not adopted and uniformly followed until the Supreme Court, in *Payne v. Newton* (255 U. S. 438), and *Lane v. Hoglund* (244 U. S. 174), approved the rulings to that effect in *Jacob v. Harris* (42 L. D. 611), decided December 13, 1913.

Under the doctrine of the cases last cited, on December 31, 1905, Burrows, the entryman, had a vested estate and a right to a patent for the land, which could not be questioned or affected by any proceedings in the Land Department, and the cancelation thereafter of his entry on the land records had no effect whatsoever on his rights. The fact remains, however, that legal title remained in the United States. Burrows had but an equitable estate. He could convey no more than that to his transferee, and the question is suggested by the appeal whether Burrows and the subsequent transferees have not lost their rights by their acquiescence in an erroneous ruling for so long a time and by abandonment of their claim, and are not, in the presence of an adverse claim, estopped to assert their rights by laches. See *State of New Mexico, Robert M. Wilson, Lessee, v. Robert S. Shelton and John T. Williams* (54 I. D. 112).

It would seem from the showings of Pozar that Baker knew of the partial cancelation of Burrows' entry; that he acquiesced in that action and in the action of the tax assessor in striking the land off the tax rolls because it was public land, paid no taxes upon the land, and that neither he nor Mrs. Baker did anything to establish their equitable interest. There is no affirmative showing that Burrows or the Bakers occupied and improved the land or did any other acts that would afford notice to Pozar or others of their claim and possession thereof, or that Mrs. Baker raised any objections to Pozar's entry and settlement until after they were made.

It is not believed that the record warrants the cancelation of the entry of Pozar on the facts disclosed. Therefore, Mrs. Baker should be required to file a sufficient protest, duly corroborated, set-

ting forth all the facts upon which she bases her superior right to a patent for lot 3 and SE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 33, within 30 days from notice of this decision; otherwise, she will be deemed estopped from further asserting her claim. Accordingly, the Commissioner's action in holding the entry of Pozar for cancelation is reversed. His order for the segregation of the land relinquished by Burrows will be suspended to await determination of the question whether Mrs. Baker or Pozar has a better right to acquire the title to the land, and the case will be remanded for procedure in accordance with these views.

Reversed.

DISPOSITION OF OSAGE INDIAN TRUST FUNDS UPON DEATH OF INDIAN OWNER

Opinion, April 23, 1936

INDIANS—OSAGE "HEADRIGHT"—INCIDENTS THEREOF—ACT OF JUNE 28, 1906, AND AMENDMENTS.

Under the Act of June 28, 1906 (34 Stat. 539), and amendatory legislation, the right of individual members of the Osage Tribe of Indians in Oklahoma to receive trust funds segregated and placed at interest to their credit in the United States Treasury and to share in the Osage tribal mineral estate at the end of the trust period fixed by Congress, and during that period to receive the interest on the segregated trust funds and to participate in the distribution of bonuses and royalties from the mineral estate, is an Osage "headright."

INDIANS—SEGREGATED TRUST FUNDS—OSAGE "HEADRIGHT"—ALIENATION.

As the right to receive the segregated trust funds at the end of the trust period is part of the Osage "headright", the trust funds themselves fall into the same category as the headright in so far as voluntary and involuntary alienation is concerned.

INDIANS—SEGREGATED OSAGE TRUST FUNDS—IN WHOM BENEFICIAL TITLE RESTS—ALIENATION—CONTROL BY CONGRESS.

The beneficial title in and to the segregated trust funds of Osage Indians rests in the individual members, and such title may be transmitted by descent (section 6 of Act of June 28, 1906), or devise (section 8 of Act of April 18, 1912). But the devisee or heir succeeds to the beneficial title subject to the trust imposed upon the funds by Congress, and such trust may be released or terminated only when and as authorized by Congress.

INDIANS—SEGREGATED OSAGE TRUST FUNDS—PAYMENT TO ESTATE—LEGISLATION BY CONGRESS—CERTIFICATE OF COMPETENCY.

In the absence of legislation by Congress providing for payment of the segregated trust funds of deceased Osage Indians to executors or administrators of their estates, such payments, operating as they do to terminate or release the trust imposed upon such funds, are not authorized, whether the deceased member did or did not have a certificate of competency at the time of death.

INDIANS—SEGREGATED OSAGE TRUST FUNDS—SCOPE OF AUTHORITY OF EXECUTORS AND ADMINISTRATORS.

The authority contained in section 2 of the Act of February 27, 1925 (43 Stat. 1008), as amended by section 4 of the Act of March 2, 1929 (45 Stat. 1478), for payments to executors and administrators, does not extend to the segregated trust funds, but is confined to those funds which have accrued or which may accrue from the interest on said segregated trust funds and from the mineral royalties and bonuses.

MARGOLD, *Solicitor*:

You [the Secretary of the Interior] have requested my opinion on certain questions arising out of the Act of June 28, 1906 (34 Stat. 539), as amended by subsequent legislation hereinafter referred to. The questions deal with trust funds on deposit in the United States Treasury to the credit of individual Osage Indians and relate particularly to the disposition to be made of such funds upon the death of the Indian owner. As formulated by the Commissioner of Indian Affairs, the questions are:

1. Whether such funds are part of the Osage headright and as such must be held awaiting the determination of heirs.
2. Whether such funds may be paid to the administrator in the discretion of the Secretary of the Interior.
3. Whether such funds *must* be paid to the administrator on application where the decedent is less than one-half Indian blood or had a certificate of competency.

Before discussing those questions, it is necessary to review at some length the pertinent provisions of the Act of June 28, 1906, *supra*, and subsequent legislation.

The Act of June 28, 1906, provides for an equal division of the lands and funds of the Osage Tribe of Indians among the individual members according to a roll authorized to be made by the act. Most of the lands were to be allotted in severalty, partly as homesteads and partly as surplus lands. The remaining lands, including some town lots, were to be sold for the benefit of the tribe. Section 2, subdivision 7, authorized the Secretary of the Interior, in his discretion, to issue a certificate of competency to any adult member authorizing him to sell and convey all of his allotted lands except his homestead. The oil, gas, coal, and other minerals were reserved to the Osage Tribe for 25 years, with provisions for the leasing of same on royalties during that period. At that time, the United States held for the tribe trust funds of more than \$8,000,000 received under various treaties as compensation for the relinquishment of other lands. Under subdivision 1 of section 4, these funds were segregated and the sum of \$3,819.76 placed to the credit of each of the 2,229 enrolled members. The act contained no provision for the payment of this sum or any part thereof to the individual member.

Instead, the act declared that the segregated funds should be held in trust at interest by the United States for a period of 25 years, at the end of which period the funds (together with the lands and mineral interests) were to become the absolute property of the individual members (Sections 4 and 5). In the meantime, the interest accruing on these segregated funds was to be paid, with exceptions not here material, "quarterly to the members entitled thereto" (sub-division 1, section 4). The funds so segregated and retained in trust are those to which the questions under consideration relate and they will hereinafter be referred to as "trust funds."

With respect to the proceeds derived from mineral leases and other tribal sources, subdivision 2 of section 4 of the Act of 1906 directs that all such moneys be placed in the Treasury of the United States to the credit of the individual members and that, subject to certain deductions, all such moneys "shall be distributed to the individual members of said Osage Tribe according to the roll provided for herein, in the same manner and at the same time that payments are made of interest on other moneys held in trust for the Osages by the United States."

Section 6 of the Act of 1906 provides:

That the lands, moneys, and mineral interests, herein provided for, of any deceased member of the Osage tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys, and mineral interests must go to the mother and father equally.

By the Act of April 18, 1912 (37 Stat. 86), Congress altered the Act of 1906 in some respects and supplemented it in others. Section 3 of that act subjects to the jurisdiction of the local county courts the estates of Osages who are deceased or are orphan minors, insane or otherwise incompetent. That section reads:

That the property of deceased and of orphan minor, insane, or other incompetent allottees of the Osage Tribe, such incompetency being determined by the laws of the State of Oklahoma, which are hereby extended for such purpose to the allottees of said tribe, shall, in probate matters, be subject to the jurisdiction of the county courts of the State of Oklahoma, but a copy of all papers filed in the county court shall be served on the superintendent of the Osage Agency at the time of filing, and said superintendent is authorized, whenever the interests of the allottee require, to appear in the county court for the protection of the interests of the allottee. The superintendent of the Osage Agency or the Secretary of the Interior, whenever he deems the same necessary, may investigate the conduct of executors, administrators, and guardians or other persons having in charge the estate of any deceased allottee or of minors or persons incompetent under the laws of Oklahoma, and whenever he shall be of opinion that the estate is in any manner being dissipated or wasted or is being permitted to deteriorate in value by reason of the negligence, carelessness, or incompetency of the guardian or other

person in charge of the estate, the superintendent of the Osage Agency or the Secretary of the Interior or his representative shall have power, and it shall be his duty, to report said matter to the county court and take the necessary steps to have such case fully investigated, and also to prosecute any remedy, either civil or criminal, as the exigencies of the case and the preservation and protection of the interests of the allottee or his estate may require, the costs and expenses of the civil proceedings to be a charge upon the estate of the allottee or upon the executor, administrator, guardian, or other person in charge of the estate of the allottee and his surety, as the county court shall determine. Every bond of the executor, administrator, guardian, or other person in charge of the estate of any Osage allottee shall be subject to the provisions of this section and shall contain therein a reference hereto: *Provided*, That no guardian shall be appointed for a minor whose parents are living, unless the estate of said minor is being wasted or misused by such parents: *Provided further*, That no land shall be sold or alienated under the provisions of this section without the approval of the Secretary of the Interior.

Section 4 of the act declared that the tribal oil and mineral rights should remain unchanged and that the act should not be construed as changing or amending in any manner the provisions of the act of 1906 in regard to oil and mineral rights.

Section 5 deals expressly with trust funds and provides for the payment of same as follows:

That the Secretary of the Interior, in his discretion, hereby is authorized, under rules and regulations to be prescribed by him and upon application therefor, to pay to Osage allottees, including the blind, insane, crippled, aged, or helpless, all or part of the funds in the Treasury of the United States to their individual credit: *Provided*, That he shall be first satisfied of the competency of the allottee or that the release of said individual trust funds would be to the manifest best interests and welfare of the allottee: *Provided further*, That no trust funds of a minor or a person above mentioned who is incompetent shall be released and paid over except to a guardian of such person duly appointed by the proper court and after the filing by such guardian and approval by the court of a sufficient bond conditioned to faithfully administer the funds released and the avails thereof.

Section 6 provides that the lands of deceased Osage allottees may be partitioned or sold upon proper order of any court of competent jurisdiction in accordance with the laws of the State of Oklahoma, with this important proviso:

* * * That no partition or sale of the restricted lands of a deceased Osage allottee shall be valid until approved by the Secretary of the Interior. Where some heirs are minors, the said court shall appoint a guardian ad litem for said minors in the matter of said partition, and partition of said land shall be valid when approved by the court and the Secretary of the Interior. When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed. *If some of the heirs are competent and others have not certificates of competency, the proceeds of such part of the sale as the competent heirs shall be entitled to shall be paid to them without the intervention of an administrator. The shares due minor heirs, including such minor Indian heirs as may not be tribal mem-*

bers and those Indian heirs not having certificates of competency, shall be paid into the Treasury of the United States and placed to the credit of the Indians upon the same conditions as attach to segregated shares of the Osage national fund, or with the approval of the Secretary of the Interior paid to the duly appointed guardian. The same disposition as herein provided for with reference to the proceeds of inherited lands sold shall be made of the money in the Treasury of the United States to the credit of deceased Osage allottees. [Italics added.]

Section 7 of the Act of 1912 reads:

That the lands allotted to members of the Osage tribe shall not in any manner whatsoever be encumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency, or removal of restrictions on alienation; nor shall the lands or funds of Osage tribal members be subject to any claim against the same arising prior to grant of a certificate of competency. That no lands or moneys inherited from Osage allottees shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs: *Provided, however,* That inherited moneys shall be liable for funeral expenses and expenses of last illness of deceased Osage allottees, to be paid under order of the county court of Osage County, State of Oklahoma: * * *

Section 8 of the Act of 1912 reads:

That any adult member of the Osage Tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal, or mixed, including trust funds, from which restrictions as to alienation have not been removed, by will in accordance with the laws of the State of Oklahoma: *Provided,* That no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior.

The remaining acts of Congress to be considered are the Acts of March 3, 1921 (41 Stat. 1249), February 27, 1925 (43 Stat. 1008), and March 2, 1929 (45 Stat. 1478). The Act of 1921 enlarged the period of tribal ownership of the minerals, extended the life of all valid oil and gas leases existing at the end of the original period, and changed the original plan in some particulars, notably with respect to the quarterly distributions of the income from bonuses and royalties from tribal mineral leases and the interest on trust funds. Under the act of 1906, the entire income was distributed to the individual members. Nothing was withheld. However, increased oil production had so swelled the income that the payments were greatly in excess of current needs and were leading to gross extravagance and waste. Accordingly, the Act of 1921 restricted the quarterly payments to specified amounts and directed that the balance be retained by the Secretary of the Interior and invested and conserved for the future benefit of the members. The Act of February 27, 1925, made some minor changes in the quarterly allowances and broadened the authority of the Secretary with respect to the expenditure and investment of the retained funds. The income to be so administered

under that act and the prior act of 1921, it is important to notice, is the "pro rata share, either as a member of the tribe or heir or devisee of a deceased member, of the interest or trust funds, the bonus received from the sale of oil or gas leases, the royalties therefrom, and any other moneys due such Indian received during each fiscal quarter."

Section 2 of the Act of 1925, as amended by section 4 of the Act of March 2, 1929, *supra*, reads:

Upon the death of an Osage Indian of one-half or more Indian blood who does not have a certificate of competency, his or her moneys and funds and other property accrued and accruing to his or her credit and which have heretofore been subject to supervision as provided by law may be paid to the administrator or executor of the estate of such deceased Indian or direct to his heirs or devisees, or may be retained by the Secretary of the Interior in the discretion of the Secretary of the Interior, under regulations to be promulgated by him: *Provided*, That the Secretary of the Interior shall pay to administrators and executors of the estates of such deceased Osage Indians a sufficient amount of money out of such estates to pay all lawful indebtedness and costs and expenses of administration when approved by him; and, out of the shares belonging to heirs or devisees, above referred to, he shall pay the costs and expenses of such heirs or devisees, including attorney fees, when approved by him, in the determination of heirs or contest of wills. Upon the death of any Osage Indian of less than one-half of Osage Indian blood or upon the death of an Osage Indian who has a certificate of competency, his moneys and funds and other property accrued and accruing to his credit shall be paid and delivered to the administrator or executor of his estate to be administered upon according to the laws of the State of Oklahoma: * * *

Section 1 of the Act of 1929 extended the period of trust established for the trust funds segregated under the Act of 1906 to January 1, 1959. The period of tribal ownership of the minerals was extended for a like period.

The first question as to whether the trust funds are part of the Osage headright and as such must be held awaiting the determination of heirs, appears to have been induced by certain court decisions dealing with the alienability, etc., of an Osage headright and the jurisdiction of the courts thereover. In *Taylor v. Fayrien* (51 Fed. (2d) 884), the Tenth Circuit Court of Appeals ruled that no Indian of the Osage Tribe has the right to alienate his headright and that it is not subject to judicial process. In that case the Indian involved was an Osage of less than one half blood and had a certificate of competency, and the court held that his headright was not transferable and did not pass to his trustee in bankruptcy. To the same effect is *Taylor v. Jones* (51 Fed. (2d) 892), involving a member of the Kaw Tribe of Indians of less than the half blood with a certificate of competency. In both cases the Supreme Court of the United States denied certiorari. *Taylor v. Fayrien* (284 U. S. 672); *Taylor v. Jones* (284 U. S. 663). See also *In re Dennison* (38 Fed.

(2d) 662); appeal dismissed, 45 Fed. (2d) 585. In *Denoya v. Arrington* (20 Pac. (2d) 563), the Supreme Court of Oklahoma held that the income accruing to the Osage headright of a deceased Osage allottee subsequent to the death of said allottee is not an asset of the estate of such decedent which can be appropriated for the payment of the claims of creditors. Compare, however, *Globe Indemnity Company v. Bruce* (81 Fed. (2d) 143).

In the *Globe Indemnity Company* case, an Osage headright is accurately defined in the following language:

The right to receive the trust funds and the mineral interests at the end of the trust period, and during that period to participate in the distribution of the bonuses and royalties arising from the mineral estates and the interest on the trust funds, is an Osage headright.

As the right to receive the trust funds at the end of the trust period is part of the Osage headright, it follows that the trust funds themselves fall into the same category as the headright in so far as voluntary and involuntary alienation is concerned. The right to receive such funds, like the right to receive the mineral interests, at the end of the trust period, may be transmitted by descent (section 6 of the Act of 1906) or devise (section 8 of the Act of 1912). No provision in the Act of 1906 or in any subsequent act of Congress authorizes the alienation or encumbrance of the trust funds in any other manner. The disposition of such trust funds upon the death of the Indian entitled to receive the same at the end of the trust, that is, whether the trust funds should be released to the administrator or retained under trust for the benefit of the heirs or devisees, as the case may be, depends upon the answers to questions 2 and 3, which are so closely related that they will be jointly considered.

Section 2 of the Act of February 27, 1925, as amended by section 4 of the Act of March 2, 1929, *supra*, deals expressly with payments to executors and administrators, and will first be considered for the purpose of determining whether trust funds are included within the authority conferred by that section. Said section, which is reproduced above, divides the estates of deceased Osage Indians into two classes: (1) estates of Osage Indians of one half or more Indian blood who do not at the time of death have certificates of competency, and (2) estates of Osage Indians of less than one half Indian blood, or who have certificates of competency at the time of death. As to the first class, the Secretary of the Interior is given authority in his discretion to retain in his custody and control or pay to the administrator or executor of the estate the decedent's "moneys and funds and other property accrued and accruing to his or her credit and which have heretofore been subject to supervision as provided by law." With respect to the second class, the Secretary is directed

in mandatory language to deliver the funds and property described to the executor or administrator. In both cases, only those moneys "accrued and accruing" may be paid. Interpreting the words "accrued and accruing," the Tenth Circuit Court of Appeals, in *Globe Indemnity Company v. Bruce, supra*, said (at page 153):

It will be observed the act speaks of moneys, funds, and property accrued and accruing to the credit of the owner of the headright, not of quarterly payments accrued or accruing to such owner. We see no reason for construing the words accrued and accruing as referable to quarterly payments.

Interest on trust funds and the mineral royalties are constantly accruing to the credit of owners of headrights. On the death of the owner of a headright, certain interest on trust funds and mineral royalties will have accrued to his credit. The word accruing cannot refer to them. It must refer to those that arise after the death of the owner of the headright. *We hold the word "accrued" refers to interest and royalties that have arisen to the credit of the owner of the headright at the time of his death and the word "accruing" refers to the interest and royalties that will arise to the credit of his headright after his death and prior to the distribution of his estate.* [Italics added.]

It is clear from the foregoing interpretation that the funds and moneys authorized or directed to be paid to administrators and executors by section 2 of the Act of 1925, as amended by section 4 of the Act of 1929, are those moneys and funds which have accrued or may accrue from the interest on the trust funds and the mineral royalties. The trust funds upon which the interest accrues are not included in the section. Any other conclusion would be wholly inconsistent with the Congressional direction that these funds be held in trust until 1959, at which time, and not before, the right to receive the same becomes absolute.

The tribal funds segregated under the Act of 1906 were placed in trust by Congress for a definite and specific period which has since been extended to 1959, and the authority to determine when and under what conditions the trust so created shall be terminated rests exclusively with Congress. An intent to shorten or curtail the period of trust is not to be implied but must be clearly expressed. Payment of the trust funds to the administrator or executor obviously releases and terminates the trust. No provision authorizing release or termination of the trust in that or any other manner is found in the Acts of 1906, 1921, 1925, and 1929. Section 3 of the Act of 1912 does, as we have seen, subject to the jurisdiction of the local county courts the estates of deceased allottees of the Osage Tribe. That section, however, when read, as it must be, in conjunction with sections 5 and 6 of the same act cannot be regarded as authorizing termination of the trust by payment of the trust funds to the administrator or executor of such estates. Section 5 deals expressly with the trust funds and takes cognizance of the lack of authority in the Secretary of the Interior to release such funds from the trust by authorizing such re-

lease, in whole or in part, upon application, to Osage allottees, including minors as well as the blind, insane, crippled, aged, or helpless, with a proviso dealing specifically with payments to guardians appointed by the local county courts. Speaking of this section, the Supreme Court of the United States, in *McCurdy v. United States* (246 U. S. 263, 269) said:

Under the Act of June 28, 1906, the Secretary of the Interior had no authority to release or to invest any part of the principal of the trust fund held for Panther. His authority to release rests wholly upon section 5 of the Act of April 18, 1912 * * *

It is significant to note that Congress, in authorizing the release of these trust funds by section 5, expressly refrained from granting authority for the payment of such funds to the executor or administrator. The withholding of such authority and the granting of it in the several particulars enumerated shows a plain understanding on the part of Congress that the general grant of jurisdiction made by section 3 of the act did not authorize the release of these trust funds to any one. Even more specific is section 6, which deals expressly with the disposition to be made of these trust funds upon the death of the Indian entitled to receive them at the end of the trust. That section deals with the partition and sale of restricted lands of deceased Osage allottees, but the directions contained therein as to the disposition to be made of the proceeds from sales are made applicable to the trust funds by the concluding clause, which declares that the "same disposition as herein provided for with reference to the proceeds of inherited land sold shall be made of the money in the Treasury of the United States to the credit of deceased Osage allottees." These directions are (1) that where some of the heirs are competent (the word "competent" being defined elsewhere in the act to mean a person holding a certificate of competency), and others have not certificates of competency, the proceeds from such part of the sale as the competent heirs are entitled to "shall be paid to them without the intervention of an administrator" and (2) that the shares due minor heirs, including such minor Indian heirs as may not be tribal members and those Indian heirs not having certificates of competency, "shall be paid into the Treasury of the United States and placed to the credit of the Indians upon the same conditions as attach to segregated shares of the Osage national fund, or with the approval of the Secretary of the Interior paid to the duly appointed guardian." Applying these directions to the trust funds, it is to be observed that no authority whatsoever is conferred for the payment of such funds to an administrator. Indeed, such payments are prohibited in cases where competent heirs are jointly interested with incompetent heirs in such funds by the mandatory direction that the

competent heirs be paid their shares without the intervention of an administrator. As to the shares of the incompetent heirs, regardless of degree of Indian blood, the plainly expressed intent of Congress is that the trust funds shall be retained under trust for their benefit unless the Secretary of the Interior approves their release, not to an administrator, but to the duly appointed guardian of the heir.

The case of *Globe Indemnity Company v. Bruce, supra*, held that the probate court had jurisdiction under the Act of 1912 over the headright of a deceased Osage Indian who had a certificate of competency at the time of death and that the administrator was authorized to receive the quarterly payments accruing to the headright after the decedent's death. The funds which the administrator in that case had received, however, did not include the principal of the trust funds but represented accumulations from mineral royalties and interest on trust funds. The authority of the Secretary of the Interior to release the trust funds to the administrator was not before the court for decision, but the lack of such authority may be implied from the recognition given by the court throughout its decision that the interest of the individual Indian in the trust funds consisted of the right to receive the same at the end of the trust and that, in the meantime, he was entitled only to participate in the quarterly distributions of the interest.

The court stated that its conclusion with respect to the jurisdiction of the probate court was in harmony with certain opinions of the Solicitor for this Department and the Comptroller of the Treasury. See Solicitor's Opinion of May 25, 1915 (D. 29630); Opinion Comptroller of the Treasury, March 11, 1916 (22 Comp. Dec. 457); and Solicitor's Opinion of May 25, 1922 (M-7169). The last named opinion appears to have been concerned with funds accumulating to the Osage headright and is without controlling bearing here. The Solicitor's opinion of May 25, 1915, and that of the Comptroller of March 11, 1916, definitely hold that the trust funds to the credit of the estate of Thomas Mosier, Sr., a deceased Osage allottee, properly could be paid to the executor of his estate. Careful examination of these opinions discloses, not only that the trust imposed upon these funds by Congress was disregarded, but that no effect was given to the specific directions made by Congress with respect to the disposition of such funds upon the death of members of the tribe. The Solicitor placed chief reliance upon section 8 of the Act of April 18, 1912, authorizing adult members of the tribe to dispose of any or all of his estate, real, personal, or mixed, including trust funds, with the approval of the Secretary of the Interior. The Solicitor said:

When a will, approved by the Secretary of the Interior, is admitted to probate, the jurisdiction of the court attaches to all the property involved therein,

trust funds being specifically named. The only possible concern the Secretary of the Interior can have thereafter, is that conferred by section 2 of said act to investigate the conduct of the executor and present any delinquencies or negligence on his part to the proper court, taking such further steps as may be necessary to have the matter prosecuted, or to prosecute any remedy, civil or criminal, in behalf of the heirs of the decedent.

The foregoing statement is based upon a fundamental misconception of the interest of individual members of the tribe in the trust funds. As pointed out in the *Globe Indemnity Company* case, *supra*, the legal title to such funds is in the United States in trust for a specified period. The beneficial interest only vested in the individual member. This beneficial interest might be transmitted by descent to the heirs of the member or might be devised to others, but in either event, the heir or devisee took no greater interest than the deceased member himself possessed. This was the right to receive the trust funds, not immediately, but at the end of the trust period. The only exception to this arises where the heir or devisee is a non-Indian, in which event the rule announced by the Supreme Court in *Levindale Lead Company v. Coleman* (241 U. S. 432) would apply. Any possible doubt about the correctness of this conclusion is removed, I think, by the Acts of 1921 and 1925, both of which specify that the heir or devisee of a deceased member of the tribe shall receive only the interest on the trust funds in addition to the income from mineral royalties, thus plainly indicating that the trust imposed upon the trust funds is to be binding upon the devisee as well as the heir.

The Globe Indemnity Company case, *supra*, refers to the well settled rule that decisions of the department charged with the execution of a law are entitled to great respect and should not be overthrown except for cogent reasons. It is equally well settled, however, that the administrative view is not controlling where clearly wrong. *Harris v. Bell* (254 U. S. 103, 109). It is also well settled that the Secretary of the Interior may reconsider and vacate decisions of his predecessors in office in matters of this kind wherever such reconsideration demonstrates the fallacy of the prior decisions. *Wilbur v. United States* (281 U. S. 206).

It is my considered opinion that the Secretary of the Interior not only has not been authorized by Congress to release the funds under consideration to the administrator of the estate of a deceased Osage Indian, but that such action would be in direct contravention of the express directions for the disposition of said funds as contained in section 6 of the Act of April 18, 1912. Questions Nos. 2 and 3 are, therefore, answered in the negative.

Further answering question 1, I have to advise that the trust funds credited to the estate of a deceased Osage Indian should be held

pending administration of the estate in the local courts, at the conclusion of which the funds should be retained in trust for the benefit of the heirs or devisees subject to release as now authorized by sections 5 and 6 of the Act of April 18, 1912, or as may hereafter be authorized by Congress.

Approved:

T. A. WALTERS,

First Assistant Secretary.

USE OF INDIAN TRUST FUNDS IN PURCHASE OF SINGLE PREMIUM ANNUITY POLICIES

Opinion, April 28, 1936.

INDIANS—TRUST FUNDS—AUTHORITY OF SECRETARY OF THE INTERIOR OVER RESTRICTED FUNDS—ACT OF JUNE 25, 1910 (36 STAT. 855).

The Secretary of the Interior has only such authority over restricted Indian property as Congress has expressly or by necessary implication confided in him, and such authority cannot safely be construed as extending to the purchase by the Secretary, *independently of the Indian owner's wishes or consent*, of single premium annuity policies from moneys derived from the sale, under authority of section 8 of the Act of June 25, 1910 (36 Stat. 855), of timber on Indian allotments held under a trust or other patent containing restrictions on alienation, such a transaction involving the transfer of substantial sums of Indian moneys in consideration of an unsecured obligation to pay a stipulated sum monthly, beginning usually at some future date.

Cited: *Mott v. United States* (283 U. S. 747); Trust of Restricted Indian Funds (36 Ops. Atty. Gen. 98); Solicitor's Opinion of October 14, 1933 (54 I. D. 310).

MARGOLD, *Solicitor*:

You [the Secretary of the Interior] have requested my opinion as to the authority of the Secretary of the Interior to expend the restricted funds of individual Indians, adults and minors, under the jurisdiction of the Taholah Indian Agency, in Washington, in the purchase of single premium annuity policies.

The Secretary of the Interior has only such power over restricted Indian property as Congress has expressly or by necessary implication confided in him. According to the correspondence accompanying the present inquiry, the moneys here involved were derived from sales of timber on the restricted allotments of the Indian owners. The timber sales were made under authority of section 8 of the Act of June 25, 1910 (36 Stat. 855), which provides:

That the timber on any Indian allotment held under a trust or other patent containing restrictions on alienations, may be sold by the allottee with the

consent of the Secretary of the Interior, and the proceeds thereof shall be paid to the allottee or disposed of for his benefit under regulations to be prescribed by the Secretary of the Interior.

In my opinion of October 14, 1933 (54 I. D. 310), it was held that the Secretary of the Interior had discretionary authority under a statute no more comprehensive than that quoted above to permit individual Indians to invest their restricted funds in the purchase of life insurance policies or single premium annuity contracts. That opinion, while equally applicable here, is limited to expenditures made at the request of the individual owners of the funds to be expended or invested. This presupposes expenditures or investments founded on requests by Indians of legal age and qualified by sufficient knowledge and experience to understand the uses to which their moneys are to be put. Whatever doubt which might otherwise exist as to the Secretary's authority, there can be none where the qualified Indian owner assents to the expenditure or investment.

In the case of minors and Indians *non compos mentis*, as well as adult nonassenting Indians, the expenditure or investment, if made, must be made by the Secretary of his own volition. These Indians are all wards of the United States and the authority conferred by section 8 of the act of 1910, *supra*, extends to all. But that authority, while broad, is not unlimited. The Secretary is not authorized, for example, to make donations or gifts of the Indians' property. *Mott v. United States* (283 U. S. 747). He is not authorized to create trusts transferring Indian property from Federal supervision and control to a private agency without specific authority from Congress (36 Ops. Atty. Gen. 98). Nor can his authority safely be construed as extending to the purchase, independently of the Indian owner's wishes or consent, of single premium annuity policies. Such a transaction involves the transfer to the insurance company of substantial sums of money in consideration of the company's unsecured obligation to pay a stipulated sum monthly commencing usually at some future date. Congress has not clearly indicated its intent to confer authority upon the Secretary to make disposals of the property of its Indian wards in this way, and until it has done so, it is my opinion that such expenditures or investments, if made at all, should be confined to the funds of adult Indians having sufficient mental capacity to understand the nature of the expenditure or investment and who desire that their moneys be used for such purpose.

Approved:

T. A. WALTERS,

First Assistant Secretary.

AMENDMENT OF EXECUTIVE ORDER NO. 6964 OF FEBRUARY 5, 1935, WITHDRAWING ALL PUBLIC LAND IN CERTAIN STATES

EXECUTIVE ORDER

By virtue of and pursuant to the authority vested in me by the act of June 25, 1910, ch. 421, 36 Stat. 847, as amended by the act of August 24, 1912, ch. 369, 37 Stat. 497, it is ordered that Executive Order No. 6964 of February 5, 1935, withdrawing all public land in certain States, be, and it is hereby, amended so as to permit, subject to valid existing rights, the exchange under section 8, the sale under section 14, and the leasing under section 15 of the act of June 28, 1934, ch. 865, 48 Stat. 1269, of any lands covered by the said order which the Secretary of the Interior shall determine to be properly subject to such exchange, sale, or lease and not needed for any public purpose.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
May 6, 1936.

REGULATIONS UNDER SECTIONS 13, 14, 17, AND 28 OF THE GENERAL LEASING ACT OF FEBRUARY 25, 1920, AS AMENDED BY THE ACT OF AUGUST 21, 1935

[Circular No. 1386] — 43870 1920/23

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 7, 1936.

REGISTERS, U. S. LAND OFFICES:

By the act approved August 21, 1935 (49 Stat. 674), sections 13, 14, 17, and 28 of the Leasing Act of February 25, 1920 (41 Stat. 437), were amended. A copy of the act is appended hereto.

This act changes materially the system of disposing of the oil and gas resources on the public domain in the United States and Alaska, chiefly, by providing for the issuance of leases instead of prospecting permits for unproven oil and gas lands.

In general, the amended act authorizes and directs the Secretary of the Interior to issue oil and gas prospecting permits on applications filed 90 days or more prior to its approval. Applications for prospecting permits filed after 90 days prior to the date of the act shall be considered as applications for leases. All lands subject to disposition under the Leasing Act which are known or believed to contain oil and gas deposits may be leased in units of not exceeding 640 acres to the highest responsible qualified bidder by competitive

bidding under general regulations, except that the first qualified applicant for lease of lands not within a known geologic structure of a producing oil or gas field and applicants for permits whose applications were filed after 90 days prior to the date of the act are entitled to preference rights over others to lease such lands without competitive bidding. Rights to leases in case of a discovery under existing permits and permits which may issue under the pending applications are not changed or affected. The holder of any permit in good standing may at any time prior to termination thereof exchange said permit for a lease without proof of discovery. Leases for terms of five and ten years and so long thereafter as oil or gas is produced in paying quantities are authorized at a royalty of not less than 12½ per centum of the amount of production and an annual rental charge of not less than 25 cents per acre. Rights of way granted under section 28 shall be upon the additional condition that the grantee accept, convey, transport, or purchase without discrimination oil or natural gas produced from Government lands in the vicinity of the pipe line.

The following rules and regulations are prescribed for the administration of the amended sections of the act, existing oil and gas regulations to continue in force except as modified by the amendatory act and by these regulations:

PROSPECTING PERMITS

1. *Applications for permits.*—Prospecting permits are authorized by section 13 as amended only in cases where the applications were filed 90 days or more prior to the date of the amendatory act. Accordingly, the pending applications for permits filed on or prior to May 23, 1935, will be considered and where found allowable, permits will be granted for periods of two years, but in no case beyond December 31, 1938, except that in Alaska permits will be granted for the full four-year periods. Applications for permits filed after May 23, 1935, and prior to August 21, 1935, will be considered as applications for leases pursuant to the last two provisos to section 13 of the amendatory act of August 21, 1935. Any applications for permits filed on or after August 21, 1935, will be considered as regular applications for leases under section 17 as amended.

2. *Extension of permits.*—Outstanding permits heretofore extended by the Secretary of the Interior and which are not subject to cancellation for violation of the law or operating regulations are extended by the act to December 31, 1937, subject to the applicable conditions of such prior extensions, and such permits may be further extended by the Secretary of the Interior for an additional period of not exceeding one year.

Permits which have not been extended or which may be issued under the pending applications may be extended by the Secretary of the Interior for not exceeding two years, but not beyond December 31, 1938, where he shall find that the permittee has been unable, with the exercise of diligence, to test the lands in the time granted by the permit, the extensions to be upon such conditions as the Secretary may prescribe.

No extension of any permit may be made beyond December 31, 1938.

Any applications for extension of time should contain full and definite information regarding work done in compliance with the terms of the permit and money expended for developing the permit area 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, to whom the payments were made, and if the permittee has secured a geological survey of the land, 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.

3. *Reward for discovery.*—Upon discovery of valuable deposits of oil or gas within the permit area during the life of the permit, the permittee will be entitled to lease the lands under the original provisions of section 14 (see Circular 1094, 51 L. D. 597), no change being made in such rights by the amendatory act, except that in case a permit is issued upon any structure after discovery based upon an application filed prior to discovery the royalty to be paid under the preferential or earned lease shall be 10 per centum instead of 5 per centum in amount or value of the production. Applications for leases based on discovery should conform to the instructions of October 1, 1926 (Circular 823, 51 L. D. 600).

4. *Exchange of permits for leases.*—Any person holding a prospecting permit not subject to cancellation for violation of the law or operating regulations, and otherwise in good standing, has the right, prior to the termination of the permit, to exchange the same for a lease to the area described therein, without proof of discovery, at a royalty rate of not less than 12½ per centum of the amount or value of the production, such lease not to be subject to the acreage limitation of the law until one year after the discovery of oil or gas thereon, or to payment of rental within the first two lease years, unless valuable deposits of oil or gas are sooner discovered within the boundaries of the lease.

If the permits are in good standing, applications for such exchanges may be made at any time by the parties in interest, as shown by the records of the Land Department. No formal application

will be required, but such application should be addressed to the Secretary of the Interior, and filed with the register or the Commissioner of the General Land Office. If the Secretary of the Interior approves the exchange, lease forms will be transmitted to the permittee, who will be allowed 30 days to execute and file the lease and furnish such bond as may be required.

OIL AND GAS LEASES

5. *Designation and offer of lands for lease.*—Pursuant to the provisions of section 17 of the act as amended, the unappropriated lands and deposits subject to disposition under the act will be divided into leasing blocks or tracts in units of not exceeding 640 acres each, which shall be as nearly compact in form as possible, and offered for lease at a stated royalty and rental by competitive bidding to the highest responsible qualified bidder.

6. *Notice of lease offer.*—Notice of the offer of lands for lease will be given by publication for a period of 30 days in a newspaper of general circulation to be designated by the Commissioner of the General Land Office in the county in which the lands or deposits are situated, or in such other paper or papers as the Secretary of the Interior may direct. Such notice will set the day and hour on which the offer will be made at public auction at the United States land office of the district in which the lands are situated, or at such other place as may be fixed in the notice, to the qualified bidder offering the highest bonus (not less than the minimum bonus fixed in the notice) for the lease at the stated rental and royalty. Copy of the notice will be posted in the district land office during the period of publication. This notice will be published at the expense of the Government. All bidders at any such auction are warned against violation of the provisions of section 59 of the United States Criminal Code, approved March 4, 1909, prohibiting unlawful combination or intimidation of bidders.

7. *Auction of lease.*—At the time fixed in the notice the register will, by public auction, offer the land for lease on the terms and conditions fixed in the notice to the qualified bidder of the highest amount offered as a bonus for the privilege of leasing the land. The successful bidder must deposit with the register on the day of sale certified check on a solvent bank, or cash, for one-fifth of the amount bid by him, which payment the register will credit to "Trust funds—Unearned moneys." At the time of such payment the successful bidder will also file the requisite showing of his qualifications to receive a lease, which should include the following:

(a) Proof of citizenship—by affidavit of such fact if native born, or, if naturalized, affidavit stating date of naturalization, court in

which naturalized and number of certificate, if known; if a corporation, by certified copy of the articles of incorporation and a showing as to the residence and citizenship of its stockholders.

(b) The affidavit of the bidder or the affidavit of one of the officers of a corporate bidder, stating in full the interests, direct or indirect, held in permits and leases, and applications therefor, in the same State, identifying the records wherein such interests may be found.

The register will thereupon transmit such showing, together with a report of the proceedings had at the auction, by a special letter to the Commissioner of the General Land Office.

8. *Award of lease.*—Upon receipt of the report of the auction from the register, the Secretary of the Interior will take action thereon and either award the lease to the successful bidder or reject same, notice of which will be forthwith transmitted to the bidder through the local office. If the lease shall be awarded, the notice will be accompanied by copies of the lease for execution by the lessee, who shall within 30 days from receipt of such notice execute said lease in triplicate, and pay to the register the balance of the bonus bid by him, together with the first required rental, and also cause to be filed any bond required in connection with the lease. If the bid be rejected the register will return by his official check the deposit made at the auction. In case of the award of a lease and failure on the part of the bidder to execute same and otherwise comply with the applicable regulations, the deposit will be considered forfeited and disposed of as other receipts under this act.

If two or more units are awarded to any bidder, such units, not exceeding in area the maximum allowed by law, may be included in a single lease if circumstances warrant.

LEASES WITHOUT COMPETITIVE BIDDING

9. *Preference right to lease.*—A preference right over others to a lease without competitive bidding is granted under section 17, as amended, to—

(a) The person first making application for the lease of any lands not within any known geologic structure of a producing oil or gas field who is qualified to hold a lease under the act.

(b) Applicants for permits whose applications were filed after 90 days prior to the effective date of the amendatory act.

10. *Applications for leases.*—Applications for leases of lands not within the known geologic structure of a producing oil or gas field may be filed in the proper district land office, or in States in which there is no district land office, in the General Land Office, addressed to the Commissioner of the General Land Office. Such applications when filed will be promptly noted of record, the date and exact hour

of filing noted thereon, and where filed in the district land office, promptly forwarded to the General Land Office with a report as to the status and conflicts. No specific form of application is required and no blanks will be furnished, but such application must be under oath of the applicant, or if sworn to by his attorney in fact, the power of attorney and the applicant's own affidavit as to his citizenship and holdings must be attached thereto.

The application must cover in substance the following points:

(a) The applicant's name and address.

(b) Statement as to citizenship—in case of an individual, whether native born or naturalized, and, if naturalized, date of naturalization, court in which naturalized, and number of certificate if known; if a corporation, by certified copy of the articles of incorporation and a showing as to residence and citizenship of the stockholders.

(c) A statement of the interests, direct and indirect, held by the applicant, in permits and leases, and applications therefor, in the same State, identifying the records wherein such interests may be found.

(d) Description of the lands for which a lease is desired, which may not exceed 2,560 acres as nearly compact in form as possible and should involve only one geologic structure, describing the lands by legal subdivisions if surveyed or, if not surveyed, by the approximate subdivisions and metes and bounds description connected with a corner of the public surveys by courses and distances.

(e) A statement that to the best of applicant's knowledge and belief the lands applied for are not within the known geologic structure of any producing oil or gas field and are believed to contain oil and gas.

(f) The names and addresses of three references as to the applicant's reputation and business standing.

(g) A statement that the applicant is ready to pay in advance the annual rental under the lease, and to furnish such bond or bonds as may be required under the lease or regulations.

Payment of a bonus for leases made without competitive bidding will not be required for the present.

11. *Leases based on permit applications.*—Applications for permits filed after May 23, 1935, are considered as applications for leases under section 17 of the amended act. Such leases are subject to the acreage limitations of section 27 of the act and, if otherwise regular, will be issued without bonus requirement at the royalty rate provided in section 17 hereof and at a rental as provided in section 15 hereof.

12. *Conflicting applications for leases.*—Should more than one application for lease of the same lands be filed, the applications will

be considered in the order filed and a lease granted to the qualified applicant first in point of time in filing application. If two or more applications are filed simultaneously, the right to lease will be determined pursuant to existing regulations governing simultaneous filings of applications for oil and gas prospecting permits (see Circular 1320, 54 I. D. 400).

FORM OF LEASE

13. *Form of lease.*—The lease referred to in the preceding sections will be in form and substance substantially as follows:

“DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Serial_____

LEASE OF OIL AND GAS LANDS UNDER THE ACT OF FEBRUARY 25, 1920, AS AMENDED

THIS INDENTURE OF LEASE, entered into, in triplicate, as of the _____ day of _____, by and between the UNITED STATES OF AMERICA, party of the first part, hereinafter called the lessor, by the Secretary of the Interior, and _____

party of the second part, hereinafter called the lessee, under, pursuant, and subject to the terms and provisions of the act of Congress approved February 25, 1920 (41 Stat. 437), entitled “An Act to Promote the Mining of Coal, Phosphate, Oil, Oil Shale, Gas, and Sodium on the Public Domain”, as amended, hereinafter referred to as the Act, which is made a part hereof, WITNESSETH:

SEC. 1. *Rights of Lessee.*—That the lessor, in consideration of rents and royalties to be paid, and the conditions and 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 tracts of land situated in the _____

field _____
and more particularly described as follows:

containing _____ acres, more or less, 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 thereof, for a period of three years, and so long thereafter as oil or gas is produced in paying quantities.

SEC. 2. In consideration of the foregoing, THE LESSEE HEREBY AGREES:

(a) *Bond*.—To furnish prior to beginning of drilling operations and maintain at all times thereafter as required by the lessor a bond in the penal sum of \$5,000, with approved corporate surety, or with deposit of United States bonds as surety therefor, conditioned upon compliance with the terms of this lease; and, until such bond is furnished, to submit and maintain a bond in the sum of \$1,000 with acceptable surety, similarly conditioned.

(b) Within 30 days of demand, to subscribe to and to operate under such reasonable cooperative or unit plan for the development and operation of the area, field, or pool embracing the lands included herein as the Secretary of the Interior may determine to be practicable and necessary or advisable, which plan shall adequately protect the rights of all parties in interest, including the United States.

(c) *Wells*.—(1) To drill and produce all wells necessary to protect the leased land from drainage by wells on lands not the property of the lessor or lands of the United States leased at a lower royalty rate, or in lieu of any part of such drilling and production, with the consent of the Secretary of the Interior, to compensate the lessor in full each month for the estimated loss of royalty through drainage in the amount determined under instructions of said Secretary; (2) at the election of the lessee, to drill and produce other wells in conformity with any system of well spacing or production allotments affecting the field or area in which the leased lands are situated, provided such system is authorized and sanctioned by applicable law or by the Secretary of the Interior; and (3) promptly after due notice in writing, to drill and produce such other wells as the Secretary of the Interior may require to insure reasonable diligence in the development and operation of the property.

(d) *Rentals*.—To pay the lessor in advance for each acre or fraction thereof, a rental of 50 cents for the first lease year beginning on the first day of the month in which the lease issues, and a rental of 25 cents for each subsequent lease year beginning prior to discovery of a valuable deposit of oil or gas within the limits of the geologic structure on which all or part of the leased lands are situated, and one dollar for each lease year beginning on or after such discovery, the rental so paid for any one lease year to be credited on the royalty for that year: *Provided*, that if this lease is granted in exchange for an oil and gas prospecting permit or pursuant to an application for a prospecting permit filed after May 23, 1935, no rental shall be payable for the first two lease years unless valuable deposits of oil or gas are sooner discovered within the boundaries of the lease; but a rental of one dollar shall be payable, as above pro-

vided; for each lease year beginning on or after such discovery; and *Provided further*, that when the Secretary of the Interior shall direct or shall assent to suspension of operations or of production of oil or gas under this lease, after a valuable deposit of oil or gas shall have been discovered within the lands leased, any payment of acreage rental prescribed herein likewise shall be suspended during such period of suspension of all operations and production; and this lease shall not be deemed to expire by reason of suspension of prospecting, drilling, or production, pursuant to any order or consent of the said Secretary.

(e) *Royalties*.—To pay the lessor royalties, as follows, on the amount or value of all production from the leased lands (except that portion thereof used for production purposes on said lands or unavoidably lost):

(1) When the price of oil used in computing royalty value is \$1.00 or more per barrel, the per centum of royalty shall be as follows:

When the average production for the calendar month in barrels per well per day is—

Not over 50, the royalty shall be 12.5 percent.

Over 50 but not over 60, the royalty shall be 13 percent.

Over 60 but not over 70, the royalty shall be 14 percent.

Over 70 but not over 80, the royalty shall be 15 percent.

Over 80 but not over 90, the royalty shall be 16 percent.

Over 90 but not over 110, the royalty shall be 17 percent.

Over 110 but not over 130, the royalty shall be 18 percent.

Over 130 but not over 150, the royalty shall be 19 percent.

Over 150 but not over 200, the royalty shall be 20 percent.

Over 200 but not over 250, the royalty shall be 21 percent.

Over 250 but not over 300, the royalty shall be 22 percent.

Over 300 but not over 350, the royalty shall be 23 percent.

Over 350 but not over 400, the royalty shall be 24 percent.

Over 400 but not over 450, the royalty shall be 25 percent.

Over 450 but not over 500, the royalty shall be 26 percent.

Over 500 but not over 750, the royalty shall be 27 percent.

Over 750 but not over 1,000, the royalty shall be 28 percent.

Over 1,000 but not over 1,250, the royalty shall be 29 percent.

Over 1,250 but not over 1,500, the royalty shall be 30 percent.

Over 1,500 but not over 2,000, the royalty shall be 31 percent.

Over 2,000, the royalty shall be 32 percent.

(2) When the price of oil used in computing royalty value is less than \$1.00 per barrel, the per centum of royalty shall be the foregoing multiplied by the ratio of said price to a price of \$1.00 per barrel, provided, however, that the per centum of royalty shall never be less than 12.5.

(3) If the United States shall take its royalty in oil, the price received by the lessee, as well as that received by the lessor, shall be considered in determining the price to govern the per centum of royalty, unless both prices are \$1.00 or more per barrel.

(4) On gas, including inflammable gas, helium, carbon dioxide, and all other natural gases and mixtures thereof, and on natural or casing-head gasoline and other liquid products obtained from gas:

When the average production of gas per well per day for the calendar month does not exceed 5,000,000 cubic feet, 12½ percent; and when said production of gas exceeds 5,000,000 cubic feet, 16⅔ percent of the amount or value of the gas and liquid products produced, said amount or value of such liquid products to be net after an allowance for the cost of manufacture: *Provided*, that the allowance for cost of manufacture may exceed two-thirds of the amount or value of any product only on approval by the Secretary of the Interior, and that said value of gas and of liquid products shall be as determined by said Secretary.

The average production per well per day for oil and for gas shall be determined under rules and regulations approved by the Secretary of the Interior.

(5) It is expressly agreed that the Secretary of the Interior may establish reasonable minimum prices for purposes of computing royalty in value on any or all oil, gas, natural gasoline and other liquid products obtained from gas; and that in no case shall the price so established be less than the estimated reasonable value of the product, due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field, to the price received by the lessee, to posted prices and to other relevant matters.

(6) When paid in value, such royalties on production shall be due and payable monthly on the last day of the calendar month next following the calendar month in which produced. When paid in amount of production, such royalty products shall be delivered in merchantable condition on the premises where produced without cost to lessor, unless otherwise agreed to by the parties hereto, at such times, and in such tanks provided by the lessee as reasonably may be required by the lessor: *Provided*, that the lessee shall not be required to hold such royalty oil or other liquid products in storage beyond the last day of the calendar month next following the calendar month in which produced: *And provided further*, that the lessee shall be in no manner responsible or held liable for the loss or destruction of royalty oil or other liquid products in storage from causes over which the lessee has no control.

(7) Royalties, whether in amount or value of production, shall be subject to reduction whenever the average daily production of the oil wells on the entire leasehold or on any tract or portion thereof segregated for royalty purposes shall not exceed ten (10) barrels per well per day, or where the cost of production of oil or gas is such as to render further production economically impracticable, if in the judgment of the Secretary of the Interior the wells can not be successfully operated upon the royalties fixed herein.

(f) *Contracts for disposal of products.*—To file with the Federal oil and gas supervisor, or such other officer as the Secretary of the Interior may designate, copies of all contracts immediately upon execution thereof, and full information as to all other arrangements for the disposal of oil, gas, natural gasoline, and other products produced hereunder (except products used for production purposes on the leased lands or unavoidably lost), and not to sell or otherwise dispose of the products of the land leased except in accordance with a contract or other arrangement first approved by said officer, such approval to be subject to review by the Secretary of the Interior but to be effective unless and until revoked by said Secretary or his said subordinate.

(g) *Monthly statements.*—To furnish monthly statements in detail at such time and in such form as may be prescribed by the lessor, showing the amount and quality of all oil, gas, natural gasoline, and other substances produced during the preceding calendar month and the amounts thereof used for production purposes on the leased lands or unavoidably lost, and to furnish current records and monthly statements of the amounts thereof sold or otherwise disposed of and the proceeds therefrom.

(h) *Payments.*—Unless otherwise directed by the Secretary of the Interior, to make rental, royalty, or other payments to the lessor to the order of the Commissioner, General Land Office, such payments to be tendered to the Federal oil and gas supervisor of the district in which the leased land is situated.

(i) *Inspection.*—To keep open at all reasonable times for the inspection of any duly authorized officer of the Department the leased premises and all wells, improvements, machinery, and fixtures thereon or connected therewith, and all books, accounts, maps, and records relative to operations and surveys or investigations on the leased lands or under the lease.

(j) *Plats and reports.*—To furnish at such times and in the manner and form prescribed by or on behalf of the lessor, 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, and

to report in detail when required as to the stockholders, investment, depreciation, and cost of operation, and the amount, nature, and quality of products sold, and the amount received therefor.

(k) *Well records.*—To keep a daily drilling record, a log, and complete information on all well surveys, in form acceptable to or prescribed by or on behalf of the lessor, of all the wells drilled on the leased lands, and an acceptable record of all subsurface investigations affecting said lands, which log, information, and records, or copies thereof, shall be furnished to the lessor as requested or required.

(l) *Diligence—Prevention of waste—Health and safety of workmen.*—To exercise reasonable diligence in drilling and producing the wells herein provided for unless consent to suspend operations temporarily is granted by the Secretary of the Interior; to carry on all operations hereunder in a good and workmanlike manner, in accordance with approved methods and practice as provided in the operating regulations, having due regard for the prevention of waste of oil or gas developed or damage to deposits or formations containing oil, gas, or water, or to coal measures or other mineral deposits, for conservation of gas energy, for the preservation and conservation of the property for future productive operations, and for the health and safety of workmen and employees; to plug properly and effectively all wells before abandoning the same; not to drill any well within 200 feet of any of the outer boundaries of the lands covered hereby, unless the adjoining lands have been patented or the title thereto otherwise vested in private owners; to carry out at expense of the lessee all reasonable orders of the lessor relative to the matters in this paragraph, and that on failure of the lessee so to do the lessor shall have the right to enter on the property and to accomplish the purpose of such orders at the lessee's cost: *Provided*, that the lessee shall not be held responsible for delays or casualties occasioned by causes beyond lessee's control.

(m) *Regulations.*—To abide by and conform to any and all reasonable regulations of the Secretary of the Interior now or hereafter in force, all of which regulations are made a part and condition of this lease; *Provided*, that such regulations are not inconsistent with any express and specific provisions hereof and particularly that no regulations hereafter approved shall effect a change in the rate of royalty or annual rental herein specified without the written consent of the parties to this lease.

(n) *Taxes and wages—Freedom of purchase.*—To pay, when due, all taxes lawfully assessed and levied under the laws of the State or the United States, 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.

(o) *Reserved deposits.*—To comply with all statutory requirements and regulations thereunder, if the lands embraced herein have been or shall hereafter be disposed of under the laws reserving to the United States the deposits of oil and gas therein, subject to such conditions as are or may hereafter be provided by the laws reserving such oil or gas.

(p) *Assignment of lease.*—Not to assign this lease or any interest therein by an operating agreement or otherwise, nor to sublet any portion of the leased premises, except with the consent in writing of the Secretary of the Interior first had and obtained.

(q) *Deliver premises in cases 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; but this shall not be construed to prevent the removal, alteration, or renewal of equipment and improvements in the ordinary course of operations.

(r) *Pipe lines to purchase or convey at reasonable rates and without discrimination.*—If owner, or operator or owner of a controlling interest in any pipe line or of any company operating the same which may be operated accessible to the oil or gas derived from lands under this lease, to accept and convey, and, if a purchaser of such products, to purchase at reasonable rates and without discrimination the oil or gas of the Government or of any citizen or company not the owner of any pipe line, operating a lease or purchasing or selling oil, gas, natural gasoline or other products, under the provisions of the act.

SEC. 3. THE LESSOR EXPRESSLY RESERVES:

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

(b) *Disposition of surface.*—The right to lease, sell, or otherwise dispose of the surface of the lands embraced within this lease under existing law or laws hereafter enacted, insofar as said surface is not necessary for the use of the lessee in the extraction and removal of the oil and gas therein: *Provided*, that this reservation shall not apply to any lands herein described title to which has passed from the United States:

(c) *Monopoly and fair prices.*—Full power and authority to promulgate and enforce all orders necessary to insure the sale of the pro-

duction of the leased lands to the United States and to the public at reasonable prices, to protect the interests of the United States, to prevent monopoly, and to safeguard the public welfare.

(d) *Helium*.—Pursuant to section 1 of the act and section 1 of the Act of Congress approved March 3, 1927 (44 Stat. 1387), the lessor reserves the ownership and the right to extract, under such rules and regulations as shall be prescribed by the Secretary of the Interior, helium from all 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 at any point on the leased premises 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 paragraph provided for, suffer a diminution of 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.

(e) *Taking of royalties*.—All rights pursuant to section 36 of the act to take royalties in amount or in value of production.

(f) *Casing*.—All rights pursuant to section 40 of the act, to purchase casing and lease or operate valuable water wells.

SEC. 4. *Drilling and producing restrictions*.—It is covenanted and agreed that the rate of prospecting and developing and the quantity and rate of production from the lands covered by this lease shall be subject to control in the public interest by the Secretary of the Interior, and in the exercise of his judgment the Secretary may take into consideration, among other things, Federal laws, State laws, and regulations issued thereunder, or lawful agreements among operators regulating either drilling or production, or both.

SEC. 5. *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 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. 6. *Purchase of materials, etc., on termination of lease.*—Upon the expiration of this lease, or the earlier termination thereof pursuant to the last preceding section, the lessor or another lessee may, if the lessor shall so elect within three months from the termination of the lease, purchase all materials, tools, machinery, appliances, structures, and equipment placed in or upon the land by the lessee, and in use thereon as a necessary or useful part of an operating or producing plant, on the payment to the lessee of such sum as may be fixed as a reasonable price therefor by a board of three appraisers, one of whom shall be chosen by the lessor, one by the lessee, and the other by the two so chosen. Pending such election all equipment shall remain in normal position. If the lessor, or another lessee, shall not within three months elect to purchase all or any part of such materials, tools, machinery, appliances, structures, and equipment, the lessee shall have the right at any time, within a period of ninety days, to remove from the premises all the materials, tools, machinery, appliances, structures, and equipment which the lessor shall not have elected to purchase, save and except casing in wells and other equipment or apparatus necessary for the preservation of the well or wells. Any materials, tools, machinery, appliances, structures, and equipment, including casing in or out of wells on the leased lands, shall become the property of the lessor on expiration of the period of ninety days above referred to or such extension thereof as may be granted on account of adverse climatic conditions throughout said period.

SEC. 7. *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, and such default shall continue for a period of 30 days after service of written notice thereof by the lessor, the lease may be canceled by the Secretary of the Interior in accordance with section 17 of the act as amended, and all materials, tools, machinery, appliances, structures, equipment, and wells shall thereupon become the property of the lessor, except that if said lease was earned as a preference right pursuant to section 14 of the act or covers lands known to contain valuable deposits of oil or gas, the lease may be canceled only by judicial proceedings in the manner provided in section 31 of the 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 cancelation and forfeiture of this lease for any other cause of forfeiture, or for the same cause occurring at any other time.

SEC. 8. *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. 9. *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, 1919 (35 Stat., 1109), relating to contracts, enter into and form a part of this lease so far as the same may be applicable.

IN WITNESS WHEREOF,

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

BONDS

14. *Bonds.*—All leases under the amended act provide that a general lease bond in the penal sum of not less than 5,000, conditioned upon compliance with all lease terms, shall be furnished prior to the beginning of drilling operations on leased land. Such bonds in every instance shall be either corporate-surety bonds or individual bonds, accompanied, in the latter instance, by a deposit of negotiable Federal securities in a sum equal, at their par value, to the amount of the bond, and by a proper conveyance to the Secretary of full authority to sell such securities in case of default in the performance of the conditions of the lease bond.

Until a general lease bond is filed a lessee will be required to furnish and maintain a bond in the penal sum of not less than \$1,000 for compliance with the lease obligations, and for the protection of the owner of surface or sub-surface rights or estates from damage resulting from the operations of such lessee, such bond to terminate upon acceptance of the \$5,000 lease bond. This and other special-purpose bonds involving penal sums less than \$5,000 may be furnished (a) with approved corporate-surety, (b) with two qualified individual sureties when duly supported by affidavits of justification by such sureties and by a certificate as to their identity, signatures, and

financial competency, or (c) without surety, upon deposit of acceptable collateral as indicated above.

Bonds required under this section 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 Feb. 25, 1920 (41 Stat. 437).

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, and any lessee under lease heretofore issued by the United States of other mineral deposits in any portion of such land, 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 an exclusive right to drill for, mine, extract, remove, and dispose of all the oil and gas deposits in or under the following described lands _____, under and pursuant to the provisions of the act approved February 25, 1920 (41 Stat. 437), as amended; 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 obliga-

tion 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):

(L. S.)

(Principal)

(L. S.)

(Surety)

Where United States bonds are submitted in lieu of surety the same form may be used (with the omission of the recitals as to sureties) with the additional provision substantially as follows:

The above-bounden obligor, in order more fully to secure the United States in the payment of the aforesaid sum, hereby pledges as security therefor bonds of the United States of a par value equal to said sum, which said bonds are numbered serially and are in the denominations and amounts and are otherwise more particularly described as follows:

----- bonds of \$----- bearing ----- percent interest with ----- coupons attached to each, numbered -----, which said bonds have this day been deposited with the Secretary of the Interior and his receipt taken therefor.

That the said obligor does hereby constitute and appoint the Secretary of the Interior as his attorney, for him and in his name to collect or to sell, assign and transfer the said United States bonds above described and deposited by the obligor as aforesaid, pursuant to authority conferred by section 1126 of the act of February 26, 1926 (44 Stat. 122), as security for the faithful performance of any and all of the conditions or stipulations as hereinbefore set out, and it is agreed that, in case of any default in the performance of the conditions and stipulations of such undertaking, the said attorney shall have full power to collect said bonds or any part thereof, or to sell, assign, and transfer said bonds or any part thereof without notice, at public or private sale, free from any equity of redemption or without appraisalment or valuation, notice and right to redeem being waived, and to apply proceeds of such sale or collection to the full amount of the bond to the satisfaction of any damages, or deficiencies arising by reason of such default, as said attorney may deem best. The interest accruing upon said United States bonds deposited as above stated, in the absence of any default in the performance of any of the conditions or stipulations of the bond, shall be paid to said obligor. The said obligor hereby for himself, his heirs,

executors, administrators, successors, and assigns ratifies and confirms whatever his said attorney shall do by virtue of these presents.

In witness whereof I have hereunto set my hand and seal this _____ day of _____, 19___.

(Signature) (L. S.)

Before me, the undersigned, a notary public within and for the county of _____, in the State of _____, personally appeared _____ and duly acknowledged the execution of the foregoing bond and power of attorney.

Witness my hand and notarial seal this _____ day of _____, 19___.

(Notarial Seal)

15. *Rentals.*—A lessee shall pay an annual rental of fifty cents per acre or fraction thereof for the first year of the lease, and shall pay an annual rental of twenty-five cents per acre or fraction thereof for the second and each succeeding lease year until oil or gas in commercial quantities is discovered on the leased lands. Thereafter, beginning with the first lease year succeeding discovery, the annual rental shall be \$1 per acre or fraction thereof, any rental paid for any one year to be credited against the royalties as they accrue for that year. For the purposes of making rental payments the lease year shall in all instances be deemed to start on the first day of the month in which the lease was issued. In all instances rental shall be paid in advance, the first payment being due prior to the execution and delivery of the lease: Except, That where a lease is granted in exchange for an existing permit or pursuant to an application for permit filed after May 23, 1935, and before August 21, 1935, no rental is required for the first two lease years, unless valuable deposits of oil or gas are sooner discovered within the boundaries of the lease.

16. *Suspension of rentals.*—Rentals under any leases issued pursuant to the provisions of the amendatory act, except as otherwise expressly provided in these regulations, may not be waived, suspended, or reduced until a valuable deposit of oil or gas is discovered within the lease area. In any lease on which discovery has been made, the Secretary of the Interior may direct or assent to the suspension of operations or of production of oil or gas, and no payment of rentals under the lease so suspended will be required during the period of suspension of all operations and production. Such suspension of payment of rentals, if so directed or assented to, shall be applied pro rata, by months, for lease years or portions thereof and shall begin with the first day of the lease month after the filing in the office of the oil and gas supervisor of written application for

suspension, or after actual cessation of operations if that be later, and end with the first day of the lease month in which the relief is terminated.

17. *Royalties.*—Royalties, as follows, shall be paid on the amount or value of all production from the leased lands (except that portion thereof used for production purposes on said lands or unavoidably lost):

(1) When the price of oil used in computing royalty value is \$1.00 or more per barrel, the per centum of royalty shall be as follows:

When the average production for the calendar month in barrels per well per day is—

Not over 50, the royalty shall be 12.5 percent.

Over 50 but not over 60, the royalty shall be 13 percent.

Over 60 but not over 70, the royalty shall be 14 percent.

Over 70 but not over 80, the royalty shall be 15 percent.

Over 80 but not over 90, the royalty shall be 16 percent.

Over 90 but not over 110, the royalty shall be 17 percent.

Over 110 but not over 130, the royalty shall be 18 percent.

Over 130 but not over 150, the royalty shall be 19 percent.

Over 150 but not over 200, the royalty shall be 20 percent.

Over 200 but not over 250, the royalty shall be 21 percent.

Over 250 but not over 300, the royalty shall be 22 percent.

Over 300 but not over 350, the royalty shall be 23 percent.

Over 350 but not over 400, the royalty shall be 24 percent.

Over 400 but not over 450, the royalty shall be 25 percent.

Over 450 but not over 500, the royalty shall be 26 percent.

Over 500 but not over 750, the royalty shall be 27 percent.

Over 750 but not over 1,000, the royalty shall be 28 percent.

Over 1,000 but not over 1,250, the royalty shall be 29 percent.

Over 1,250 but not over 1,500, the royalty shall be 30 percent.

Over 1,500 but not over 2,000, the royalty shall be 31 percent.

Over 2,000 the royalty shall be 32 percent.

(2) When the price of oil used in computing royalty value is less than \$1.00 per barrel, the per centum of royalty shall be the foregoing multiplied by the ratio of said price to a price of \$1.00 per barrel, provided, however, that the per centum of royalty shall never be less than 12.5.

(3) If the United States shall take its royalty in oil, the price received by the lessee, as well as that received by the lessor, shall be considered in determining the price to govern the per centum of royalty, unless both prices are \$1.00 or more per barrel.

(4) On gas, including inflammable gas, helium, carbon dioxide and all other natural gases and mixtures thereof, and on natural or casinghead gasoline and other liquid products obtained from gas:

When the average production of gas per well per day for the calendar month does not exceed 5,000,000 cubic feet, 12½ percent; and when said production of gas exceeds 5,000,000 cubic feet, 16½ percent of the amount or value of the gas and liquid products produced, said amount or value of the gas and liquid products to be net after an allowance for the cost of manufacture: *Provided*, that the allowance for cost of manufacture may exceed two-thirds of the amount or value of any product only on approval by the Secretary of the Interior, and that said value of gas and of liquid products shall be as determined by said Secretary.

The average production per well per day for oil and for gas shall be determined under rules and regulations approved by the Secretary of the Interior.

18. *Reduction of royalties.*—Where the average daily production of the oil wells on an entire leasehold or on any tract or portion thereof segregated for royalty purposes does not exceed ten barrels per well per day, or where the cost of operation renders production economically impracticable, the Secretary of the Interior may reduce the royalty on future production when in his judgment the wells can not be successfully operated upon the royalty fixed in the lease.

Applications for the reduction of royalties should be made in accordance with the instructions of June 28, 1927 (Circular 1127, 52 L. D. 175).

Applications for the waiver, suspension or reduction of rentals, and reduction of royalties under leases valuable only for the production of gas should be filed in the same manner and with substantially the same showing as that provided by said instructions.

19. *Drainage.*—Upon determination that wells drilled upon lands not owned by the United States are draining oil or gas from lands or deposits owned in whole or in part by the United States, the Secretary of the Interior may negotiate agreements whereby the United States or the United States and its permittees, lessees, or grantees shall be compensated for such drainage, such agreements to be made with the consent of any permittees and lessees affected thereby.

Steps looking to the negotiation of such special agreements may be initiated in the Department or by application of interested parties. The precise nature of any agreement negotiated will depend on all the conditions and circumstances involved in the particular case.

20. *Exchanges of leases.*—Application for exchange of leases under section 2 (a) of the amendatory act may be filed with the register of the district land office or directly with the Commissioner of the General Land Office. Such application should be made by the record title holder of the outstanding lease and joined in or consented to by any operator of record. Any lease issued in lieu of the outstanding lease will be issued to the record title holder or holders of the

outstanding lease, bear current date, and at the royalties and rentals provided by these regulations and will be issued for a period of 10 years and so long thereafter as oil and gas is produced in paying quantities. The lessee will be required to furnish a new and satisfactory lease bond and to discharge any indebtedness against the lease before the new lease will be issued. Two or more outstanding leases may be combined into a single lease where held in common ownership and the lands are sufficiently compact to justify their inclusion in one lease.

21. *Acreage limitation.*—All leases operated under a cooperative or unit plan for the development and operation of any area, field, or pool approved by the Secretary of the Interior, are excepted in determining holdings or control under the provisions of any section of the act of February 25, 1920, as amended.

22. *Rights of way for pipe lines.*—Applications for rights of way under section 28 of the act as amended will be governed by the regulations of February 21, 1931 (Circular 1237, 53 I. D. 277), in so far as applicable, appropriate changes being made in the forms prescribed to make them applicable to rights of way cases arising under this provision of the act for pipe lines to be constructed, maintained and operated as common carriers. In approving such right of way grant it shall be specifically stated that such pipe line shall be constructed, operated, and maintained as a common carrier and that the grantee shall accept, convey, transport, or purchase without discrimination oil or natural gas produced from government lands in the vicinity of the pipe line in such proportionate amounts as the Secretary of the Interior may, after a full hearing with due notice thereof to interested parties and a proper finding of facts determine to be reasonable, and in addition that the use of such pipe line for the transportation of oil or gas shall be limited to oil and gas produced in conformity with State and Federal laws, including laws prohibiting waste.

Failure on the part of the grantee to fulfill the conditions imposed by the act shall be grounds for forfeiture of the grant by the United States District Court for the district in which the property or some part thereof is located, in an appropriate proceeding.

FRED W. JOHNSON,
Commissioner.

I concur:

W. C. MENDENHALL,
Director, Geological Survey.

Approved:

HAROLD L. ICKES,
Secretary.

WITNESSES AT HEARINGS IN LOCAL OFFICES IN CASES ARISING UNDER TAYLOR GRAZING ACT—AUTHORITY OF THE SECRETARY OF THE INTERIOR, INCLUDING POWERS OF DELEGATION

Opinion, May 9, 1936

TAYLOR GRAZING ACT—APPEALS FROM ADMINISTRATIVE OFFICERS—LOCAL HEARINGS—AUTHORITY OF THE SECRETARY OF THE INTERIOR—DELEGATION OF AUTHORITY.

The Taylor Grazing Act (Act of June 28, 1934, 48 Stat. 1269), directs the Secretary of the Interior to provide, by appropriate rules and regulations, for local hearings on appeals from the decisions of administrative officers in matters arising in connection with the administration of the act, such hearings to be conducted "in a manner similar to the procedure in the land department" of the national Government. *Held*: That since registers of local land offices are by statute authorized to issue subpoenas and administer oaths to witnesses, who are entitled to receive fees and mileage for attendance, and since the Secretary of the Interior is directed by section 2 of the act to "establish such service * * * and do any and all things necessary" to accomplish the purposes of the act, it follows that regional graziers may be directed by the Secretary to issue subpoenas and administer oaths to witnesses in grazing appeals, and that the witnesses are entitled to receive fees and mileage for attendance.

MARGOLD, Solicitor:

At the request of the Director of Grazing, certain questions relating to the conduct of local hearings on appeals from the decisions of administrative officers have been submitted to me for opinion. The Director refers to sections 2 and 9 of the Taylor Grazing Act (Act of June 28, 1934, 48 Stat. 1269), the significant portions of which are quoted respectively:

The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of the foregoing section, and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this Act and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range; * * *

* * * The Secretary of the Interior shall provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer in charge in a manner similar to the procedure in the land department. * * *

The Director's questions follow:

1. Can the language quoted above be construed so as to give the Secretary of the Interior the authority to subpoena witnesses for local hearings, compel their attendance, administer oaths to witnesses, and pay them mileage and per diem for their attendance?

2. If question 1 is answered in the affirmative, can the Secretary of the Interior delegate such authority to the Director of Grazing or any regional grazer?

For the reasons set forth in the discussion to follow, I am of the opinion that both questions are to be answered in the affirmative. The two questions are related, and the answer to question 2 becomes apparent in the consideration of question 1, which in a preliminary way involves two subsidiary questions: first, that of the interpretation of sections 2 and 9 of the Taylor Grazing Act, and second, assuming that an interpretation in favor of the authority of the Secretary of the Interior is proper, whether the exercise of such authority transcends the limits of administrative functions.

Revised Statutes, section 2234 (Tit. 43, U. S. C., Sec. 72), provides for the appointment, by the President with the advice and consent of the Senate, of a register for each district land office. Revised Statutes, section 2246 (Tit. 43, U. S. C., Sec. 75), authorizes the register "to administer any oath required by law or the instructions of the General Land Office, in connection with the entry or purchase of any tract of the public lands." The Act of January 31, 1903 (32 Stat. 790), provides in part:

That registers and receivers of the land office, or either of them, in all matters requiring a hearing before them, are authorized and empowered to issue subpoenas directing the attendance of witnesses, which subpoenas may be served by any person by delivering a true copy thereof to such witness, and when served, witnesses shall be required to attend in obedience thereto: *Provided*, That if any subpoena be served under the provisions of this Act by any person other than an officer authorized by the laws of the United States, or of the State or Territory in which the depositions are taken, the service thereof shall be proved by the affidavit of the person serving the same: *Provided further*, That said subpoenas shall be served within the county in which attendance is required, and at least five days before attendance is required.

Sec. 2. That witnesses shall have the right to receive their fee for one day's attendance and mileage in advance. The fees and mileage of witnesses shall be the same as that provided by law in the district courts of the United States in the district in which such land offices are situated; and the witness shall be entitled to receive his fee for attendance in advance from day to day during the hearing.

Sec. 3. That any person willfully neglecting or refusing obedience to such subpoena, or neglecting or refusing to appear and testify when subpoenaed, his fees having been paid if demanded, shall be deemed guilty of a misdemeanor, for which he shall be punished by indictment in the district court of the United States or in the district courts of the Territories exercising the jurisdiction of circuit or district courts of the United States. * * *

Sec. 4. That whenever the witness resides outside the county in which the hearing occurs, any party to the proceeding may take the testimony of such witness in the county of such witness's residence in the form of depositions by giving ten days' written notice of the time and place of taking such depositions to the opposite party or parties. The depositions may be taken before any

United States commissioner, notary public, judge, or clerk of a court of record. * * *

The foregoing statutes manifestly define certain phases of "the procedure in the land department", and there can be no doubt, therefore, that the Secretary of the Interior is authorized by section 9 to provide for hearings in grazing matters to be conducted "in a manner similar" to the procedure outlined in the quoted statutory provisions. The exact application of section 9, however, raises the question whether subpoenas must be issued and oaths administered by registers of the Land Office or whether the exercise of these functions may be delegated to regional graziers in the Division of Grazing. In my opinion, section 9 clearly authorizes the latter. It is to be noted that no provision of the Taylor Grazing Act purports to create a service or to designate a then existing bureau or division for the administration of the act. To the contrary, section 2 provides that "*the Secretary of the Interior * * * shall make such rules and regulations and establish such service, * * * and do any and all things necessary to accomplish the purposes of this Act * * **" [Italics added.] It should be further noted that section 9 directs the Secretary to provide for local hearings to be conducted, not *by* the Land Department, but in a *manner similar* to the procedure in the Land Department. It seems clear that while Congress intended the procedure in grazing appeals to be similar to that in land appeals, it intended to leave to the Secretary of the Interior the establishment of a complete and separate service for the administration of the act, including the designation of persons to carry out the procedural functions for which provision had been made in the statutes relating to the public lands.

It is therefore my opinion that on the basis of interpretation alone the Taylor Grazing Act requires that both the Director's questions be answered in the affirmative. The question remains, however, since the authority of a register is more directly derived from statutory enactments, whether the exercise of these functions by a regional grazer may be open to attack on the ground that Congress has unlawfully delegated legislative authority to an administrative officer. The legality of the delegation of authority conceivably may be tested in a prosecution based on disobedience to a subpoena, under section 3 of the Act of January 31, 1903, quoted *supra*, or in a prosecution for perjury, under section 125 of the Criminal Code (Tit. 18, U. S. C., Sec. 231), which provides:

Whoever, having taken an oath before a *competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered*, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed,

is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than \$2,000 and imprisoned not more than five years. [Italics added.]

Congress having expressly authorized grazing appeals to be conducted in a manner similar to the procedure in the Land Department and having authorized the Secretary of the Interior to "establish such service * * * and do any and all things necessary to accomplish the purposes" of the Taylor Grazing Act, it is clear that an oath administered to a witness, by a regional grazier, pursuant to departmental regulations, is an oath taken "before a competent * * * officer" in a case "in which a law of the United States authorizes an oath to be administered", and that an indictment for a violation of section 125 of the Criminal Code may be predicated on false testimony given in such a proceeding. This conclusion is supported by the decisions in *United States v. Grimaud*, 220 U. S. 506, and *United States v. Small*, 236 U. S. 405. The following is from the opinion of the court in the *Small* case (pp. 408-409):

The charge of crime must have clear legislative basis. * * * It cannot be doubted that a charge of perjury may be based upon § 125 of the Criminal Code where the affidavit is required either expressly by an act of Congress or by an authorized regulation of the General Land Office, and is known by the affiant to be false in a material statement. That is, the Land Department has authority to make regulations which are not inconsistent with law and are appropriate to the performance of its duties (Revised Statutes, §§ 161, 441, 453, 2478), and when by a valid regulation the Department requires that an affidavit shall be made before an officer otherwise competent, that officer is authorized to administer the oath within the meaning of § 125. The false swearing is made a crime, not by the Department, but by Congress; the statute, not the Department, fixes the penalty. *United States v. Grimaud*, 220 U. S., p. 522.

The same reasons may be invoked in support of a prosecution for disobedience to a subpoena under section 3 of the Act of January 31, 1903, *supra*.

It is therefore my conclusion that the Secretary of the Interior, pursuant to the provisions of the Taylor Grazing Act, has the authority to promulgate regulations directing regional graziers to subpoena witnesses to testify in grazing appeals, to compel their attendance and to administer oaths to them, and that the witnesses are entitled to receive fees and mileage under the Act of January 31, 1903, *supra*.

Approved:

CHARLES WEST,

Under Secretary.

**GRAZING FEES—AMENDMENT OF RULES APPROVED MARCH 2,
1936**

DEPARTMENT OF THE INTERIOR,

DIVISION OF GRAZING,

Washington, D. C., May 15, 1936.

The paragraph of the Rules for Administration of Grazing Districts, approved March 2, 1936, which provides for the collection of grazing fees (page 3) reads as follows:

A grazing fee of five (5) cents per head per month, or fraction thereof, for each head of cattle or horses and one (1) cent per month, or fraction thereof, for each sheep or goat shall be collected from each licensee except free-use licensees.

Field representatives of this Division have advised that in the administration of this provision of the rules the 30-day minimum basis for collection of fees would be inequitable or work a hardship on the licensees in numerous cases. It is therefore recommended that the said paragraph be amended to read as follows:

A grazing fee of five (5) cents per month for each head of cattle or horses and one (1) cent for each sheep or goat shall be collected from each licensee, except free-use licensees, but where the grazing period involves a fraction of a month the grazing fee for such fraction shall be charged on a daily basis prorated on a 30-day month.

F. R. CARPENTER,
Director.

Approved:

CHARLES WEST,

Acting Secretary of the Interior.

SUSPENSION OF ANNUAL ASSESSMENT WORK ON MINING CLAIMS

[Circular No. 1388]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., May 19, 1936.

REGISTERS, UNITED STATES LAND OFFICES:

For your information, and in order that you may inform inquirers relative thereto, your attention is called to the Act of April 24, 1936 (49 Stat. 1238), providing for the suspension of annual assessment work on mining claims held by location in the United States, and reading as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provision of section 2324

of the Revised Statutes of the United States, which requires on each mining claim located, and until a patent has been issued therefor, not less than \$100 worth of labor to be performed or improvements aggregating such amount to be made each year, be, and the same is hereby, suspended as to all mining claims in the United States during the year beginning at 12 o'clock meridian July 1, 1935, and ending at 12 o'clock meridian July 1, 1936: *Provided*, That the provisions of this Act shall not apply in the case of any claimant not entitled to exemption from the payment of a Federal income tax for the taxable year 1935: *Provided further*, That every claimant of any such mining claim, in order to obtain the benefits of this Act, shall file, or cause to be filed, in the office where the location notice or certificate is recorded, on or before 12 o'clock meridian July 1, 1936, a notice of his desire to hold said mining claim under this Act, which notice shall state that the claimant, or claimants, were entitled to exemption from the payment of a Federal income tax for the taxable year 1935: *And provided further*, That such suspension of assessment work shall not apply to more than six lode-mining claims held by the same person, nor to more than twelve lode-mining claims held by the same partnership, association, or corporation: *And provided further*, That such suspension of assessment work shall not apply to more than six placer-mining claims not to exceed one hundred and twenty acres (in all) held by the same person, nor to more than twelve placer-mining claims not to exceed two hundred and forty acres (in all) held by the same partnership, association, or corporation.

Attention is called to the fact that this act does not apply to Alaska but applies only to claimants in the United States who are exempt from the payment of a Federal income tax for the taxable year 1935, and who file on or before 12 o'clock noon July 1, 1936, in the office where the location notice or certificate is recorded, a notice of their desire to hold the claims under the act. The notice so filed should state that they were entitled to exemption from the payment of a Federal income tax for the year 1935.

It is to be observed that an individual who files such notice is not entitled to exemption from performing assessment work on more than six lode claims nor on more than six placer claims not to exceed 120 acres (in all), and that a partnership, association, or corporation is not entitled to such exemption on more than twelve lode claims nor on more than twelve placer claims not to exceed two hundred and forty acres (in all).

FRED W. JOHNSON,
Commissioner.

Approved:

T. A. WALTERS,
First Assistant Secretary.

COLUMBUS C. MABRY

Decided April 16, 1936

OIL AND GAS—BOUNDARIES OF GEOLOGICAL STRUCTURE—FUNCTION ADMINISTRATIVE.

The defining of the boundaries of the geological structures of producing oil or gas fields, under authority of section 32 of the Leasing Act, is for administrative purposes and is not a guaranty of geologic character. Accordingly, such boundaries are not to be taken as absolutely and accurately showing the extent in each instance of the geological structure producing oil or gas, but they may later be extended or reduced to accord with the facts.

OIL AND GAS—APPLICATION FOR PROSPECTING PERMIT—PRIOR SURRENDER OF LEASE—CHANGE IN STATUS OF LAND.

One who exercised a preferential right to an oil and gas lease under section 20 of the Leasing Act of February 25, 1920 (41 Stat. 437), the land being at the time within the limits of a defined producing area, and who later surrendered the lease, which was duly canceled, is not qualified to receive an oil and gas prospecting permit for the same land, since embraced within the permit application of another, even though said land has been eliminated from the proven area of the oil field and become subject to oil and gas prospecting.

WALTERS, *First Assistant Secretary*:

By decision of November 26, 1935, the Commissioner of the General Land Office rejected the oil and gas prospecting permit application of Columbus C. Mabry, filed June 19, 1935, for the W½ of lot 1 and all of lot 2 of the NE¼ Sec. 4, T. 28 S., R. 27 E., M. D. M., California, on the ground that an oil and gas prospecting permit had been issued to Walter R. Movius for the same land on January 25, 1935. At the same time the Commissioner dismissed the protest of Mabry against the permit issued to Movius. Mabry appealed from the Commissioner's decision.

Mabry made a homestead entry for the land involved in 1910. The land was thereafter included in a petroleum withdrawal, and in 1917 he was given a patent with reservation of oil and gas to the United States. See the case of *Columbus C. Mabry* (48 L. D. 280).

In 1926 Mabry filed an application for an oil and gas prospecting permit for this land under the preferential provision of section 20 of the Leasing Act of February 25, 1920 (41 Stat. 437). The land had been defined as being within the producing area of the Kern River Oil Field, and Mabry was held to be entitled to an oil and gas lease, but not to a prospecting permit, following the decision in the case of *Matt Mechaley* (51 L. D. 413).

An oil and gas lease, under section 20 of the Leasing Act, was issued to Mabry in 1927, but in 1932 he surrendered the lease and the Department accepted the surrender and canceled the lease. In

February 1933 the Department, on recommendation of the Geological Survey, redefined the oil field and this land was eliminated from the proven area.

Movius filed his permit application on March 21, 1934, and furnished a bond for the protection of the surface owner. He was not required to serve notice of his permit application on Mabry because the latter had already exercised his preferential right, and having exercised that right had surrendered his lease.

In his appeal Mabry contends that the Geological Survey erroneously classified this land as being upon a producing structure and that as a result of this erroneous classification he was forced to accept a lease which could not then be developed; that when the erroneous classification was corrected he had the preferred right to a permit as provided in section 20, but was not notified of the corrected classification or of the permit application of Movius; and that if it had not been for the erroneous classification he would have been granted a permit with the possibility of obtaining a lease at 5 percent royalty in case of discovery of oil or gas, and it would not then have been necessary to pay rental or maintain a lease bond prior to discovery.

It does not appear that there is any valid ground for the contention that the Geological Survey, or the Department, made an erroneous definition of structure. It is provided in section 32 of the Leasing Act that "the Secretary of the Interior is authorized * * * to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this act." The boundaries of the geological structures of producing oil or gas fields can not always be so determined that they will not be subject to change; they may be extended or they may be reduced. The boundaries are defined for administrative purposes but can not be taken as absolutely and accurately showing the extent in each instance of the geologic structure producing oil or gas.

Section 20 of the Leasing Act provides that under certain conditions a surface owner or claimant of lands "shall be entitled to a preference right to a permit and to a lease, as herein provided, in case of discovery." The appellant was notified of his preferred right and he exercised his preference right by taking a lease for this land. Having exercised his preference right and having obtained a lease, in accordance with the ruling in the *Mechaley case, supra*, Mabry had no further preferred right. When he surrendered his lease the possible oil and gas deposits in the land were open to disposition by the Government without any further right in him, and when the structure was redefined the deposits became subject to disposition to the first qualified permit applicant.

In the case of *Shaw v. Rink* (50 L. D. 405), the Department held that nonaction on the part of one to whom was accorded a preference right to an oil and gas-prospecting permit by section 20 of the Act of February 25, 1920, after service of notice upon him by a permit applicant in accordance with a regulation of the Department issued pursuant to that act, created a constructive waiver of the preference right which estopped him from ever thereafter asserting the right, notwithstanding that the application in connection with which the notice was served was disallowed.

The appellant has cited and attempted to rely on the unreported decision of the Department of August 18, 1935, in the case of *Benjamin F. Dowd v. Lee N. Layport* (A-17496, Sacramento 027730, 027818). In that case a surface owner of land had filed a prospecting permit application under section 20 of the Leasing Act, but this application was rejected under the conservation order of March 13, 1929. Thereafter in July 1932 he filed a permit application for the same land which was junior to the application of another person who had not served notice on the surface owner. The Department held that as the surface owner's first application was rejected without fault on his part he could not be held to have exercised his preference right.

In the present case there is no question about the exercise of preference right. It is true that in the exercise of that right Mabry accepted a lease, but he exercised the preferred right that he had. Thereafter there was no further preferred right to be exercised.

The decision appealed from is

Affirmed.

UNITED STATES v. STATE OF CALIFORNIA ET AL. (ON REHEARING)

Decided May 20, 1936

PRACTICE—INFORMALITY IN PROCEDURE.

Mere informality in bringing a matter to the attention of the Secretary should not prevent a consideration of its merits.

REOPENING OF CASE—WHEN PROPER.

A case should not be reopened on the basis of additional facts unless proof of those facts would warrant a change in the previous action.

STIPULATION IN PRIOR ACTION—EFFECT UPON SUBSEQUENT ACTION BETWEEN SAME PARTIES.

A stipulation in one action affects another between the same parties only if it is of such a nature as to warrant a dismissal of the action as a matter of law or if either the agreement upon or the performance of its terms tends toward a determination of the issue involved.

STIPULATION PURSUANT TO RESOLUTION OF CONGRESS—SCOPE.

A stipulation made pursuant to a joint resolution of Congress is not binding upon the parties beyond the limits fixed by the resolution.

LANDS WITHIN SCHOOL GRANTS—WHETHER “KNOWN MINERAL LANDS”—LANDS IN RAILROAD GRANTS—SIMILARITY OF TEST.

In determining whether lands within school grants are known mineral lands the same test is applicable as that applied to lands in railroad grants, Congress clearly having intended to dispose of *all* mineral lands in only one way, namely, under the mining laws. (Cited, *Mining Company v. Consolidated Mining Company*, 102 U. S. 167; *Deffebach v. Hawke*, 115 U. S. 392.) The fact that railroad grants except mineral lands expressly whereas school grants except them only by inference strengthens rather than weakens the argument that the same test is properly applicable in both classes of cases, for the existence of the express exception in the one was one of the important factors which led the Supreme Court to infer the existence of the same exception in the other.

“KNOWN MINERAL LANDS” EXCEPTED FROM SCHOOL GRANT WITHOUT PROOF OF DISCOVERY—WHEN SUBJECT TO DISPOSAL UNDER MINING LAWS.

Lands may be “known mineral lands” and therefore excepted from a school land grant although no actual discovery of mineral has been made thereon. Such lands so excluded from the grant without proof of discovery would still be subject to disposition under the mining laws upon proof of discovery just like other lands containing the same mineral.

CALIFORNIA SCHOOL GRANT ACT—BASIS FOR EXCEPTION OF MINERAL LAND.

The California school grant act (Act of March 3, 1853, 10 Stat. 246), construed in *Mining Co. v. Consolidated Mining Co.*, 102 U. S. 167, was enacted many years before the Federal mining laws and long before Congress made any provision for the acquisition of mineral land on proof of discovery. The basis for the exception of mineral land from that grant, read into the act by the Supreme Court, had nothing to do with discovery, but was spelled out from a long and varied list of Congressional enactments, including railroad grants, dealing with the disposition of the public domain, and which reflected a consistent Congressional practice not to give away the mineral lands, but rather to reserve them for future disposition in accordance with such policies as Congress should from time to time deem expedient.

“KNOWN MINERAL CHARACTER” OF PUBLIC LAND—AUTHORITY OF SECRETARY IN DETERMINING APPLICABLE TEST.

In determining whether a tract of public land was of known mineral character on a certain date the Secretary is not bound by an erroneous test since discredited and abandoned merely because that test happened to be improperly current in the Department on that date.

SECRETARY OF THE INTERIOR—DISMISSAL OF PROCEEDINGS—WHEN BEYOND AUTHORITY.

A dismissal by the Secretary of proceedings on the basis of an alleged rule of law, the decision of which is not reasonably necessary or incidental to a determination of the only proper issue in the case, would be beyond his authority.

SECRETARY OF THE INTERIOR—OFFICIAL AUTHORITY—NOT APPELLATE ONLY.

The authority of the Secretary of the Interior is not appellate only, and he may inquire into a case *de novo*.

SECRETARY OF THE INTERIOR—OFFICIAL AUTHORITY—SOURCE AND EXTENT.

The authority finally to determine the issue of fact as to the known mineral character of public land is conferred by law on the Secretary and no stat-

ute has ever authorized any delegation by him of that authority. Departmental rules and regulations referring issues of fact to officials of the General Land Office were "designed to facilitate the Department in the dispatch of business, not to defeat the supervision of the Secretary." (See *Knight v. United States Land Association*, 142 U. S. at p. 178.) They cannot and do not operate to deprive the Secretary of any authority which he possesses under the law. *West v. Standard Oil Company*, 278 U. S. 200.

SECRETARY OF THE INTERIOR—CONCURRING DECISIONS BELOW NOT CONCLUSIVE.

While the findings of registers upon the weight and interpretation to be given evidence adduced at hearings before them, and the affirmance of their findings by the General Land Office, are matters which may well be considered and given weight by the Secretary in cases before him on appeal, they do not preclude him from making other or different findings.

MINERAL LAND—SCHOOL SECTION, CALIFORNIA—WHEN MINERAL CHARACTER KNOWN.

Held, That Sec. 36, T. 30 S., R. 23 E., M. D. B. & M., California, was known mineral (oil and gas) land before, on, and after January 26, 1903, the date when the survey officially establishing the boundaries of the section was approved by the Commissioner of the General Land Office.

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On January 24, 1935, I reviewed and reversed a decision of the Commissioner of the General Land Office affirming the dismissal by a substitute register of adverse proceedings affecting all of the land in Section 36, T. 30 S., R. 23 E., M. D. B. & M. I found as a fact that section 36 in question was chiefly valuable for oil and gas and that its mineral character was known before, on, and after January 26, 1903, the date when the survey officially establishing the boundaries of the section was approved by the Commissioner.

The claimants have moved for a rehearing on grounds which challenge, in much detail, the propriety of the subordinate and ultimate findings of fact as well as the conclusions of law contained in my opinion of January 24, 1935. Careful consideration has been given to each of the grounds urged by the claimants, and the entire case has been reviewed again in the light of them. However, I have been able to find no reason either to change my prior decision or to grant the motion for a rehearing.

In view of the comprehensive survey of the case made in that decision, no legitimate purpose would be served by a lengthy re-statement of my views such as a full discussion of the grounds urged for a rehearing would entail. I therefore shall confine myself here to a brief consideration of the few contentions advanced by the claimants that seem to merit special comment and that have not been fully disposed of in the decision already rendered.

I

The claimant Pan American Petroleum Company calls attention to a stipulation, entered into on January 17, 1933, in a Federal re-

ceivership proceeding involving its assets, whereby it was agreed that "upon the receipt * * * of a certain sum of money * * * the United States would make no further claim to any assets, mortgaged or otherwise, in the hands of the said Receiver of Pan American Petroleum Company" (Pan American brief on motion for rehearing, p. 6). This stipulation is said to have been authorized by Congress on May 3, 1933 (S. J. Res. 13, 48 Stat. 30), to have been approved by the court having jurisdiction over the receivership on May 19, 1933, and to have been consummated on behalf of the Pan American Company on May 14, 1935, through the payment to the United States of the sum of \$5,500,000. Without spelling out its reasons in detail, the company invokes the stipulation and payment thereunder as a special ground for granting its motion for a rehearing.

Counsel for the Government object to my consideration of this ground because (1) it has not been raised by some appropriate form of verified supplemental pleading, (2) it is not germane to this proceeding, and (3) it raises a question which I have no jurisdiction to determine.

Mere informality in bringing the matter to my attention should not, I believe, lead to a refusal to consider the merits of the point raised by the Company. If the facts, as stated by the claimant, justified a rehearing, I should not hesitate to grant the motion and afford the Company an opportunity to file supplemental pleadings and thereafter to adduce such additional evidence as might be necessary. As to the other two objections, however, I agree that I am not concerned here with the effect that the stipulation may have in any future court proceedings brought by the United States against the Pan American Company, either to recover possession of the land or to call the Company to account for the proceeds of oil and gas already extracted therefrom. That is a question that must await judicial determination if litigation proves necessary. My own duty is to decide only whether the facts asserted by the Company with respect to the stipulation should lead me to reopen this proceeding by granting its motion for a rehearing.

A reopening of the proceeding on the basis of the facts invoked by the Company obviously would not be justified unless proof of those facts in the reopened hearings would warrant a dismissal of the contest so far as the Pan American Company is concerned. A dismissal on the merits, as counsel for the Government point out, is justified in this case if, and only if, section 36 in the Elk Hills was not known mineral land in 1903. This is the ultimate question of fact upon which the finding must rest, and the only one which I have jurisdiction to decide in this proceeding. *West v. Standard Oil Company*, 278 U. S. 200. The stipulation has no bearing whatsoever on this issue. Neither the agreement upon nor the performance

of its terms could have the slightest tendency to show whether or not section 36 in question was known mineral land in 1903. Consequently, proof of these facts could not possibly justify a revision, on the merits, of my original decision.

If the motion for a rehearing is supportable at all, it can be only because it warrants a dismissal of the proceedings as against the Pan American Company as a matter of law, despite the absence of any reason to change the ultimate finding of fact already made. That this is the ground actually invoked by the Pan American Company is borne out by the assertion in its brief that "the Government has duly waived" its "rights and claims" and "is estopped from further prosecuting this proceeding."

A dismissal of the proceeding on the basis of such an estoppel would, as counsel for the Government contend, be no different in principle from the dismissal heretofore made by Secretary Fall and held, by the Supreme Court, to have been beyond his jurisdiction. *West v. Standard Oil Co., supra.* It would be a dismissal on the basis of an alleged rule of law, the decision of which is not reasonably necessary or incident to the determination of the only issue properly before me, *i. e.*, the issue of fact as to the known mineral character of the land in 1903.

Moreover, I cannot agree that the facts concerning the stipulation would, if open to consideration, supply a basis for reopening the hearings and dismissing the proceeding as to the Pan American Company even as a matter of law. In the first place, the stipulation only binds the United States, upon receipt of the \$5,500,000, "to make no further claim to any assets in the hands of" the receiver. Assuming, for the moment, that payment of the money prior to the termination of the contest proceedings would have estopped the United States from further prosecution thereof, the stipulation could not reasonably be stretched to require the United States to reopen proceedings which were concluded several months before the promise not to do anything further took effect. The departmental proceedings came to an end on January 24, 1935, when my decision was promulgated. The \$5,500,000 was not paid until May 14, 1935. Thus, the Pan American Company really is asking the United States to take, rather than to refrain from taking, further action in the departmental proceedings; and by denying the Company's motion for a rehearing, I am merely refusing, on behalf of the United States, to do anything further in the case. By no stretch of the imagination can such a refusal be said to be contrary to the terms of the stipulation.

Furthermore, even if I now granted the motion for a rehearing, it still would not be true that the stipulation would require me to

dismiss the proceedings irrespective of the merits of my original finding as to the known mineral character of the land in question. To reconsider and reaffirm that finding would not violate the promise to "make no further claim to any assets in the hands of" the receiver. The sole basis for any claim that the Pan American Company can have to the land in question is supplied by a purported lease of lots 1 and 2 executed by the claimants Doheny and Greeley. In view of my original finding of fact as to the known mineral character of the land in 1903, Doheny and Greeley, who trace their claim of title to the State of California, did not own the land and conveyed no interest therein to the Pan American Company by virtue of the lease. Consequently, on May 15, 1935, the only assets in the hands of the receiver, so far as concerns the land in question, was a void paper lease. If this be an asset at all, it certainly is not an asset against which the United States would be making a claim by insisting that my original decision on the merits was correct and should not be disturbed on rehearing. In other words, the Pan American Company is in no position to invoke the stipulation until it has succeeded in obtaining a reversal on the merits of the finding of fact finally made on January 24, 1935. Since it would not have to rely on the stipulation if it were entitled to a review and reversal of that finding on the merits, it really is in no position to invoke the stipulation at all.

This conclusion is further reinforced by a consideration of the circumstances surrounding the entering into the stipulation. Those circumstances indicate that the parties had not the slightest actual intention of waiving any claims of the United States against the Pan American Company that had anything to do with the controversy concerning Section 36 in the Elk Hills. The claims with respect to which the parties negotiated arose by reason of certain fraudulent conveyances of public land made with the criminal connivance of Secretary Fall. Section 36 here in question was not part of this land. After extensive litigation the United States obtained, among other things, a judgment for \$9,277,666.17 against the Pan American Company by reason of its part in these frauds. It was in order to collect on this judgment that the United States intervened in the receivership proceedings then pending against the Pan American Company; and it was primarily for the purpose of compromising the claims represented by the judgment that the \$5,500,000 was accepted and paid.

To extend vague language in a stipulation to claims which the parties did not intend to cover would be improper in any event. But even if it were not permissible to ascertain the intended meaning of broad general language in a stipulation by a reference to

parol evidence it still would be impossible validly to extend the stipulation here in question to any claims of the United States arising out of the controversy regarding Section 36 in the Elk Hills. The compromise embodied in the stipulation, as the Pan American Company itself asserts, was specifically authorized by joint resolution of Congress (48 Stat. 30). Although drawn up before, it was not until after this authorization and in virtue of it, that the stipulation was approved by the court having jurisdiction over the receivership. The joint resolution contains a careful and detailed statement of the nature and limits of the authority which it confers. Its language, however, confers no authority to include in the compromise settlement any claims the United States may have with respect to the controversy concerning Section 36 in the Elk Hills. On the contrary, such authority was plainly withheld; and if the stipulation purported to cover such claims, whether by inadvertence or design, it would to that extent be unauthorized and invalid.

I conclude, therefore, that under no reasonable hypothesis is the Pan American Company entitled to a rehearing on the ground specially invoked by it on the basis of the compromise stipulation in the receivership proceedings.

II

Counsel for the Pan American Company contend that I erred in adopting the test as to known mineral land applied by the Supreme Court in *United States v. Southern Pacific Co.*, 251 U. S. 1. That case, counsel point out, related to a railroad grant, whereas this one concerns a school grant. The California school grant act did not in terms except mineral lands. The exception was carved out by judicial decision; and the basis relied on by the Supreme Court, as is clear from its opinions in *Mining Co. v. Consolidated Mining Co.*, 102 U. S. 167, and *Deffeback v. Hawke*, 115 U. S. 392, was, in the language of counsel for the Pan American Company, "the supposed intent of Congress to dispose of them in only one way, to wit, under the mining laws." (Pan American reply brief, p. 36.) The mining laws provided for disposition of mineral lands only on actual discovery of mineral on the land in question. Ergo, Congress intended to exclude from the California school grant only land on which mineral actually was discovered prior to the effective date of the transfer of the land. Unless this is so, counsel claim, "there might result a class of lands which would not pass by school grants because mineral, but which could not be acquired under the mining laws because non-mineral" (Pan American reply brief, p. 36).

If this argument otherwise had merit, I still would be unable to see why it should not be equally applicable to mineral lands excepted from railroad grants. The requirements for acquiring such

lands under the mining laws are precisely the same as those for acquiring lands excepted from school grants. Likewise, the underlying reason for excepting mineral lands from railroad grants is no different from the reason for excepting such lands from school grants. Indeed, the Supreme Court relied on the fact that the Congress had made such exceptions from railroad grants as one of the indications justifying the implication of a similar intention with respect to school grants. (See, *e. g.*, *Mining Co. v. Consolidated Mining Co.*, *supra*, 102 U. S. 167, at 174.) Consequently, if the anomaly deprecated by counsel for the Pan American Company existed with respect to school grant lands and justified a rule that actual discovery of mineral on the land was necessary to prevent title from passing to the State under the grant, it also would exist and require the same rule with respect to railroad grant lands. Thus, counsel for the Pan American Company really are attacking the validity of the decision in the *Southern Pacific* case under the guise of seeking to distinguish it. In substance, they merely are reiterating here an argument which has been squarely rejected by the Supreme Court and which I would not be free to adopt even if I deemed it intrinsically meritorious.

But the argument is itself a fallacious one. It is not true that the application of the *Southern Pacific* test in school land cases would produce an anomalous situation under which lands excepted from a school grant because they are mineral nevertheless would not be subject to disposition under the mineral laws because they were not mineral. [When land is excluded from a school grant as mineral even though no mineral has been found thereon prior to the effective date of the grant, it does not follow either that the excluded land in fact contains no mineral or that the mineral which it contains will never be discovered. Nor is there any requirement that excluded school grant lands can be acquired under the mining laws only if mineral has been discovered thereon prior to the effective date of the school grant. Such lands, even though excluded from a school grant without proof of discovery, would still be subject to immediate disposition under the mining laws upon proof of discovery just like any other land containing the same mineral.]

Furthermore, it is also not true that the exception with respect to mineral lands was carved out from the California school grant act by the Supreme Court, because Congress had indicated an intention to dispose of all mineral lands *under mining laws requiring proof of discovery*. The California school grant act, construed in *Mining Co. v. Consolidated Mining Co.*, *supra*, was enacted many years before the mining laws and long before Congress made any provision for the acquisition of mineral land on proof of discovery.

The basis for the exception had nothing to do with discovery. It was spelled out from a long and varied list of Congressional enactments (including railroad grants) dealing with the disposition of the public domain which reflected a consistent Congressional practice not to give away the mineral lands but rather to reserve them for future disposition in accordance with such policies as Congress should from time to time deem expedient. In the words of the Supreme Court (102 U. S. 167, at 174):

The purpose of these provisions was undoubtedly to reserve these lands, so much more valuable than ordinary public lands, and the nature of which suggested a policy different from other lands in their disposal, for such measures in this respect as the more matured wisdom of that body, which by the Constitution is authorized to dispose of the territory or other property of the United States, should afterwards devise.

There is no justification for assuming that Congress excepted mineral lands from the California school grant merely in order to dispose of them exclusively in accordance with the particular mining laws that would be the first thereafter to be enacted and only on proof of discovery. There is no reason, for example, why Congress could not have reserved the mineral lands for the use of the United States; and such a reservation has in fact been made with respect to the very land involved herein (Naval Petroleum Reserve No. 1; Executive order of September 2, 1912; Act of June 25, 1910, 36 Stat. 847). Similarly, there is no reason why the land could not have been reserved for disposition under laws that require no proof of discovery; and this, too, has in fact come to pass with respect to all unreserved mineral lands which, like the land here in question, are chiefly valuable for oil or gas (Act of August 21, 1935, 49 Stat. 674). This being so, there can be no merit to the contention of counsel for the Pan American Company that the necessity for disposing of mineral land, excepted from a school grant, exclusively under mining laws requiring proof of discovery, precludes the application in school grant cases of the test as to known mineral land approved by the Supreme Court in railroad grant cases. The fact that railroad grants except mineral lands expressly, whereas school grants except them only by inference, strengthens rather than weakens my conviction that the same test is properly applicable in both classes of cases, for the existence of the express exception in the one was one of the important factors which led the Supreme Court to infer the existence of the same exception in the other.

III

Counsel for the claimant Standard Oil Company of California submit that the test of known mineral land applied by the Supreme Court in *Diamond Coal Co. v. United States*, 233 U. S. 236, and in

Southern Pacific Co. v. United States, 251 U. S. 1; is not the one employed in the Department in 1903; that under the departmental test actual discovery and development of mineral deposits on the land in question would have been required; and that it is my duty to dispose of the present controversy concerning the known mineral character of land in 1903 in accordance with the rule then prevailing in the Department.

I cannot agree that I am bound to decide the issue of fact raised in this proceeding in accordance with an erroneous and now thoroughly discredited and abandoned test of known mineral land merely because that test happened to be improperly current in the Department in 1903. I would not be inclined to do so in any case, and in this particular case my right to refuse virtually has been upheld by the Supreme Court.

In substance, the argument of counsel for the Standard Oil Company is the very one that, during prior stages of this controversy, was pressed successfully on Secretary Fall and unsuccessfully on the Supreme Court. *West v. Standard Oil Co.*, 278 U. S. 200. If I approved it now, I, too, would have to dismiss the proceeding without inquiry into the mineral character of the land within the meaning of the *Diamond Coal* and *Southern Pacific* cases. Indeed, like Secretary Fall, I would have to dismiss the proceedings without any factual inquiry at all, for the absence of any mineral discovery or development in Section 36 in the Elk Hills is just as clear and admitted on the case before me as it was before him.

In any circumstances it would be a sufficient answer to the Standard Oil Company's contention that the argument has been considered by the Supreme Court and found wanting. In the *West* case the Supreme Court declared that (278 U. S. 200, 218, 221) :

* * * Secretary Fall did not hear evidence or make a determination on the issue of fact as to the known mineral character of the land within the meaning of the decisions in *Diamond Coal Co. v. United States*, 233 U. S. 236, and *Southern Pacific Co. v. United States*, 251 U. S. 1; and this because he deemed the fact in issue of no legal significance. * * *

When Secretary Fall undertook to determine, not as a fact whether the land was known to be mineral in 1903, but as a proposition of law that, because of other conceded facts, the Company's title had become unassailable, he acted without authority; and the order of dismissal based thereon did not remove the land from the jurisdiction of the Department.

Even if the Department rule in 1903 was as claimed by counsel for the Standard Oil Company, and even if I thought the rule itself a good one, I could not properly apply it here in the teeth of the foregoing language plainly pointing out, with respect to the very matter now before me, that it is my duty to "make a determination on the issue of fact as to the known mineral character of the land

within the meaning of the decisions" in the *Diamond Coal* and *Southern Pacific* cases.

In view of counsel's persistence in their discredited argument, however, the departmental decisions have been carefully and exhaustively reexamined. The result merely has been to verify my original views. The alleged rule is of itself unjustifiably narrow; it is doubtful whether it ever prevailed in the Department; it has not even the semblance of support in the departmental decisions after 1892; and the decisions between 1892 and 1903 sufficiently show that no matter what the rule might have been up to 1892, the rule current in the Department in 1903 did not render proof of actual discovery and development of a mineral deposit on the land indispensable to the establishment of its known mineral character. *Holter et al. v. Northern Pacific R. R. Co.*, 30 L. D. 442; *Kern Oil Company v. Clotfelter*, 30 L. D. 583, 587. See also *Instructions*, 34 L. D. 194, 198, 200.

IV

Finally, counsel for the various claimants advance supplementary contentions to show that I am not at liberty to disturb the register's findings, after their affirmance by the Commissioner of the General Land Office, if they are supported by "substantial evidence." They stress the advantages in judging the weight and effect of the evidence which the register had by reason of his opportunity to observe the witnesses and by reason of his personal inspection of the physical conditions in and around Elk Hills to which the evidence related. Calling attention to numerous cases in which the existence of similar advantages led this Department to refuse to disturb findings of a register, reached on conflicting evidence, after their affirmance by the Commissioner of the General Land Office, the claimants charge me with having exceeded the legitimate scope of my powers of appellate review. My sole duty, they contend, was to determine whether the record contained sufficient evidence to support the register's findings. Questions regarding the weight and interpretation of the evidence, as well as those concerning the credibility of the witnesses, should have been treated as foreclosed by the concurring opinions below.

The departmental decisions do not go as far as they are sought to be pressed by the claimants. In none of the cases that have been cited did it appear that the Secretary desired to reverse the register but refrained from doing so because he lacked the requisite power. In many the Secretary or Assistant Secretary rendering the decision actually inquired into the merits and expressed his complete agreement with the register's findings. In all the others the affirmance was based, not on any lack of power to inquire into the case *de novo*, but on a disinclination to do so in view of the conflicting character

of the evidence and of the superior advantages enjoyed by the trier of the facts in evaluating it. Those advantages and the affirmance of the register's findings by the Commissioner of the General Land Office undoubtedly are circumstances to be taken into consideration by the Secretary. Where the evidence is conflicting and fairly evenly balanced they may properly be regarded as a sufficient basis for refusing to disturb the register's decision. But they are not circumstances which necessarily preclude action in cases where the Secretary, after giving them consideration, nevertheless is convinced that the register's findings should be revised or reversed because he misjudged the credibility, or the weight, or the effect of the evidence. (See *Holter v. Northern Pacific R. R. Co.*, 30 L. D. 442, 447.)

Any rule denying power to the Secretary of the Interior, in a public land contest, to make as full an inquiry into the facts as he deems to be in the public interest would be inconsistent with the very basis on which is predicated the Secretary's power to pass on such cases at all. His power flows from the responsibility imposed upon him by the Congress to safeguard the interests of the United States in the public domain and to supervise the conduct of the Commissioner and all the other officials in the General Land Office. As Secretary Lamar stated in answer to a contention, advanced in *Pueblo of San Francisco*, 5 L. D. 483, "that the Secretary of the Interior has not the power to reverse the action of the Commissioner upon the survey of a private land claim pending before him" (pp. 494, 497):

The statutes in placing the whole business of the Department under the supervision of the Secretary invest him with authority to review, reverse, amend, annul, or affirm all proceedings in the Department having for their ultimate object to secure the alienation of any portion of the public lands, or the adjustment of private claims to lands with a just regard to the rights of the public and of private parties. Such supervision may be exercised by direct orders or by review on appeals. The mode in which the supervision shall be exercised in the absence of statutory direction may be prescribed by such rules and regulations as the Secretary may adopt. When proceedings affecting titles to lands are before the Department the power of supervision may be exercised by the Secretary whether or not these proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice. *The rules prescribed are designed to facilitate the Department in the despatch of business, not to defeat the supervision of the Secretary.* [Italics added.]

Not long after rendering this decision, Secretary Lamar was elevated to the Supreme Court of the United States and had an opportunity authoritatively to affirm his views in an opinion written for the Court in a related case. *Knight v. U. S. Land Association*, 142 U. S. 161. In addition to quoting the foregoing excerpt from his prior decision, Mr. Justice Lamar said (pp. 177-178, 181):

The phrase, "under the direction of the Secretary of the Interior", as used in these sections of the statutes, is not meaningless but was intended as an expres-

sion in general terms of the power of the Secretary to supervise and control the extensive operations of the Land Department of which he is the head. It means that, in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims and the issuing of patents thereon, and the administration of the trusts devolving upon the government, by reason of the laws of Congress or under treaty stipulations, respecting the public domain, the Secretary of the Interior is the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States.

* * * * *

It makes no difference whether the appeal is in regular form according to the established rules of the Department, or whether the Secretary on his own motion, knowing that injustice is about to be done by some action of the Commissioner, takes up the case and disposes of it in accordance with law and justice. The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it.

These obligations furnish not only the basis but also the measure of the Secretary's authority. Since his right to review decisions rendered in the General Land Office exists in order to enable him to fulfill his duty to see that no part of the public domain is disposed of to a party not entitled to it, the right, in the absence of compelling reasons to the contrary or of express statutory limitation, should be broad enough to enable the complete and proper performance of the duty from which it is derived. It obviously is just as possible for the public domain to be "disposed of to a party not entitled to it" through errors of fact as through errors of law. No statute limits the duty of the Secretary to prevent improper dispositions of public land only to cases where the impropriety is due to errors of law. No statute prohibits him from reviewing Land Office decisions in order to correct errors of fact where, in his judgment, such errors have been committed and, if not corrected, will operate to vest title to a part of the public domain in one not entitled to it. Nor can any such limitation be said to have been imposed, apart from statute, by departmental rule, regulation, or decision. As has already been stated, the departmental decisions hold at most that the Secretary *may*, not that he *must*, affirm concurring decisions of a register and the Commissioner of the General Land Office in cases where the evidence is conflicting and the Secretary is not disposed to review the facts *de novo*.

But even if the departmental decisions stood for the rule contended for by the claimants, it would be my duty to disregard them in deciding the present controversy. Under such a rule the Secretary would be limited to the review and correction of such errors of law as the register and Commissioner committed incident to their determination of the issue of fact as to the known mineral character

of the land. Yet the Supreme Court of the United States has held, with respect to this very controversy, that while the Secretary need not inquire into the issue of fact, if he does not deem it advisable, yet, if he refuses to inquire into the facts on the ground that their consideration is foreclosed as a matter of law, his refusal cannot and does not preclude him or his successor in office from reopening the case at a later date in order to investigate and decide the issue of fact on its merits. *West v. Standard Oil Co.*, 278 U. S. 200. The reason for the Court's ruling and its applicability to the point here under consideration are amply indicated in the following quotation from the opinion of the Court (pp. 220-221) :

Authority to determine as a fact the known mineral character of the land falls naturally to the Secretary as "the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States" to public lands. *Knight v. U. S. Land Ass'n*, 142 U. S. 161, 178. But that authority does not carry the power to relinquish the jurisdiction of the Department over the land without determining, as a fact, that it was non-mineral at the time of the approval of the survey. Compare *Work v. Louisiana*, 269 U. S. 250, 261. The broad power of control and supervision conferred upon the Secretary "does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress as manifested in the granting act." *Payne v. Central Pacific Railway Co.*, 255 U. S. 228, 236. See also *Burfenning v. Chicago, St. Paul & C. Ry.*, 163 U. S. 321; *Daniels v. Wagner*, 237 U. S. 547, 558. To read into the legislation, under such circumstances, authority to pass upon the State's claim of right to the land, regardless of its known mineral character, would create, by implication, a power in direct contravention of the expressed intention of Congress that mineral lands were not granted to the State. Thus, the Secretary would be constituted an agent rather for relinquishing than for preserving the rights of the United States in the public lands. See *Shaw v. Kellogg*, 170 U. S. 312, 337-338.

When Secretary Fall undertook to determine, not as a fact whether the land was known to be mineral in 1903, but as a proposition of law that, because of other conceded facts, the Company's title had become unassailable, he acted without authority; and the order of dismissal based thereon did not remove the land from the jurisdiction of the Department.

I, too, would be acting without authority, if I "undertook to determine, not as a fact whether the land was known to be mineral in 1903, but as a proposition of law that, because of" the concurring decisions of the register and the Commissioner of the General Land Office, the claimants' title has become unassailable. No statute has ever authorized the slightest curtailment, through departmental rule, regulation, or decision, of the Secretary's powers of supervision over his subordinates in the General Land Office. No statute has ever authorized any delegation to them of the Secretary's authority finally to determine the issue of fact as to the known mineral character of the land. The departmental rules and regulations pursuant to

which this issue of fact was referred to the register and the Commissioner were "designed to facilitate the Department in the despatch of business, not to defeat the supervision of the Secretary." (See *Knight v. U. S. Land Association*, 142 U. S. at p. 178.) The reference and the action of the register and the Commissioner thereunder were purely advisory in character. They could not and did not operate to deprive the Secretary of the Interior of the authority which the Supreme Court has held him to have (*West v. Standard Oil Co.*, *supra*) "to determine as a fact the known mineral character" of the lands here in question.

The rule as to the affirmance of concurring decisions of register and Commissioner is based on general considerations of convenience rather than on applicable statutory requirement. Such advantages in judging the credibility, weight, and effect of evidence as a register, who actually hears the witnesses, may have over the Commissioner and the Secretary, who merely review the record of the testimony, are not so great as to provide an absolute guarantee against error. Nor is the possibility of error entirely eliminated when the Commissioner, after reviewing the case, agrees with the register's findings. There being a possibility of error, there is room for the exercise of the Secretary's supervisory authority, and no mere rule of administrative convenience can render it improper for him to do so.

The advantages enjoyed by the register as trier of the facts and the affirmance of his decision by the Commissioner of the General Land Office are, as I have already indicated, mere makeweight considerations whose importance necessarily varies in different cases. It was and is my duty to evaluate them and to give them due weight in this case along with all the other circumstances which properly should govern my decision. To the best of my ability I have done so, and having done so, I am clearly of the opinion that the register and the Commissioner erred and that my reversal of their decisions should stand.

On reviewing all the evidence in the record, and after considering all the arguments advanced by the claimants, I reaffirm my original decision, and now again find as a fact that Section 36, T. 30 S., R. 23 E., M. D. B. & M. was known mineral land before, on, and after January 26, 1903, the date of the approval by the Commissioner of the General Land Office of the survey officially establishing the boundaries of that section.

The motion for a rehearing is denied.

Motion denied.

NORTH DOME KETTLEMAN HILLS

Opinion, May 27, 1936

OIL AND GAS LEASES—COMPACTNESS OF AREA—LEASING ACT—AUTHORITY TO ALTER OR WAIVE.

Certain provisions in section 27 of the Leasing Act (41 Stat. 437), as amended by the Act of July 3, 1930 (46 Stat. 1006), and substantially reenacted in the Act of March 4, 1931 (46 Stat. 1523), authorized the Secretary of the Interior to alter, change, or revoke drilling, producing, and royalty requirements of leases of oil and gas lands in order to bring about agreements for their unit or cooperative development. *Held*, That these provisions empowered the Secretary to alter or waive requirements of compactness, contained in section 14 of the Leasing Act, in order to effectuate such agreements; and action looking to the disturbance of leases previously allowed is not only of doubtful wisdom but lacks sufficient legal basis.

OIL AND GAS LEASES—UNIT PLAN OF DEVELOPMENT—AGREEMENT—EFFECT.

Held, That the action of the Secretary, on January 31, 1931, in certifying, upon the authority of the Act of July 3, 1930, "that each and every lease that *has been* or may be issued that is subject to this agreement for a unit plan of development and operation for the North Dome Kettleman Hills shall continue beyond the twenty years specified in the lease and until the termination of the plan", affected *all* leases subject to the agreement, including those of tracts not in compact form, and of necessity had the effect of validating such leases of tracts not compact included in the unitization agreement; and by this action a solemn assurance was given, within the scope of the Secretary's authority to give the same, that all such leases were to be deemed valid and effective.

MARGOLD, *Solicitor*:

Certain memoranda submitted to me raise the question whether certain oil and gas leases bearing serials 019492, 019419, 019445, 019699, and 019327, issued for land on the North Dome Kettleman Hills oil and gas field, were not issued in violation of the requirement that they shall be issued in compact form prescribed in section 14 of the Leasing Act of February 25, 1920 (41 Stat. 437), and are therefore void for the reason they were issued without authority of law.

The further question is presented that if such leases, or any of them, were issued in disregard of the requirement mentioned, whether it is proper and advisable to recommend appropriate action to cancel the leases and compel the holders thereof to take in substitution new leases conforming to the requirement and to account for the losses in oil and gas royalties that may have been sustained by the United States resulting from the disregard of the requirement.

On June 30, 1922, oil and gas prospecting permit (Sacramento 019492) under section 13 of the Leasing Act was issued to Ervin S. Armstrong for N $\frac{1}{2}$, N $\frac{1}{2}$ S $\frac{1}{2}$, S $\frac{1}{2}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 4, all of Sec. 10, T. 22 S., R. 17 E., all of Secs. 6 and 8, T. 22 S., R. 18 E., M. D. M., containing 2547.40 acres. February 19, 1929, the Depart-

ment approved an assignment of the tracts in Sec. 4 and all of Sec. 6 to George F. Getty, Inc., and another assignment of all of Sec. 10 to the Standard Oil Company of California.

In January and February 1930, leases under section 14 of the Leasing Act were authorized and executed for the lands in permit 019492 as follows:

To Ervin S. Armstrong, (a) SW $\frac{1}{4}$ Sec. 8 at 5 percent royalty and (b) remainder of Sec. 8 at sliding scale royalty;

To Shell Oil Company and Union Oil Company (Getty), (c) lots 1 and 2, S $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 4, E $\frac{1}{2}$ SW $\frac{1}{4}$, lots 6 and 7, Sec. 6 at 5 percent royalty, and (d) remainder of permit area in Secs. 4 and 6 at sliding scale royalty;

To Standard Oil Company of California, (e) NE $\frac{1}{4}$ Sec. 10 at 5 percent royalty, and (f) remainder of Sec. 10 at sliding scale royalty.

It will be noticed that practically a quarter section was granted as primary acreage in each of the four sections; that all the primary acreage could have been included in either Sec. 6, 8, or 10, or in Sec. 4, with the addition of one 40-acre tract.

On June 10, 1924, oil and gas prospecting permit (now Sacramento 019699) was issued under section 13 of the Leasing Act to Roy N. Ferguson for all of Sec. 24, T. 22 S., R. 17 E., all of Sec. 30, N $\frac{1}{2}$ Sec. 32, T. 22 S., R. 18 E., N $\frac{1}{2}$ Sec. 4, T. 23 S., R. 18 E., containing 1929.37 acres. Certain contracts were made with respect to royalties, and on June 29, 1930, the Department approved an assignment of all the permit except E $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 4 to the Bolsa Chica Oil Corporation, subject to prior agreements as to royalties. On November 8, 1930, leases under section 14 of the Leasing Act were authorized and executed for all the lands in permit 019699 as follows:

To the Bolsa Chica Oil Corporation, (a) dated March 27, 1930, 240 acres each in Secs. 24 and 30, comprised in two separate tracts, at a royalty rate of 5 percent, and (b) the remaining permit areas in Secs. 24 and 30, the N $\frac{1}{2}$ Sec. 32, W $\frac{1}{2}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ Sec. 4 at a sliding scale royalty;

(c) To Roy N. Ferguson, E $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 4 at a sliding scale royalty.

It will be noticed that the 480-acre primary area could have been taken in either Sec. 24 or 30.

On April 16, 1921, oil and gas prospecting permit (now Sacramento 019419) was issued under section 13 of the Leasing Act to Washington H. Ochsner for all of Secs. 20, 22, 26, and all but SE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 28, T. 22 S., R. 18 E., containing 2538.24 acres.

Assignments of this permit were approved by the Department on November 1, 1922, to the Coast Land Company and from the Coast Land Company to the General Petroleum Corporation, and on April 11, 1926, to the General Petroleum Corporation of California. The permit was successively extended to April 16, 1929, and final extension was granted to April 16, 1930, subject to the North Dome Kettleman agreement approved November 22, 1929. In this agreement it was provided that:

The Secretary of the Interior offers to the holders of the permits on which active development is already in progress, the issue of all leases upon the Elliott (Sac. 019327), Ochsner (Sac. 019419), and Armstrong (Sac. 019492) permits on the basis of discovery already made; and the issue of all leases on the Beal, Crum, Ferguson, and Watson (Sac. 019445) permits when validated by discoveries as above provided; * * *

On January 9, 1931, leases under section 14 of the Leasing Act were authorized and executed for the lands in permit 019419 as follows:

To the General Petroleum Corporation of California, (a) dated July 23, 1930, 280 acres in Sec. 20, 160 acres in Sec. 22, 120 acres in Sec. 28, 80 acres in Sec. 26, at a royalty of 5 percent, and (b) to the same company for the remaining permit acreage at a sliding scale royalty.

The diagram shows the primary acreage is in scattered tracts, non-contiguous. All of the primary acreage could have been selected in one body in square form from either Sec. 20, 22, or 26, or a primary lease could have included all the permit area in Sec. 28 and 40 acres in Sec. 20 or 22.

On August 12, 1921, oil and gas prospecting permit (now Sacramento 019445) was issued under section 13 of the Leasing Act to Douglas S. Watson for SE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 28, all of Sec. 34, T. 22 S., R. 18 E., all of Sec. 2, T. 23 S., R. 18 E., M. D. M., containing 1336.32 acres. On May 3, 1928, Watson entered into an agreement with the Associated Oil Company that in event of discovery he would execute assignment of the permit to the Associated Oil Company and upon issuance of leases the 5 percent area shall be equally divided into two compact parcels and the company would assign or sublet one of said parcels to Watson; that the lease carrying the graduated government royalty would be divided between the parties; that the company would assign or sublet one half of the acreage of such lease in alternate 80-acre tracts, subject to no reservation of royalties to the company. On March 2, 1929, the Department approved an assignment of the permit to the Pioneer Kettleman Company, subject to the Watson-Associated agreement above mentioned.

On April 17 and 30, 1931, the Department authorized and executed leases under section 14 of the Leasing Act for the permit area in 019445, dated March 13, 1931, as follows:

To the Associated Oil Company, (a) NE $\frac{1}{4}$ Sec. 34 at 5 percent royalty and (b) 160 acres in Sec. 34, 360 acres in Sec. 2, at a sliding scale royalty;

To the Pioneer Kettleman Company, (c) NE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 34, lots 1 and 2 (N $\frac{1}{2}$ NE $\frac{1}{4}$), Sec. 2, and 5 percent royalty, and (d) the remainder of the permit area at a sliding scale royalty.

It will be noticed that the primary leases could have been selected in permit 019445 in one body in square form instead of scattered and widely separated tracts.

On October 30, 1920, oil and gas prospecting permit (now Sacramento 019327) was issued under section 13 of the Leasing Act to Amos W. Elliott for all of Secs. 2 and 12, T. 22 S., R. 17 E., and all of Sec. 18, T. 22 S., R. 18 E., containing 1,933.38 acres. On October 13, 1924, assignment of the permit was approved to the Marland Oil Company. By subsequent assignments the interests in the permit, subject to certain royalties, became vested in the various lessees as shown below.

On November 22, 1929, leases as of January 7, 1929, were authorized and executed as follows:

To the Marland Oil Company, (a) N $\frac{1}{2}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 2, NW $\frac{1}{4}$ Sec. 12, at a 5 percent royalty, and (b) NE $\frac{1}{4}$, N $\frac{1}{2}$ NW $\frac{1}{4}$, S $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 2, S $\frac{1}{2}$ Sec. 12, NW $\frac{1}{4}$, S $\frac{1}{2}$ Sec. 18 at a sliding scale royalty;

To Milham Exploration Company, (c) SE $\frac{1}{4}$ Sec. 2, at 5 percent royalty and (d) N $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 12, S $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 18, at a sliding scale royalty;

To the Kettleman Oil Corporation, (e) remainder of the permit area at a sliding scale royalty.

March 1, 1930, the Department approved assignment of leases (a) and (b) from the Marland Oil Company to the Continental Oil Company, subject to certain prior agreements as to contracts for the disposal of oil and to certain overriding royalties, and subject also to the North Dome Kettleman Hills agreement of July 25, 1929.

It will be noticed that the 480 acres that the permittee was entitled to as a primary lease could have been taken in one body in either of the sections involved.

The leases issued under the above-named serials were those on the North Dome of the Kettleman Hills field in which the rule as to compactness of the primary lease acreage was not followed. The

records in the Department, particularly as to leases issued under the Armstrong permit, show that the Department in granting such leases was fully aware that it departed from its interpretation of section 14 of the Leasing Act, requiring that "the area to be selected by the permittee shall be in compact form * * * and, if surveyed, to be described by legal subdivisions of the public land surveys", but that it was thought that the special circumstances in these instances justified a relaxation of the rule.

By decision of January 9, 1929 (52 L. D. 527), the Department refused to approve assignments that embodied stipulations to the effect that the primary acreage in the Armstrong permit could be selected out of two or more full sections, on the ground that selection would be a circumvention of the principle of compactness, but conceded that in the event a part of the 600 acres in Sec. 4 was selected, the remaining primary acreage to which permittee was entitled could be taken in Sec. 10. The question of the selection of the primary acreage under the Armstrong permit was under consideration, however, while Dr. George Otis Smith, Director of the Geological Survey, was engaged in negotiations with the holders of oil interests on the North Dome Kettleman Hills, in the interest of conservation, to secure an agreement for unit operation on that structure. The letters, telegrams, and memoranda in the Department files disclose that Dr. Smith urged and obtained a modification of the requirement of compactness as the price for procuring the consent of Armstrong and his assignees to the proposed unit plan.

On September 26, 1929, the Departmental Committee, consisting of the former Solicitor, E. C. Finney, and Dr. Smith, in a memorandum to the Secretary, recommended the issuance of the (a) or primary leases on the Armstrong permit area as above shown in accordance with the wishes of the parties concerned. The grounds assigned for this action in the letter of authorization were as follows:

With the approval of this Department the permittee assigned Sec. 10 to the Standard Oil Company of California; Secs. 4 and 6 to G. F. Getty, and Armstrong retains record title to Sec. 8. A discovery of oil having been made, it becomes important to designate the areas which may be taken under lease at 5% royalty, viz, one-fourth of the entire area, or 640 acres. This is also important because of the working out of the conservation policy in Kettleman Hills area. While the leasing law contemplates that lands covered by permits shall be in compact form and that the areas selected as 5% royalty lands shall also be in compact form, in this case it was physically impossible for permittee to select 2,560 acres of contiguous or compact lands. Between each of the sections described are located odd-numbered sections passed many years ago to the Southern Pacific Railroad Company under its land grant. Other intervening lands are covered by the prior titles, claims, or filings of others so that the four sections included in the Armstrong permit are widely separated from each other. The parties in interest have indicated they desire to select as 5% areas

to be included in A-leases, the following lands: NE $\frac{1}{4}$ Sec. 4, SW $\frac{1}{4}$ Sec. 6, NE $\frac{1}{4}$ Sec. 10, and SW $\frac{1}{4}$ Sec. 8.

In view of the impossibility of taking the permit in contiguous or compact areas; in view of the diverse ownership of the respective tracts under approved assignments, and in view of the importance of adjusting the matter in the interest of conservation of oil and gas in the North Dome of Kettleman Hills, we recommend that upon proper application by the parties in interest, they be allowed to select and include in applications for lease at the 5% royalty rate the said NE $\frac{1}{4}$ Sec. 4, SW $\frac{1}{4}$ Sec. 6, T. 22 S., R. 17 E., and the SW $\frac{1}{4}$ Sec. 8, and NE $\frac{1}{4}$ Sec. 10, T. 22 S., R. 18 E.

With the exception of the leases granted under 019327, which were authorized and issued prior to the Armstrong lease, and as to which no question of the violation of rule of compactness appears to have been raised, the issuance of the other primary leases hereinabove mentioned appears to be based principally on the precedent set in the Armstrong case, and for the purpose of supplying an inducement to join in the unit plan of operation.

The urgent need for a unit plan of development of the North Dome and the prompt adoption of measures in the public interest to prevent and check an imminent and enormous waste of oil and gas and the demoralization of the oil market in California by flooding the market with an unwarranted supply of cheap gasoline, and the beneficial effects of voluntary production-curtailement measures, adopted by the operators and the Secretary of the Interior by an agreement effective July 25, 1929, between them, with the cooperation of the Standard Oil Company of California, which owned in fee approximately one-half the acreage on the structure, are convincingly set forth in a Report on Petroleum Production and Development by two senior engineers of the Bureau of Mines appearing in the Report of Hearings before the Subcommittee on Interstate and Foreign Commerce, 73d Congress, on H. R. 441, pp. 1200-1265.

The agreement of July 25, 1929, was approved by the Secretary on November 22, 1929. The agreement, among other things, provided that in lieu of production test to demonstrate discovery necessary to validate Government leases, wells should be considered completed when a water shut-off was secured and the drill reached the productive Temblor zone. As compensation for those wells shut in, the agreement provided that the four producing wells of the "discovery group" should distribute from 10 to 25 percent of their production equally among the owners of the wells completed but shut in, an arrangement which the Standard Oil Company of California agreed to. The agreement further provided all drilling in the field was to be suspended until July 1, 1931; that the Secretary would seek enactment of legislation to enable him to enter into cooperative and unitization agreements, and that the agreement was to be effective until

said date. Provision was made for the allocation of the primary and secondary acreage, in terms of legal subdivisions, on the Armstrong lease, substantially as was afterwards granted. The holders of the interests in the permit areas here in question united in this agreement.

The Secretary recommended to Congress that legislation be enacted authorizing him to approve cooperative or unit plans which would include Government lands. July 3, 1930, an act was approved (46 Stat. 1007), amending sections 17 and 27 of the Leasing Act of February 25, 1920, and authorizing the Secretary to approve such plans. Section 17 as so amended contained the following proviso:

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, which plan has the approval of the Secretary of the Interior as necessary or convenient in the public interest, shall continue in force beyond said period of 20 years until the termination of such plan.

Section 27 as amended contained the following proviso:

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 involved, to establish, alter, change, or revoke drilling, producing, and royalty requirements of such leases, and to make such regulations with reference to such leases with like consent on the part of the lessee or lessees 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.

Section 2 of the act provided that the amendments should expire January 31, 1931. Under the authority of this act negotiations were then undertaken by the Department which finally resulted in the approval by the Secretary of the Interior on January 31, 1931, of a unit plan for the North Dome Kettleman Hills field. The agreement was with Kettleman North Dome Association, organized as a non-profit cooperative corporation for the development and operation of the land subject to the unit agreement on the one part and the lessees of the United States and others subscribing to the agreement. The plan covered 11,740 acres of Government land and fee-owned lands, exclusive of those owned by the Standard Oil Company of California and a few hundred acres of other fee-owned land held by the Felix and Huffman interests. Operations of the land defined by the agreement have since been conducted by the Kettleman North Dome Association, the temporary agreement of July 25, 1929, having expired.

It is considered unnecessary to outline the provisions of this agreement, except certain stipulations which seem to have pertinent bearing on the questions presented here. Section XIV of the agreement provided, in substance, that it should become effective when the Secretary of the Interior approved it and certified that it was necessary and advisable in the public interest and when he shall—

(b) certify that each and every lease that has been or may be issued for lands of the United States and that is subject to this agreement for a unit plan of development and operation for the North Dome of Kettleman Hills shall continue beyond the twenty (20) years specified in the lease and until the termination of said plan; and

(c) with the consent of the holder, certify that each and every lease, as aforesaid, shall be recognized as modified (1) as to drilling and producing requirements, so as to conform to and be satisfied by the drilling and producing stipulations of this agreement; (2) as to its royalty requirements, so as to provide that computation of royalty accruing to the United States, irrespective of the number of wells on the leasehold and the production therefrom, shall be based on a portion of production allocated to such lease in conformity with the principle for participation of members set forth in III hereof, provided that the royalty rate for oil for each lease not at five per cent (5%) shall be computed on the average daily gross oil production for each month of the Association's acreage as follows:

Up to 15,000 barrels per day-----	12½%
When over 15,000 and not over 30,000 barrels per day-----	16¾%
When over 30,000 and not over 60,000 barrels per day-----	20%
When over 60,000 and not over 110,000 barrels per day-----	25%
When over 110,000 barrels per day-----	33½%

that the above schedule of B lease royalties applies only to Association production and is based on an area of 11,740 acres, as stated in XIII hereof, and it is understood and agreed that for less initial Association acreage the above production schedule shall be reduced in the proportion that the actual initial Association acreage bears to 11,740 acres. That the royalty on gas, gasoline, and all hydrocarbons except oil shall be computed as provided in the standard lease form and the Secretary of the Interior reserves all rights pursuant to Section 36 of the Act of February 25, 1920, *supra*.

[In accordance with (c) the initial association acreage has been reduced since to 10,800 acres and the production schedule reduced conformably.]

The Secretary so certified to the agreement. All of the holders of oil interests in the permits here involved, as above named and described, were parties to the agreement except lessees under the permit of Ferguson, 019699, the area of that permit being outside the participating area and having no allocation of production.

The diagrams depicting the outlines of the structure subject to the Kettleman North Dome Association and the location of permit areas here in question with respect thereto disclose that the selection of the primary acreages in scattered tracts instead of conforming to the rule of compactness operative at the time the selections were made has resulted in substantially less royalty to the Government than

would have accrued had the rule been observed. This loss is due to the fact that primary acreages granted fall almost entirely within the participating area, while the area subject to the sliding scale royalties composes the edge acreage.

In his memorandum of March 30, 1936, at the Acting Solicitor's request, the Director of the Geological Survey has furnished an estimate of present and probable future money losses to the United States should the *status quo* not be disturbed. He states no losses have been sustained in connection with the leases under 019327, as the entire permit area is within the 100 percent participating area, and none under 019699, as the entire permit area is without the participating area. His estimate of the losses in royalty value on oil (resulting from the selections of primary acreages under 019419, 019445 and 019492) from April 1, 1931, to January 31, 1936; based upon an average value of \$1 per barrel, amounts to \$271,388. The loss in royalty value on natural gas and one third of the natural gasoline for the same period is estimated at \$108,392.37. On an assumption of one billion barrels reserve in the Dome, future losses on oil is put at \$2,456,890, and on natural gas and one third of the natural gasoline, at \$981,281.87.

In this connection it seems proper to observe that in the computation of the amount of loss present and future, the assumption is made that the lessees would have selected such tracts as the survey designates as the most advantageous locations for primary leases, and that the liability of the lessees is measured by the difference in the amount of royalty accruing to the Government had such leases been actually issued and that which it receives under the existing leases. It seems that a contractual liability is assumed to exist to pay a royalty on the leases as if they had been issued in accordance with the rule of compactness.

The case presents so many anomalous features for which no existing precedent affords guidance that the proper theory upon which to base the claim of loss may be difficult to determine. It would seem that the lessees could not be sued on any theory that they are trespassers. The lessees were and are entitled to leases exhausting the entire permit areas. As permittees they were and are entitled to extract and dispose of oil and gas on the permitted land upon paying as royalty 20 per centum of the gross value thereof (sec. 15, Act. of February 25, 1920).

While it is believed that the computations of the Geological Survey rest on the more equitable and reasonable basis, even if the existing leases were declared void *ab initio*, and no lease in accordance with section 14 was held to exist, and those that acquired interests in the permit were relegated to the status of permittees, the lia-

bility would not be founded on unlawful conversion of oil and gas obtained from public land but rather on failure to pay lawful rates.

The premises considered, attention will be turned to the questions whether the Government has the right to have the leases canceled or reformed and to require the holders of the leases under serials 019419, 019445, and 019492 to respond in damages or to account for oil unlawfully converted to their own use.

For the purposes of the case it will be assumed that the authorization of any of the primary leases above mentioned prior to the Act of July 3, 1930, was in contravention of the requirement of compactness in section 14 of the Leasing Act; that the reasons assigned in the Departmental Committee's letter of September 26, 1929, as above quoted, for a departure from the requirement, supplied no legal excuse or justification at that time for disregard of the requirement, and that the Secretary's action in that regard was without lawful authority. It may also be conceded that under settled rules the United States is not bound by the unauthorized acts of its officers, and in such a case no defense of laches or other estoppel could prevail in a suit brought by the United States to enforce a public right or to protect a public interest, *Pine River Logging Co. v. United States* (186 U. S. 279); *Utah Power & Light Co. v. United States* (243 U. S. 389); *Cramer v. United States* (261 U. S. 219); *Mammoth Oil Co. v. United States* (275 U. S. 13, 35), even though the act is beneficial to the Government, *Filor v. United States* (9 Wall. 45).

However, the question arises whether under the provisions of the Act of July 3, 1930, above set forth, the Secretary was not amply empowered to do the thing that he was theretofore without authority to do, namely, to waive the requirement of compactness in order to obtain the consent of lessees to a unit plan of operation, and that when clothed with this authority his subsequent dealings and agreement with the holders of the leases theretofore unlawfully issued did not have the effect of a ratification thereof. If the Secretary was clothed with such power, it is clear that such of the primary leases that were authorized and executed subsequent to the passage of the act could not be deemed void for lack of authority to issue them.

The requirement that the primary acreage should be selected in compact form is plainly one whose chief object is to prevent one entitled to such lease from picking the most promising productive area for a 5 percent royalty rate and leaving the lesser productive area subject to the higher scale of royalties. Except in conceivable cases where the area of greater production is comprehended in one compact area susceptible of selection as primary acreage, the enforcement of the rule of compactness operates to reserve to the Government a greater share of royalty oil produced from any given permit area. The grant of the primary leases in permit areas 019492,

019445, and 019419, was to all intents and purposes a reduction in royalty rates in consideration of the assumed public benefits that would result from the lessees' participation in the unit plan.

The proviso in section 27 of the Act of July 3, 1930, above quoted, confers broad powers on the Secretary "to establish, alter, change, or revoke drilling, producing, and royalty requirements of such leases" to bring about cooperative or unit plans of development for the proper conservation of oil and gas. This proviso, as well as that quoted from section 17 of the same act, is substantially reenacted in the Act of March 4, 1931 (46 Stat. 1523), so that the powers of the Secretary in this respect have not been curtailed.

The Acts of July 3, 1930, and March 4, 1931, are obviously remedial legislation, and it is believed, under the provisos mentioned in section 27 therein, the Secretary had and has the authority to reduce the royalty rates by granting primary leases not in compact form as the price of lessee's consent to a unitization plan.

On January 31, 1931, when invested with such power, and with full knowledge that the primary leases in question were issued in disregard of the rule of compactness, the Secretary certified—

that each and every lease that *has been* or may be issued for lands of the United States and that is subject to this agreement for a unit plan of development and operation for the North Dome of Kettleman Hills shall continue beyond the twenty (20) years specified in the lease and until the termination of said plan.

Manifestly, this certification was made pursuant to the power to extend the life of leases subject to the agreement until the termination of the unit plan, expressly conferred by section 17 of the Act of July 3, 1930, above quoted. But it is not reasonable to suppose that this power was to be exercised in respect to any leases except those that were valid, and by the inclusion in the certification of all leases subject to the agreement, a solemn assurance was given, within the scope of the Secretary's authority to give, that all such leases were to be deemed valid and effective.

The principle has been applied in numerous cases that the act or omission of the officers of the Government, if they be authorized to bind the United States in a particular transaction, will work estoppel against the Government if the officers have acted within the scope of their authority. *Walker v. United States* (139 Fed. 409, aff. 148 Fed. 1022); *Ritter v. United States* (C. C. A., 28 Fed. 2d, 265, 267); *United States v. Northern Pacific Ry. Co.* (57 Fed. 2d, 385).

In this view the leases issued on the Armstrong permit area, 019492, and the Elliott permit area, 019327, prior to the act of July 3, 1930, were validated by the agreement of July 31, 1931, and attack could not successfully be made to set them aside on the ground of invalidity. It also follows that if the proviso to section 27 of the

act of July 3, 1930, is susceptible of the construction hereinbefore stated as to the scope of the authority therein conferred on the Secretary, his subsequent authorization of the leases on permit areas 019699, 019445, 019419 was a valid exercise of power, and these leases are not open to attack on the ground that they are invalid.

In conclusion it seems proper to state, in the light of the history of the North Dome Kettleman Hills and the results of the perfection of the unit agreement as well as the results that have followed from the failure to obtain consent of all the holders of oil interests on the structure to unite in the agreement, and considering the probable consequences that might have followed had the bargain with the lessees not been made, it cannot be said with confidence that the public interest has been prejudiced, and that taking the long view the United States will obtain less royalties from the leases than it otherwise would have obtained by the selection of the primary acreage in the form permitted.

The claim of loss of royalties by reason of nonobservance of the rule of compactness excludes from view the incalculable but nevertheless certain losses that would have followed had either no unit plan been consummated by reason of the failure of the lessees here mentioned to unite therein, or had the plan been consummated without their joinder therein and they left free to engage in unrestricted production with a consequent waste of the oil and gas reserves, demoralization of markets, a more rapid impairment of structure, and the energy needed in production, and the shortening of the productive life of the field.

In his memorandum of March 30, 1936, the Director of the Geological Survey states:

The unitization of Kettleman North Dome was undertaken to avoid threatened demoralization of the oil industry in California by competitive development of this outstanding field. It was believed that unitization would result in the development and operation of the field in an orderly manner so that its resources would be conserved and the energy latent in the productive formations fully utilized in the recovery of the greatest possible percentage of the oil present, and would demonstrate to the petroleum industry in a practical way the advantages and benefits derivable from orderly cooperative effort.

Originally it was hoped that all persons owning lands and operating rights on lands in the area would enter into such a plan of development and operation but after considerable effort on the part of some of the operators and of representatives of the Government, a unit plan was consummated in which the owners and operators of most fee lands refused to join. The Kettleman North Dome Association was the operating agency established by the unit plan. The Standard Oil Company of California and the fee land operators in the Huffman and Felix areas are the outside interests. The Standard Oil Company of California has to a considerable degree cooperated in furthering the objectives of unitization. Competitive development and operation of both the Huffman and Felix areas, however, has taken place. For a more detailed account of the

status of conditions particularly applicable to the competitive areas of Kettleman Hills I refer to the attached photostats of an article by R. E. Collom, President of the Kettleman North Dome Association, and of an article by Brad Mills, associate editor of the Oil Weekly.

Under a satisfactory unit plan fewer wells are necessary to recover a greater amount of oil and gas; production is obtained at a lower unit cost and in greater ultimate volume; the life of the field is extended; and there is undoubtedly a tendency toward a more stable market with better prices. Records indicate that at this time there are approximately 236 wells in the North Dome field, and it is believed safe to say that there would have been ten times as many wells drilled, possibly more, had not the unit plan been operative. Without the unit plan there would undoubtedly have been a greater decline in pressures, more advanced water encroachment over the entire field, and vastly greater physical and economic waste than has actually taken place. Your attention is also invited to pages 1249 to 1275 of hearings before a subcommittee of the Committee on Interstate and Foreign Commerce of the House of Representatives, 73d Congress, on H. R. 441, Part 2, copy attached.

The conditions existing in the Huffman and Felix areas are small scale examples of what would have resulted throughout the field if the unit plan had not been consummated. Each holder of a Government permit undoubtedly would have insisted upon immediate development of his permit acreage, and the Government, in order to protect its own property from drainage, would have found it necessary to require the development of its lands, which in turn would have resulted in the development of still other lands to avoid loss by drainage. Operating companies of their own volition would also have carried on an intensive development campaign, all of which without doubt would have had a serious and detrimental effect upon the petroleum industry in California and to some extent elsewhere, and would have resulted in appalling wastes of oil and gas as well as of reservoir energy.

Even though the unit plan which is now operative in Kettleman Hills is not all that was hoped for, it has unquestionably been the means of bringing about both physical and economic conservation to a degree far in excess of that which would have been attained had it not been in existence.

The articles by Collom and Mills referred to by the Director graphically set forth the facts which show the detrimental effects of wasteful competitive operations pursued in the Felix and Huffman areas on the structure, which are not in the unit plan, bringing about in that immediate area more rapid salt water encroachment, expansion of gas cap, excessive production of gas, and dangerous pressure gradients. It is not unreasonable to presume that had the assignees of Armstrong not been granted the concessions made, a like condition would exist in that part of the field, resulting in a diminished ultimate yield of oil and gas and lower prices for oil upon which royalties are based.

In conclusion, it also should be noticed that the Act of August 21, 1935 (49 Stat. 674), in amending section 14 of the Leasing Act in several important particulars, inserted the word "reasonably" before the word "compact", which not only clothed the lease applicant with more latitude of choice in selecting his primary acreage (see departmental decision of October 24, 1935, Cheyenne, 045611) but, standing

alone, empowered the Department to relax the rule as to compactness in order to bring about unitization agreements.

In view of all the facts and circumstances, action looking to the disturbance of the leases in question not only is of doubtful wisdom and propriety but lacks sufficient legal basis.

Approved:

T. A. WALTERS,

First Assistant Secretary.

BOUNDARY OF SAN CARLOS INDIAN RESERVATION

Opinion, May 29, 1936

INDIANS AND INDIAN LANDS—BOUNDARIES—WORDS AND PHRASES—INTERPRETATION.

Giving to the words "valley of the Gila River" their ordinary and usual interpretation when employed in the Executive order of August 5, 1873, restoring to the public domain certain lands formerly embraced within the San Carlos Indian Reservation, an entire drainage area is not intended, the word "valley" being limited to its usual meaning as embracing lowlands in contradistinction to mountain slopes and ridges.

INDIANS AND INDIAN LANDS—BOUNDARY—LONG RECOGNITION.

In determining the boundaries of an Indian reservation the recognition by the Interior Department of a boundary as such for more than 60 years will be deemed controlling.

INDIANS AND INDIAN LANDS—BOUNDARIES—INTERPRETATION.

Held, That the location of the eastern portion of the south boundary of the San Carlos Indian Reservation in Arizona is the summit or crest of the Gila Mountains, such location of boundary being recognized in various public records, in harmony with action taken by the Interior Department, and supported by the natural import of the language employed in the Executive order of August 5, 1873.

MARGOLD, *Solicitor*:

At a conference before you [the Secretary of the Interior] on April 3, attended by Senators Ashurst and Hayden, Representatives Greenway, Messrs. Guy Anderson, Lee N. Stratton, and George Jones, of Arizona, a question was raised, on which you requested my opinion, as to the location of the eastern portion of the present south boundary of the San Carlos Indian Reservation in Arizona.

It was contended that this portion of the boundary line had been erroneously located, with the result that certain lands in fact a part of the public domain were included within the reservation boundaries. I have since been advised that the Indians of the reservation also claim that this boundary line is improperly located, but their claim is that lands outside of the boundary as now located should have been included in the reservation. Both claims are based

upon the language of an Executive order issued by President Grant on August 5, 1873, but before discussing the provisions of that order it may be helpful to refer to the prior orders under which the reservation was established, the conditions leading to the issuance of the order of August 5, 1873, and the action taken in locating the boundary pursuant to that order.

The San Carlos or White Mountain Indian Reservation was originally established by Executive order of November 9, 1871. The eastern portion of the south boundary of the reservation, according to that order, followed the crest of the "Cordilleras de la Gila", *i. e.*, the Gila Mountains. It is to be noticed that the valley of the Gila River at this point was not included within the reservation boundaries. The reservation was enlarged on the south to include the Gila River and a portion of its valley by Executive order of December 14, 1872, which order extended the south boundary of the reservation 15 miles south of and parallel to the Gila River. The area so added was designated in the Executive order as the "San Carlos Division of the White Mountain Indian Reservation." This order gave rise to immediate and vigorous protests, and by memorial approved February 7, 1873, the Legislative Assembly of the Territory of Arizona petitioned Congress for cancelation of the order in so far as it extended to that portion of the valley of the Gila above old Camp Goodwin, the memorial reciting, among other things, that this portion of the valley had already been settled by white persons who had made valuable improvements thereon. By letter addressed to the Secretary of the Interior under date of July 29, 1873, the Acting Commissioner of Indian Affairs referred to this memorial and, after stating that the lands were not required for agricultural purposes by the Indians, recommended restoration to the public domain of—

* * * all that portion of the valley of the Gila River in the Territory of Arizona hitherto included in the San Carlos division of the White Mountain Indian Reservation as established by Executive Order dated December 14, 1872, lying east of and above the site of old Camp Goodwin * * *

This recommendation was transmitted by the Acting Secretary of the Interior to the President, who approved the same on August 5, 1873.

The original survey of that part of the south boundary of the reservation east of and above old Camp Goodwin under the Executive order of August 5, 1873, was made under the direction of the General Land Office in 1883 (see plat approved October 15, 1883). This survey was executed by Paul Riecker, United States Deputy Surveyor, under contract No. 38, Arizona, dated May 19, 1883. In the letter of instructions to Mr. Riecker, dated May 19, 1883, it is stated:

You will run thence due north to the summit of the range of hills, or mountains bordering the Gila River on the North, known as the Gila Mountains.

Thence you will run along said summit southeasterly with the trend of same to the line of 109°30' west longitude, which is the southeast corner of said reservation.

These instructions, it will be observed, place the boundary at the point in controversy in its original position under the Executive order of November 9, 1871, *i. e.*, the summit or crest of the Gila Mountains. In other words, the Executive order of August 5, 1873, was interpreted as restoring to the public domain that area east of and above old Camp Goodwin which had been added to the reservation by the Executive order of December 14, 1872.

Riecker's record shows that in accordance with the instructions of May 19, 1883, he followed the summit of the Gila Mountains, and the records in the General Land Office show that the summit of the Gila Mountains has uniformly been recognized since that time as the south boundary of the reservation at the point in controversy. See for example a map of Arizona showing the progress of the public land surveys, accompanying the Surveyor General's report of 1874, which map indicates the location of the boundary in practically the same position as surveyed in 1883; a map of Arizona dated 1879, prepared by the War Department, showing the boundary along the summit of the Gila Mountains; and a map of Arizona dated 1883, prepared by the General Land Office, showing the boundary along the Gila Mountains in the position as surveyed in that year. In addition, a resurvey of the boundary in question was made by the General Land Office in 1915. This resurvey, as shown by plat approved June 12, 1916, confirms the location of the boundary along the crest of the Gila Mountains as determined by the survey of 1883.

In support of the claim that the boundary so located is erroneous, it was asserted at the conference of April 3 that the Executive order of August 5, 1873, intended, by use of the words "valley of the Gila River", to restore to the public domain the entire drainage area of the river east of and above old Camp Goodwin. As nearly as can be determined from the maps available, this interpretation would place the boundary on the divide between the drainage areas of the Gila River and the Black River, and this would exclude from the reservation a considerable area of land now located in the southeastern part of the reservation above the lowlands of the valley of the Gila River.

A claim similar to this was considered and rejected in *Whaley v. Northern Pac. Ry. Co.*, 167 Fed. 664. In that case it was contended that the words "the Bitter Root Valley above the Lo Lo fork", as used in an Indian treaty, embraced all of the country and lands lying above the Lo Lo fork and from which the waters flowed and

were tributary to the Bitter Root River. Answering this contention, the court said:

It is certain that the definition of what is the valley above the Lo Lo fork given to the words as used in the treaty by the Department of the Interior restricts the valley to the area of lowlands or depressions of considerable size, with bottoms of gentle slope as compared to the sides; that is to say, the valley is defined to be the space inclosed between the ranges of mountains. Under either of these commonly accepted definitions, the lands involved in this suit have been excluded from the valley lands; and decision of where the valley ends and where the range of mountains began became one of fact to be ascertained by the Interior Department, as does decision of what are swamp lands. *Heath v. Wallace*, 138 U. S. 573, 11 Sup. Ct. 380, 34 L. Ed. 1063. True, in construing a treaty had by the United States with Indians, we must always consider the words used by their plain import; yet, doing this, the common understanding of the word "valley" is to look upon it as meaning lowlands; in contradistinction to mountain slopes and mountain ridges.

Moreover, it is plain from the language of the Executive order itself that the word "valley", as used therein, was not intended to have the broad scope contended for. The language of the order definitely restricts the restoration to that part of the valley "hitherto included in the San Carlos division of the White Mountain Indian Reservation as established by Executive order of December 14, 1872, lying east of and above old Camp Goodwin." The restoration is thus confined to lands added to the reservation by the Executive order of December 14, 1872. As hereinbefore pointed out, the south boundary, after the restoration, as surveyed by Riecker, coincides with the south boundary of the reservation as originally created by the Executive order of November 9, 1871, so that all of the land east of and above old Camp Goodwin which had been added to the reservation by the Executive order of December 14, 1872, was restored to the public domain. The land now claimed to be a part of the public domain was not added to the reservation by the Executive order of December 14, 1872, but was made a part of the reservation by the prior order of November 9, 1871. The restoration of such land to the public domain not only is without the support of anything contained in the order of August 5, 1873, but such action would have been in direct contravention of the express terms of the order.

The claim of the Indians that the boundary is in error is referred to in a letter dated April 8, 1936, from the Superintendent of the San Carlos Indian Agency to the Commissioner of Indian Affairs. The Superintendent states in part:

* * * The Indians have always claimed that the land taken from them by the Executive order of August 5, 1873, did not include the land as fenced away from the reservation at present, but only included the actual Gila Valley, which was then mostly occupied by Mexicans and Mormon settlers.

It is noted from contour maps showing this area that the Gila Valley is shown under the one-thousand-meter contour, and from this altitude the

country breaks up into sharp hills and canyons and up to and including our present fence line, which is on an approximately 1,600-meter elevation and the Gila water shed. It has been claimed, and I believe with perfect propriety, that all land above the one-thousand-meter elevation of the Gila area is not valley nor alluvial land. This would place our boundary fence down on public domain at least eight or ten miles and would include into the reservation several hundred thousand acres of land improperly withdrawn.

The ordinary meaning of the word "valley" (see *Whaley v. Northern Pac. Ry. Co., supra*) would lend some credence to the Indian claim if location of the boundary depended upon that word alone. But that word as used in the Executive order of August 5, 1873, is qualified and defined by the remaining language of the order, which refers specifically to the area to be restored as that included in the San Carlos division of the White Mountain Reservation as established by the Executive order of 1872. Giving proper effect to this additional language, it is reasonable to hold that the words "the valley of the Gila River" were adopted as a convenient means of describing the area (east of and above old Camp Goodwin) which had been added to the reservation by the Executive order of 1872. This Department so interpreted the order and fixed the boundary in accordance with that interpretation more than 60 years ago and there the boundary has remained ever since. This would be controlling, even in case of doubt, at this late date.

In conclusion, I have to advise that upon the records and data before me, no basis is found for disturbing the present location of the eastern portion of the south boundary of the San Carlos Indian Reservation.

Approved:

CHARLES WEST,

Acting Secretary of the Interior.

DUTIES OF DISTRICT LAND OFFICES IN CONNECTION WITH ADMINISTRATION OF TAYLOR GRAZING ACT

[Circular No. 1356]

INSTRUCTIONS

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., June 7, 1936.

REGISTERS, UNITED STATES LAND OFFICES:

At the request of the Director of Grazing, concurred in by the Commissioner of the General Land Office, performance by the General Land Office of the following functions in connection with the

administration of the Taylor Grazing Law was approved by the Secretary March 11, 1935:

(1) Act as office for filing and record for all applications under the Taylor law, such as permits, leases, sales, exchanges, or other filings.

(2) List all applications in accordance with regular serial system of the General Land Office and appropriately record same.

(3) Maintain a complete and independent file of grazing permit applications available for reference by the Division of Grazing in each land office, separated by districts.

(4) Detail to the Division of Grazing in Washington, temporarily, as needed, clerical assistance competent to prepare orders creating grazing districts.

(5) Act as the office for collection of all fees and as the fiscal and accounting agency for examination of accounts for disbursement of funds appropriated by the Congress for grazing administration.

(6) Make available in each local land office, office facilities and temporary clerical assistance which may be needed for activities of the Division of Grazing and otherwise cooperate with the Division of Grazing, provided such detail or cooperation will not seriously impair the regular functional activities of such local land office.

(7) Promulgate all regulations issued under the terms of the Taylor Grazing Law.

(8) Proceed with the preparation for public distribution of base maps on a suitable scale for each grazing district that may be established, and also prepare overprints for such maps showing in different colors the public lands within each district, all outstanding reservations, and all filings of record.

(9) Compile a tabulation of all applications for grazing permits by grazing districts, on a form to be provided, and take such action as may be appropriate to obtain completed applications.

Pursuant thereto, the following instructions are issued for the guidance of district land offices (reference to matters requiring the attention of the General Land Office at Washington, D. C., is omitted herefrom):

(a) You will receive for filing and recording in the district land offices and such other disposal as may be directed from time to time all applications under the Taylor Grazing Law for permits, leases, sales and exchanges, and all supplemental or related papers required of and filed by such applicants or issued by the Director of Grazing or the Commissioner of the General Land Office for delivery to or service upon such applicants.

Immediately upon receipt of an application for grazing permit within a grazing district you will prepare a duplicate thereof and forward same to the Commissioner of the General Land Office for notation upon his records.

(b) All applications should be assigned a serial number in conformity with the present serial number system, beginning with the number following the last serial number which you have assigned. It will not be necessary to maintain a separate and consecutive list of grazing serial numbers.

All applications involving the administration of the grazing act will be entered on the serial register. All applications for leases, sales, and exchanges will be noted also on the plats and tract books. (See Circulars Nos. 684, 1350, 1336, and 1346, regulations governing sales, leases, and exchanges.) Applications for grazing permits will be noted on the serial registers only.

(c) An abstract of the data contained in the application on a form which will be supplied to you must be filled in and attached to the top of each application immediately upon its receipt.

(d) The Division of Grazing has indicated its desire to have all applications for grazing permits within grazing districts assembled for certain States and parts thereof at the U. S. district land offices as follows:

ARIZONA: North of the Colorado River, Salt Lake City Land Office. South of the Colorado River, Phoenix Land Office.

CALIFORNIA: Sacramento Land Office.

COLORADO: Denver Land Office.

IDAHO: Blackfoot Land Office.

MONTANA: Great Falls Land Office.

NEVADA: Carson City Land Office.

NEW MEXICO: Las Cruces Land Office.

OREGON: Lakeview Land Office.

UTAH: Salt Lake City Land Office.

WYOMING: Buffalo Land Office (for Grazing District No. 1 only). Instructions for other Wyoming grazing districts, if established, will be issued.

The registers for U. S. district land offices, other than those above listed, are therefore directed to take action on applications as above indicated, namely, receive, serialize, and note all applications for grazing permits within grazing districts, and then immediately forward same by letter of transmittal to the appropriate district land office, as above indicated, for abstracting, etc. In other words, the register at Phoenix will forward grazing applications for lands in Arizona north of the Colorado River to the U. S. land office at Salt Lake City, Utah; the register at Los Angeles will forward applications to Sacramento; the register at Pueblo to the land office at Denver; the register at Coeur d'Alene to the land office at Blackfoot; the register at Billings to the land office at Great Falls; the register at Santa Fe to the land office at Las Cruces; the registers at The Dalles and Roseburg to the land office at Lakeview; the register at Cheyenne will forward applications for grazing district No. 1, only, to the land office at Buffalo.

(e) A large number of applications for grazing permits have already been filed with the Division of Investigations and the Divi-

sion of Grazing. These divisions, as grazing districts are established, will immediately forward such applications to the registers of the proper United States land offices, who will, in disposing of same, be governed by these instructions as though the applications were filed directly with you by the applicants themselves.

(f) Upon receipt of applications, by the first-above listed land offices, from the applicants, the Division of Investigations, the Division of Grazing, or by transfer from other land offices, the registers will establish a complete and independent file of the same, separate and apart from the other files in their offices, subdivided by grazing districts, and keep them available at all times for examination and action by the Division of Grazing. They are technically the property of the Division of Grazing.

(g) A tabulation of completed applications for grazing permits by grazing districts will be prepared by you upon forms to be provided by the Division of Grazing for that purpose. This work is, however, to be performed only by the U. S. district land offices first above listed.

(h) The responsibility of determining to whom and under what conditions grazing permits or licenses are to be issued within grazing districts will rest exclusively with the Division of Grazing, subject to the supervisory control of the Secretary of the Interior. Permits or licenses, when issued (in triplicate) by the Director of Grazing, will be delivered to the register of the district land office in whose district the lands are situated, for notation upon the records of that land office, after which the original will be forwarded by the register to the permittee upon the payment in advance of such grazing charges as may be determined by the Division of Grazing (it being noted in this connection that no charges are to be made for such privileges under licenses for the first year), and the duplicate will be assembled with the application and other pertinent papers and placed by serial number in the grazing files relating to the grazing district involved and the triplicate forwarded by the register to the General Land Office for notation upon its records.

(i) Permits involving exclusive rights to the use of a particular tract of land must be noted against the applicable sections and subdivisions on the plats and tract books unless an entire township is involved, in which event one notation per township will suffice, to be placed at the head of the townships involved, similar to the present method of noting withdrawals, etc.

(j) Permits to graze in common with other permittees over an entire district will not be noted, except on the serial register, but a list of such permittees, by name, post office address, and serial number, as permits are delivered, must be kept as the top papers of the grazing file relating to that particular grazing district.

(k) You will be held responsible for the collection of all grazing fees and disposition of all moneys so received, under the general direction and supervision of the Secretary of the Interior and the Commissioner of the General Land Office, to the same extent, and in the same manner, as fiscal matters in connection with other public land matters are now being handled. Further instructions in connection with collections, accounting, and disbursement, when necessary, will be issued by the Commissioner of the General Land Office.

(l) As and when requested you will make available for the Division of Grazing office space, desk facilities, equipment and supplies, and temporary clerical assistance as needed, and in every way cooperate with the Division of Grazing, provided such assistance, etc., does not seriously interfere with the regular functional activities of your office. In this connection your especial attention is called to paragraph 6 of the Grazing Division order approved by the Secretary on March 11, 1935, above referred to, to the end that complete and full cooperation will be had between the Division of Grazing and the U. S. district land offices.

(m) In order that the Division of Grazing may have available all pertinent information at the time applications for permits to graze within grazing districts are passed upon by it, the register of each United States district land office is instructed to notify the local representative of the Division of Grazing as to all applications filed in grazing districts for exchanges under section 8 of the Taylor Grazing Act, whether the base or the selected lands are within such districts. Also to notify the Division of Grazing of any applications purporting to be under section 14 or 15 of the Taylor Grazing Act for sales or leases where the lands involved are within grazing districts. This requirement is due to the fact that many of those seeking grazing privileges within grazing districts have erroneously applied for sales or leases, whereas the real purpose of such application was to secure a grazing permit. Furthermore, many applications for the sale or lease of lands under authority of sections 14 and 15, respectively, were filed prior to the inclusion of the lands involved in grazing districts.

In order to expedite the organization of grazing districts, the Secretary of the Interior, on May 29, 1935, approved the issuance of temporary revocable licenses during the year 1935, and until such time as land classification studies can be made and the commensurability of properties dependent upon the public range, as well as reasonable grazing fees, can be determined. Applications for licenses will be the same as applications for permits (Form 1-291) and the procedure in handling the applications will be the same whether licenses or permits are issued.

Pending the issuance of these instructions and the establishment of an orderly procedure thereunder, the Division of Grazing has received, considered, and adjudicated a large number of applications for grazing privileges within some of the grazing districts and is issuing temporary revocable licenses thereunder. With a view to avoiding any unnecessary delay in giving immediate effect to these licenses, the Division of Grazing is mailing the originals direct to the applicants, but an exact copy of each will be forwarded to the appropriate district land office. Upon receipt thereof you will serialize, record, and forward a copy of the same to this office as is herein directed, as though the original license were transmitted through your office. A copy for this office will, if necessary, be made in your office. Just as soon as is possible after the promulgation of these regulations the Division of Grazing will proceed with the issuance of licenses in accordance with the procedure herein prescribed.

FRED W. JOHNSON,
Commissioner.

**ABSENCES FROM HOMESTEAD LANDS BECAUSE OF ECONOMIC
CONDITIONS—ACT OF APRIL 20, 1936 (49 STAT. 1235)**

[Circular No. 1396]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 6, 1936.

REGISTERS, UNITED STATES LAND OFFICES:

The Act of April 20, 1936 (49 Stat. 1235), entitled "An Act granting a leave of absence to settlers of homestead lands during the year 1936", reads as follows:

That any homestead settler or entryman who, during the calendar year 1936, should find it necessary, because of economic conditions, to leave his homestead to seek employment in order to obtain the necessaries of life for himself or family or to provide for the education of his children, may, upon filing with the register of the district his affidavit, supported by corroborating affidavits of two disinterested persons showing the necessity of such absence, be excused from compliance with the requirements of the homestead laws as to residence, cultivation, improvements, expenditures, or payment of purchase money, as the case may be, during all or any part of the calendar year 1936, and said entries shall not be open to contest or protest because of failure to comply with such requirements during such absence; except that the time of such absence shall not be deducted from the actual residence required by law, but a period equal to such absence shall be added to the statutory life of the entry: *Provided*, That any entryman holding an unperfected entry on ceded Indian lands may be excused from the requirements of residence upon the conditions provided herein, but shall not be entitled to extension of time for the payment of any installment of the purchase price of the land except upon payment of interest, in advance,

at the rate of 4 per centum per annum on the principal of any unpaid purchase price from the date when such payment or payments became due to and inclusive of the date of the expiration of the period of relief granted hereunder.

SEC. 2. Any homestead settler or entryman, including any entryman on ceded Indian lands, who is unable to make the payments due on the purchase price of his land on account of economic conditions, shall be excused from making any such payment during the calendar year 1936 upon payment of interest, in advance, at the rate of 4 per centum per annum on the principal of any unpaid purchase price from the date when such payment or payments became due to and inclusive of the date of the expiration of the period of relief granted hereunder.

Leaves of absences for all or part of the year mentioned by this act may be granted thereunder to any homestead settler or entryman who has established actual residence upon the lands and who thereafter found it necessary because of economic conditions to leave his homestead to seek employment in order to obtain food and other necessities of life for himself or family or to provide for the education of his children.

The application for such leave of absence must be filed in the proper district land office and give the name and present address of the applicant and be sworn to by him and corroborated by the affidavits of at least two witnesses in the land district or county within which the lands claimed under the homestead laws are located, before an officer authorized to administer oaths and using a seal. It must describe the land by legal subdivisions, section, township and range numbers, give the serial number of the entry and name of land office and show the date when residence was established thereon and how the same was maintained thereafter by giving the dates of the beginning and ending of all residence periods and of all absence periods, and the character of the improvements and cultivation performed by the applicant. It must set forth fully all the facts on which the claimant bases his right to a leave of absence, what effort was made to raise crops, giving the dates of the planting and the kind of crops planted, the purpose of his request for leave, and the period for which the leave is desired. The address of the claimant during his absence should also be supplied if possible.

The provision for leave of absence applies to entrymen only if they have established residence upon their claims. It also applies to settlers who have not made entries. If the latter file applications for leave of absence hereunder, you will assign them current serial numbers. If the settler has theretofore filed notice of his absence under the Act of July 3, 1916 (39 Stat. 341), the application under this act will be given the serial number already assigned such notice of absence.

The period during which a homesteader is absent from his claim, pursuant to a leave duly granted under this act, can not be counted

as a part of the actual residence on the land required by law, but an equivalent period may be added to the statutory life of the entry.

If the application for relief under this act is allowed, it will operate as a stay during the period for which the leave is granted against contest based upon the charge that the entryman has failed to comply with the law in the matter of residence, cultivation, improvements, expenditures, or payments of purchase price, prior to the filing of the application for leave of absence, in the absence of fraud in procuring the same.

If the showing made is satisfactory, you will promptly forward the application to this office by special letter with notation of your allowance thereof and advise the applicant of your allowance of this application by ordinary mail. If it is not satisfactory, you will reject the application, subject to the usual right of appeal, and all appeals will be promptly forwarded to this office by special letters.

APPLICATION FOR EXTENSION OF TIME TO MAKE PAYMENT OF ANY INSTALLMENT OF THE PURCHASE PRICE ON HOMESTEAD ENTRIES ON CEDED INDIAN LANDS AND OTHER LANDS WHERE PAYMENTS ARE REQUIRED.

Homestead settlers and entrymen on lands in connection with which a purchase price is payable, including ceded Indian reservation lands, desiring relief under section 2 of this act, are not entitled to an extension of time for the payment of any installment of the purchase price of the land, except upon proof that due to economic conditions they are unable to make the payment due, and upon payment of interest, in advance, at the rate of 4 per centum per annum on the principal of any unpaid purchase price from the date such payment became due to and inclusive of the expiration of the period of relief granted.

An extension may be granted either to the 1936 anniversary of the date of entry or to December 31, 1936, at the election of the claimant.

Proof as to inability to pay the amount due on account of economic conditions must be made by affidavit, duly corroborated, or by other convincing evidence. Such proof must be submitted to the proper district land office, which in turn will forward the same with recommendations to the Commissioner of the General Land Office for his consideration. The interest payment should be held by you as "unearned money" pending such consideration. If the proof is found sufficient an extension will be granted and you will be instructed to advise the claimant and to apply the money to the credit of the proper fund.

Where interest at the rate of 5 per centum, or other rate, has heretofore been paid and an extension of time for payment granted, the interest will not be recomputed at 4 per centum under the Act of April 20, 1936. Where extensions of time for payment are desired beyond December 31, 1936, and where they may be granted under existing laws upon the payment of interest in advance at the rate of 5 per centum per annum or other rate, interest will be computed under such laws from December 31, 1936, to the expiration of the period of the extension.

FRED W. JOHNSON,
Commissioner.

Approved:

T. A. WALTERS,
First Assistant Secretary.

MARY M. BOES, DEVISEE; SARAH A. MacQUEEN, MOTHER AND
GUARDIAN OF JEAN ELLEN SMITH, MINOR

Decided July 8, 1936

MINOR HEIR OF DECEASED HOMESTEADER—SECTION 2292, REVISED STATUTES.

In order that a minor child of a homestead entryman may be eligible to receive the benefit of section 2292 of the Revised Statutes, both its parents must be dead.

UNPERFECTED HOMESTEAD—DEVISABLE INTEREST—SECTION 2291, REVISED STATUTES—PROOF BY HEIR OR DEVISEE—PREFERENCE OF DEVISEE OVER HEIRS.

An unperfected homestead entry is not a part of the entryman's estate, but, by the terms of section 2291 of the Revised Statutes, if there be no widow, proof may be made by the heirs or devisee. The devisee is merely the person nominated in the will as the party who may avail himself of the privilege granted by Congress to complete the proof and secure to himself the property, and he is entitled to preference over heirs in making proof.

FINAL PROOF—REJECTION FOR INSUFFICIENCY—SUBSEQUENT COMPLIANCE WITH LAW—SUPPLEMENTAL PROOF.

Where final proof on a homestead entry is rejected because of insufficient showing as to compliance with law, a supplemental showing by *ex parte* affidavits may be accepted, without requiring new publication of notice, where the defect has since been cured and the Government is satisfied of the entryman's good faith (Case of *Roscoe L. Wykoff*, 43 L. D. 66, cited).

SECTION 2291, REVISED STATUTES—RIGHTS OF STATUTORY SUCCESSORS OF HOMESTEADER THEREUNDER—ATTRIBUTES ATTENDING RIGHT.

The inchoate right or privilege granted to the statutory successors of an entryman by section 2291 of the Revised Statutes is one which may be availed of by making satisfactory final proof as basis for patent. It may be relinquished or abandoned, but it is not subject to transfer and does not descend by inheritance (Case of *Bernier v. Bernier*, 147 U. S. 242, cited).

PATENT TO HEIRS OR DEVISEE OF DECEASED ENTRYMAN—QUESTIONS LEFT TO DETERMINATION OF LOCAL COURTS.

Under the established practice of the Department, if it be shown in the record prior to issuance of patent that an entryman, since deceased, has made a will purporting to devise his interest in an entry made by him, the patent is issued to his heirs or devisees, where there is no widow or minor orphan children entitled to claim under section 2292 of the Revised Statutes; and it is left to the local courts to determine, in such case, who are the heirs and what their individual interests may be.

WALTERS, *First Assistant Secretary*:

On July 25, 1932, Thomas Marshall Smith made original stock-raising homestead entry, Phoenix 072297. Application to make final proof was made by Sarah Agnes MacQueen, as mother and guardian of Jean Ellen Smith, alleged minor child of the entryman. She submitted proof of the death of the entryman on June 10, 1933, and alleged he obtained a divorce by publication from her on November 9, 1932, in the Superior Court of Pima County, Arizona. April 23, 1935, she was allowed to submit proof as such guardian. In the final proof it is alleged that the entryman established residence June 17, 1932, and maintained the same until his death.

On the date the final proof was submitted Mary M. Boes filed a protest against the final proof, alleging, in substance, that the entryman by will dated June 9, 1933, devised all his property to her "including all rights under the homestead location in Pima County." Certified copies of the decree of distribution of the estate of the entryman to protestant, including the homestead, and the findings of fact and conclusions of law and decree in the divorce proceedings were filed in support of the protest and show service on attorneys for Mrs. MacQueen. The court found, among other things, that Thomas Marshall Smith and Sarah Judge Smith intermarried on November 14, 1928; that the latter deserted the former on December 1, 1928; that there were no children the issue of said marriage. Documentary evidence accompanies the protest showing that in a New York hospital Sally Smith gave birth to twins on February 25, 1929, one of whom, it is alleged, died.

By decision of June 25, 1935, the Commissioner of the General Land Office held as follows:

Section 2292 of the Revised Statutes provides that upon the death of *both* father and mother leaving a child, or children, under 21 years of age, "the right and fee shall inure to the benefit of such infant child or children." The section has no application under the circumstances in this case, as the mother of the infant claimant is still alive. See *Snaaw vs. Heirs of Stott* (40 L. D. 638). Section 2291 of the Revised Statutes provides that upon the death of a homestead claimant proof must be made by "his widow or, in case of her death, his heirs or devisee." In view of the divorce, Mrs. MacQueen is not entitled to submit proof as the deceased claimant's widow, and upon the facts

of record it appears that Mary Boes, sole devisee under the will of the deceased claimant, should submit proof. Accordingly, the final proof submitted by MacQueen as mother and guardian of the alleged minor child is hereby rejected, subject to the usual right of appeal. Advise MacQueen that in the event an appeal is filed the same should bear evidence of service of copy thereof on Boes.

The notice of intention of Boes will be held suspended until the final proof as submitted by MacQueen is finally disposed of. Should the entry be perfected by Boes, final certificate and patent would not issue in her name, as devisee, but to the "heirs or devisee" of the deceased claimant, leaving all questions as to their rights for determination by the courts. See *Brown vs. Hughes' devisees* (17 L. D. 156) and *Ex parte Ellen Eustance* (40 L. D. 628).

An appeal in behalf of Mrs. MacQueen assails the conclusion that section 2292 Revised Statutes is inapplicable to the case and cites certain court decisions to the effect that an entryman who has not perfected his entry has no devisable interest in the land entered.

Even if it be assumed, contrary to the findings of the court in the divorce proceedings, that entryman died leaving a minor child, the decision in *Snow v. Heirs of Stott, supra*, is controlling as to inapplicability of section 2292, *supra*.

It is true that the unperfected entry never became a part of the estate of the entryman, nor did the entryman have any devisable interest in the ordinary sense, but by section 2291, there being no widow, proof may be made by the heirs or devisee, and the devisee is merely the party nominated in the will as the party who may avail himself of the privilege granted by Congress to complete the proof and secure to himself the property. *Cooper v. Wilder* (11 Cal. 191, 43 Pac. 591); *Daniels v. Isham* (235 Pac. 902, 905); *Hays v. Wyatt* (19 Idaho, 544, 155 Pac. 13, 34 L. R. A. N. S. 397). The devisee is entitled to preference in making the proof over the heirs. *Trueman v. Bradshaw* (43 L. D. 242); *Theisen v. Qualley* (42 S. D. 367, 175 N. W. 556). The court having jurisdiction in probate proceedings had jurisdiction of the will and all the heirs in the probate proceedings, and the decree therein determined who was the devisee of the entryman and therefore entitled to prove up on the entry. *Daniels v. Isham, supra*, and cases there cited.

While this appeal has been pending, attorneys for the protestee filed, February 6, 1936, a notice of death of the protestant, Mary M. Boes, supported by a newspaper announcement of that fact.

In addition to the objection above noted, the final proof was prematurely submitted, as three years had not elapsed since the establishment of residence. See case of *Avy Page Bennett* (49 L. D. 153). In making final proof, when the proper period has expired, it is necessary to show, among other things, that there is a habitable house upon the land; and a final affidavit is required that no part of

the land has been alienated, except as provided in Section 2288, Revised Statutes, an oath of allegiance also being required, "then in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent."

It has long been the practice, however, to permit defective final proof to be perfected by supplemental affidavits. In the case of *Roscoe L. Wykoff* (43 L. D. 66) the following rule was announced:

Where final proof is rejected because of insufficient showing as to compliance with law, supplemental showing by *ex parte* affidavits may be accepted, without requiring new publication of notice, where the defect has since been cured and the government is satisfied of the entryman's good faith.

The inchoate right or privilege granted to the statutory successors by section 2291, Revised Statutes, is one which may be availed of by making satisfactory final proof as basis for patent, or it may be relinquished or abandoned. It is not, however, subject to transfer and does not descend by inheritance. As stated by the Supreme Court of the United States in the case of *Bernier v. Bernier* (147 U. S. 242), the object of sections 2291 and 2292, Revised Statutes, was "to provide the method of completing the homestead claim and obtaining a patent therefor, and not to establish a line of descent or rules of distribution of the deceased entryman's estate."

In the case of *Ellen S. Eustance* (40 L. D. 628) it was said:

It is the established practice of the Department to issue patent to the heirs generally of a deceased entryman, if there be no widow, or minor children entitled to claim under section 2292 R. S. Or if it be shown in the record prior to issuance of patent that the entryman has made a will purporting to devise his interest in the entry, then the patent is issued to the heirs or devisees of the deceased entryman, where there is no widow, or minor orphan children entitled to claim under section 2292 R. S. It is left for the local courts to determine in such case who the heirs are and what their individual interests may be.

Inasmuch as the proof already submitted appears to show that sufficient improvements were placed upon the land, and that the entryman established residence thereon on June 17, 1932, and maintained such residence until his death, it is believed permissible to accept the proof to that extent for consideration under section 2291, Revised Statutes, and to allow its completion by supplemental affidavit with respect to the defects above indicated. Upon further satisfactory showing in that regard, patent may issue to "the heirs or devisees of Thomas M. Smith, deceased", leaving it to the courts to determine the interests of the respective parties.

The decision appealed from is modified accordingly.

Modified.

LIONEL H. GRAY

Decided July 8, 1936

ADDITIONAL ENTRY UNDER STOCK-RAISING ACT—PRIOR ENTRY UNDER SECTION 6,
ENLARGED HOMESTEAD ACT—RESIDENCE REQUIREMENTS.

Where one who has perfected a homestead entry under section 6 of the enlarged homestead act applies to make an additional entry under section 5 of the stock-raising act, he is only required to show, as to residence, that at the time of filing application he owned and resided in good faith upon the land embraced in his original enlarged homestead entry.

SAME—SCOPE OF INQUIRY BY GOVERNMENT.

Where, following approval and acceptance by the Department of final proof submitted by an entryman under section 5 of the enlarged homestead act, the entryman applies to make additional homestead entry under section 6 of the stock-raising homestead act, it is within the province of the Department to inquire into, and the entryman may be required to show, all the facts and circumstances relating to the character and extent of his residence upon the land embraced in the original entry, for the purpose of determining whether he was residing upon such land in good faith at the time of application for the additional entry, this being contemplated by section 5 of the stock-raising act.

WALTERS, *First Assistant Secretary*:

Under section 2289, Revised Statutes, on July 25, 1916, Lionel H. Gray made homestead entry, Salt Lake City 017994, for the SW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 1, T. 3 S., R. 3 W., S. L. M. On his application, the entry was changed on January 22, 1918, to one under section 6 of the enlarged homestead act. Final proof was submitted July 25, 1922, and patent issued October 28, 1922. On December 7, 1929, he filed stock-raising homestead application 048904 for 600 acres in Sec. 34, T. 2 S., R. 3 W., and Secs. 3, 10, and 11, T. 3 S., R. 3 W., S. L. M., supported by an affidavit stating in substance that he had established residence on his original entry, 017994, on June 30, 1922, and that he at this time is owner thereof and resides thereon.

The register advised applicant that his showing was not sufficient to allow entry under section 5 but would be considered as one under section 3 of the stock-raising homestead act. The applicant appealed, alleging in support thereof that he had established residence as stated in his final proof, *i. e.*, on June 22, 1922, and maintained the same for seven months each year for four years and for lesser periods in years following. Based upon a report of a special agent concluding that residence was never established on the original entry and that applicant was not residing thereon when he filed his application for the additional, the Commissioner of the General Land Office, by letter of March 10, 1933, directed adverse proceedings against the application on the following charge:

That claimant is not entitled to have his application 048904 allowed under section 5 of the act of December 29, 1916, as additional to his patented homestead

entry 017994, Salt Lake City, Utah, series; for the reason that the latter entry was made under section 6 of the enlarged homestead act and claimant did not reside thereon for seven months each year for three years or during any year of the life of said entry.

At the hearing March 21, 1933, the only witness was the applicant, called by the Government. The applicant contended that, under the language of the charge, he could submit evidence as to his residence on the original entry irrespective of the dates of final proof and patent of that entry. The Government made the contention, which was agreed to by the register, that the evidence of residence should, under the charge, be confined to that made prior to patent.

The entryman testified that he established residence on the original entry June 30, 1922, and maintained residence thereon during the periods as follows:

- 1922—June 30 to November 1;
- 1923—April 1 to November 20;
- 1924—April 13 to November 25;
- 1925—March 29 to November 1;
- 1926—April 1 to November 2;
- 1927—three or four months;
- 1928—five months, leaving December 4;
- 1929—five months, leaving November 24.

He further testified that his wife was in poor health and did not live with him on the homestead but in her own house in Salt Lake City with his married daughter, or with two of his daughters in California, and he lived in the winter time in an uncomfortable room in a basement; that in the spring he would return to the homestead to manage his ranch (which appears to cover lands embraced in other filings in addition to his entry) and return late in the fall, when the snow became deep, to Salt Lake City. He specifies a great many improvements he made on his ranch which he said cost him \$40,000.

The special agent in charge of the Government's case stated at the hearing that he could rebut the testimony of applicant as to his residence on his original entry by producing witnesses, but he regarded such testimony immaterial, as by the admissions of applicant he had resided upon the land less than four months preceding the date of the issuance of patent.

Two days after the hearing the register and Mr. Wooley, who acts in his stead, were driven to and shown the ranch and original homestead of applicant by a special agent. In his decision the register relates what he observed on the homestead and on applicant's ranch. He found the buildings on the ranch dirty and dilapidated and showing no signs of usage in recent years. He admits that the houses might have been habitable at some remote time. On the homestead he found indications of two former cabin sites and a small shack

of poor material 6 by 8 feet, with indications that it had been recently built and equipped and having some dirty and worn-out furnishings therein, and little evidence of expenditure.

The register found that the charges were sustained. His conclusions, however, seem to be based upon his personal inspection of the homestead. As the record shows that the register had the view that the charge related to residence of the entryman before he obtained title, his decision leaves it uncertain whether he found that the entryman did not reside on the land during the years and for the periods stated in his testimony. But taking it to be his finding that the entryman did not reside on the land prior to and at the time of his application for the additional, it is not believed that his observations as detailed during an inspection four and a half years after the date of application justifies the disregard of the uncontradicted testimony of the entryman as unworthy of credence.

In his decision the Commissioner stated:

The principal issue in the case is as to the right of the applicant to claim credit for residence maintained by him upon the land in his original patented entry after proof and patent thereon, and some years prior to the date of filing his present application 048904, in order that the application may be allowed under section 5 of the stock-raising homestead law and perfected without further residence showing.

Adverting to the entryman's statement that his residence began June 30, 1922, and continued to the dates of final proof and patent, and to the provisions of paragraph 19 of Circular 523, which provides that—

19. A person who has made entry under section 6 of one of the enlarged homestead acts may make an additional entry under the provisos to section 3 or under section 4 or 5 of this act, provided all be designated as stock-raising land; but he must reside on the land entered under this act or on that originally entered, to the extent required by the three-year homestead act.

the Commissioner held that—

Any residence which may have been maintained by him upon the original entry since patent issued is not a point of issue in the present contest as the charge relates to the period during which the original was an existing entry.

Entertaining the above-expressed opinion as to the requirements of the law, it is difficult to understand why a hearing should be ordered on allegations of fact by the applicant which, taken as true, showed *prima facie* that he was not entitled to make, under the Commissioner's view, an additional entry under section 5 of the act.

The holding to the effect that any residence made on an entry made under section 6 of the enlarged homestead act after the patent thereof is not material in determining the entryman's qualifications as an applicant for additional entry under section 5 of the stock-raising act is not in harmony with the views of the Department.

The case of *United States v. Samuel Don Probert*, decided September 3, 1935 (55 I. D. 341), is like the present case in material facts. There, Probert made an entry for land under section 5 of the stock-raising act on July 23, 1928, based on a previously patented entry made under section 6 of the enlarged homestead act (which, as here, required no residence to perfect). In his final proof on the additional entry, made October 19, 1933, he showed that he owned and resided upon the original entry when the additional was made, and specified periods of residence amounting to more than seven months each year from 1928 to 1933, inclusive.

Upon consideration of section 5 of the stock-raising act, paragraph 19 of the regulations above referred to, and previous departmental decisions, the Department expressed the view:

It may be assumed that in the formulation of paragraph 19 the fact was recognized that entries under section 6 of the enlarged homestead act would be patented without the necessity of any residence, and therefore it was necessary for the applicant under section 5 of the stock-raising act to show, as that section required, that he resided upon the land previously acquired. It is believed, however, that the specification in the regulation that the residence should be to the extent required under the three-year homestead act goes further than is necessary under the terms of the act.

Section 5 of the act plainly requires that the applicant must reside on the land theretofore patented to him as a condition precedent to the allowance of entry under that section. The word "reside", however, is used in the same sense as it is used in other provisions of the homestead law, and means an actual, *bona fide* residence on the land to the exclusion of a home elsewhere, and not a temporary sojourn at the time of application made for the purpose of ostensible compliance with the condition. It is therefore within the province of the Department to inquire into, and the entryman may be required to show, all the facts and circumstances relating to the character and extent of his residence for the purpose of determining whether he was residing upon the land in good faith at the time of application for the additional entry. If the *bona fide* character of his residence appears, nothing further in that regard is required.

It follows that the last clause of the charge, which alleged failure to maintain residence for seven months each year for at least three years, is immaterial and may be regarded as surplusage.

In this view, on the evidence adduced at the hearing, the application of Gray is *prima facie* allowable, as it is sufficient to show that his original entry was owned by him and was his place of residence when he filed his application for the additional. However, as the contest was instituted and tried on an erroneous view of the law, which deterred the special agent in charge of the hearing from presenting evidence, which the report thereon indicates is available to the Government, tending to show that Gray was not a *bona fide* resident on his original entry at any time, but was at all times material a legal and actual resident of Salt Lake City, the action of the

Commissioner, rejecting the application, is reversed without prejudice to the institution of new proceedings to ascertain whether the applicant had a *bona fide* residence on the original entry, 017994, at the date of his application, 048904, to qualify him as an entryman under section 5, or has performed such residence requirements as would entitle him to entry under any other section of the stock-raising homestead act.

Reversed without prejudice.

JOSEPH E. HATCH

Decided July 8, 1936

GRAZING LEASE UNDER SECTION 15, TAYLOR GRAZING ACT—AUTHORITY OF SECRETARY OF THE INTERIOR.

Section 15 of the Act of June 28, 1934, provides that only lands situated in such isolated or disconnected tracts as not to justify their inclusion in any grazing district established pursuant to the act may be leased for grazing purposes, and the determination of this matter is, by the terms of the act, left to the Secretary of the Interior.

APPLICATION TO MAKE ENTRY—SEGREGATIVE EFFECT—AUTHORITY OF SECRETARY OF THE INTERIOR—LANDS IN ESTABLISHED GRAZING DISTRICTS—GRAZING LEASE APPLICATION.

A legal application to make entry of lands subject thereto, while pending, reserves the land applied for from disposition to another under any public land law until final action thereon; but the mere filing of an application for public lands, or rights in connection therewith, confers no absolute right where allowance is discretionary with the Secretary of the Interior, such as the privilege of making a grazing lease under section 15 of the Taylor Grazing Act. Accordingly, a lease application under this section, although prior in time to the inclusion of the land in a grazing district, does not segregate the land as against the United States and is not a bar to such inclusion.

CASES DISTINGUISHED.

Case of *Goodale v. Olney* (12 L. D. 324), and cases there cited, distinguished.

WALTERS, *First Assistant Secretary*:

This is an appeal by Joseph E. Hatch, of Randolph, Utah, from the decision of the General Land Office of July 23, 1935, which rejected his application, filed October 13, 1934, for a grazing lease, under section 15 of the Act of June 28, 1934 (48 Stat. 1269), for certain described lands in T. 12 N., Rs. 6 and 7 E., S. L. M., Utah.

The lands applied for were included in Utah Grazing District No. 1, established by order of the Department dated April 8, 1935.

Section 15 of the Act of June 28, 1934, provides that only lands situated in such isolated or disconnected tracts as not to justify their inclusion in any grazing district established pursuant to the act may

be leased for grazing purposes, and the determination of this matter is, by the terms of the act aforesaid, left to the Secretary of the Interior. In the exercise of this authority, Utah Grazing District No. 1 was established. The land being within a grazing district, the application of Hatch was rejected.

In a brief filed in support of Hatch's appeal, it is contended that since the lands involved were embraced within the grazing district subsequent to the filing of Hatch's application, a valid existing right had attached which could not be overcome by such withdrawal, and the case of *Goodale v. Olney* (12 L. D. 324) is cited in support of this contention. In that decision it was held that an application to make entry of lands by one duly qualified is equivalent to an actual entry, in so far as the rights of the applicant are concerned, and that such application, while pending, reserves the land from other disposition. In the circumstances of the *Goodale-Olney* case, which was a controversy between a homestead applicant and a homestead entryman, the land being subject to entry, the pending homestead application reserved the land from disposition to another under the homestead laws; but the rule stated is too broad for recognition as to all applications for public lands or rights therein. The Department has long held that the mere filing of an application for public lands, or rights in connection therewith, confers no absolute right where the allowance of such claim is discretionary with the Secretary of the Interior, such as the privilege afforded by section 15 of the Taylor Grazing Act. That section does not apply with respect to lands within an established grazing district, nor to lands so situated as to justify their inclusion in any grazing district "to be established." It is immaterial, therefore, that the grazing district in this instance was established after the date of the application.

Apparently, the proper course for the applicant is to make application for grazing privileges under the regulations governing the grazing district. If he believes the lands are not of the character to be included in the grazing district which has been established, he may apply to the Director of the Division of Grazing for their elimination from the grazing district, so that they may be leased under section 15.

In the decision appealed from, the governing law appears to have been correctly applied to the facts appearing of record, and said decision is accordingly affirmed.

Affirmed.

APPLICATIONS FOR EXCHANGES OF STATE LANDS UNDER SEC. 8
OF THE TAYLOR GRAZING ACT AS AMENDED BY ACT OF JUNE
26, 1936

REGULATIONS

[Circular No. 1398]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 22, 1936.

REGISTERS, UNITED STATES LAND OFFICES:

Subsections (c) and (d) of Section 8 of the Taylor Grazing Act approved June 28, 1934 (48 Stat. 1269), as amended by the Act of June 26, 1936 (49 Stat. 1976), read as follows:

(c) Upon application of any State to exchange lands within or without the boundaries of a grazing district the Secretary of the Interior shall, and is hereby directed to, proceed with such exchange at the earliest practicable date and to cooperate fully with the State to that end, but no State shall be permitted to select lieu lands in another State. The Secretary of the Interior shall accept on behalf of the United States title to any State-owned lands within or without the boundaries of a grazing district, and in exchange therefor issue patent to surveyed grazing district land not otherwise reserved or appropriated or unappropriated and unreserved surveyed public land; and in making such exchange the Secretary is authorized to patent to such State land either of equal value or of equal acreage: *Provided*, That no State shall select public lands in a grazing district in furtherance of any exchange unless the lands offered by the State in such exchange lie within such grazing district and the selected lands lie in a reasonably compact body which is so located as not to interfere with the administration or value of the remaining land in such district for grazing purposes as set forth in this Act.

When an exchange is based on lands of equal acreage and the selected lands are mineral in character, the patent thereto shall contain a reservation of all minerals to the United States; and in making exchanges of equal acreage the Secretary of the Interior is authorized to accept title to offered lands which are mineral in character, with a mineral reservation to the State.

For the purpose of effecting exchanges based on lands of equal acreage the identification and area of unsurveyed school sections may be determined by protraction or otherwise. The selection by the State of lands in lieu of any such protracted school sections shall be a waiver of all of its right to such sections.

(d) Before any such exchange under this section shall be effected, notice of the contemplated exchange, describing the lands involved, shall be published by the Secretary of the Interior once each week for four successive weeks in some newspaper of general circulation in the county or counties in which may be situated the lands to be accepted, and in the same manner in some like newspaper published in any county in which may be situated any lands to be given in such exchange; lands conveyed to the United States under this Act shall, upon acceptance of title, become public lands, and if located within the exterior boundaries of a grazing district they shall become a part of the district within the boundaries of which they are located: *Provided*, That

either party to an exchange based upon equal value under this section may make reservations of minerals, easements, or rights of use. Where reservations are made in lands conveyed either to or by the United States the right to enjoy them shall be subject to such reasonable conditions respecting ingress and egress and the use of the surface of the land as may be deemed necessary. Where mineral reservations are made by the grantor in lands conveyed by the United States, it shall be so stipulated in the patent, and any person who prospected for or acquires the right to mine and remove the reserved mineral deposits may enter and occupy so much of the surface as may be required for all purposes incident to the prospecting for, mining, and removal of the minerals therefrom, and may mine and remove such minerals, upon payment to the owner of the surface for damages caused to the land and improvements thereon. No fee shall be charged for any exchange of land made under this Act except one-half of the cost of publishing notice of a proposed exchange as herein provided.

1. *Application for Exchange.*—Section 8 of the act, as amended, authorizes exchanges of lands between the United States and a State, upon the application of a State, and provides for the issuance of patent for the selected lands upon acceptance of title to the lands conveyed to the United States in exchange therefor. Lands offered in exchange by a State may be lands owned by the State within or without the boundary of a grazing district, and the selected lands may be an equal value or an equal area of surveyed grazing district lands not otherwise appropriated or reserved, or unappropriated and unreserved surveyed public lands of the United States, within the same State. If, however, the selected lands are within a grazing district, the lands offered by the State in exchange must be within the same grazing district and such selected lands must lie in a reasonably compact body so as not to interfere with the administration or value of the remaining lands in the district for grazing purposes.

When an exchange is based on equal values, the values of both offered and selected lands are to be determined by the Secretary of the Interior, consideration being given to any reservations of minerals or easements which may be made by the State or the United States.

When mineral lands are selected in an exchange based upon equal acreage, the patent will contain a reservation of all minerals to the United States, and in any exchanges based upon equal acreage the State may offer mineral lands owned by the State, with a mineral reservation to the State.

Unsurveyed school sections within or without the boundary of a grazing district may be offered by the State in an exchange based upon equal areas, but no mineral reservations to the State may be made in such unsurveyed sections the identification of which will be determined by protraction or otherwise, the State by such selections waiving all rights to the unsurveyed sections.

School sections, surveyed or unsurveyed, included within national forests, national parks and monuments, Indian or other reservations or withdrawals may not be offered as a basis for exchange under said section 8 of the Taylor Grazing Act as amended.

Payment of fees will not be required in the case of any exchange but the State will be required to pay one-half of the cost of the publishing notice of a proposed exchange.

A State desiring to exchange lands under the provisions of this act should file application, in triplicate, in the district land office having jurisdiction over the selected lands, or in the General Land Office when there is no United States district land office within the State. Such application should describe the lands offered to the Government, as well as those selected in exchange, by legal subdivisions of the public land surveys or by entire sections, and nothing less than a legal subdivision may be surrendered or selected. The application for exchange should identify the grazing district in which the offered or selected lands are situated; if in a grazing district, should state whether the proposed exchange is to be based upon equal values or equal areas; and if based upon equal values, should state whether or not any reservations of minerals, easements, or other rights of use in or to the offered lands are desired and what use thereof is contemplated. Also, when the application is based upon equal values, it should show the reservations or easements which are acceptable to the State and which are to be made by the United States affecting the selected lands. Each application for an exchange must be accompanied by the following certificate and affidavit:

A. A certificate by the selecting agent showing that the selection is made under and pursuant to the laws of the State; that the lands selected and the lands relinquished are approximately of equal value (unless the exchange is based on equal areas); that the State is the owner of the lands offered in exchange (unless the offered lands are unsurveyed); that the offered lands are not the basis of another selection or exchange, and that the selected lands are unappropriated and are not occupied, claimed, improved, or cultivated by any person adversely to the State.

B. A corroborated affidavit relative to springs and water holes on the selected lands in accordance with existing regulations pertaining thereto.

2. *Action by the Register.*—If the application for exchange appears regular and in conformity with the law and these regulations, the register will assign the current serial number thereto, and, after making appropriate notations upon his records, will transmit the original and triplicate copies of the application to the General Land

Office, together with a report as to any conflicts of record, and, if the selected lands are within a grazing district, will transmit the duplicate copy of the application to the Director of Grazing, who will report to the Commissioner of the General Land Office as to whether in his opinion the selected lands are so located as not to interfere with the administration or value of the remaining lands in the district for grazing purposes within the meaning of the act.

An application for exchange will be noted "suspended" by the register and unless disallowed, the lands applied for in exchange will be segregated upon the records of the district land office and General Land Office, and will not be subject to other appropriation, application, selection, or filing.

Circular No. 1384, approved April 15, 1936, is hereby revoked in so far as it pertains to exchanges by a State under section 8 of the grazing act as amended.

3. *Action of the General Land Office.*—When an exchange is based upon equal values, upon receipt of a favorable report from the Director of Grazing (where the selected lands are within a grazing district), all else being regular, the Commissioner of the General Land Office will transmit the triplicate copy of the application to the Director of the Division of Investigations with a request that a field investigation be made for the purpose of determining the values of the offered and selected lands; whether the selected lands are occupied, improved, cultivated, or claimed by any one adversely to the State; whether the selected lands contain minerals, timber, springs, water holes, hot or medicinal springs, or any special features which should be considered in acting on the application; and whether the reservation which the State desires to make in the offered lands, if any, together with the contemplated use of such reservation, will in any way affect adversely the administration of the grazing district, if the offered lands are within a grazing district. The field examination should be made as soon as possible, and report and special recommendation should be submitted to the General Land Office.

When an exchange is based upon equal areas, if a field examination is found necessary to determine the character of the selected lands as to mineral or springs or water holes, the Director of the Division of Investigation will be requested to have a field investigation made for either or both of such purposes.

4. *Additional Evidence Required.*—When the field investigation report is received and an exchange of equal values has been established, or, in the case of an equal area exchange, where no field investigation is found necessary, the Commissioner of the General Land Office, unless he has reason to do otherwise, will, with the approval of the Secretary of the Interior, issue notice for publication

of the contemplated exchange, and will require the State, through the register of the district land office, to submit proof of publication of notice, a duly recorded deed of conveyance of the offered lands (unless such offered lands are unsurveyed), a certificate of the proper State officer showing that the offered lands have not been sold or otherwise encumbered by the State, and a certificate by the recorder of deeds or official custodian of the records of transfers of real estate, in the proper county, or by an abstractor or abstract company approved by the General Land Office that no instrument purporting to convey or in any way encumber title to the offered land is of record or on file in his office. Where reservations of any kind are made in the offered lands complete description thereof should be furnished. If, however, the offered lands were ever held in private ownership and were acquired by the State from such source, it will be necessary for the State to furnish an abstract of title showing that at the time the deed of conveyance to the United States was recorded the title to the lands covered by such deed was in the State making the conveyance, a certificate that the lands so conveyed were free from judgments or mortgages, liens, pending suits, tax assessments, or other encumbrances, except such reservations as may be made in the lands conveyed, and a certificate by the proper official of the county in which the lands conveyed are situated showing that all taxes levied or assessed against the lands conveyed to the United States, or that could operate thereon as a lien, have been fully paid or that no taxes have been levied, or whether there is a tax due on such lands that could operate as a lien thereon but which tax is not yet payable, and that there are no unredeemed tax sales and no tax deeds outstanding against such lands conveyed to the United States.

5. *Deed of Conveyance.*—The deed of conveyance to the United States must be executed, acknowledged, and duly recorded in accordance with the laws of the State making the exchange, and must be accompanied by a certificate of the proper State officer showing that the officer executing the conveyance was authorized to do so under the State law. The deed should recite that it is made “for and in consideration of the exchange of certain lands, as authorized by section 8 of the Act of June 28, 1934 (48 Stat. 1269), as amended.”

6. *Abstract of Title.*—The abstract of title, when required, must show that the title memoranda contained therein are a full, true, and complete abstract of all matters of record or on file in the office of the recorder of deeds and in the offices of the clerks of courts of record of that jurisdiction, including all conveyances, mortgages, pending suits, judgments, liens, *lis pendens*, or other encumbrances or instruments which are required by law to be filed with the recording officer and which appear in the records of the offices of the clerks of courts of record affecting in any manner whatsoever the title to

the land to be conveyed to the United States. The abstract of title may be prepared and certified by the recorder of deeds or other proper officer under his official seal, or it may be prepared and authenticated by an abstracter or by an abstract company, approved by the General Land Office, in accordance with section 42 of the mining regulations of April 11, 1922 (49 L. D. 15, 69).

7. *Taxes.*—In case the land conveyed to the United States has been held in private ownership and taxes have been assessed or levied thereon, and such taxes are not due and payable until some future date, the State, in addition to the certificate above required relative to taxes and tax assessments, may furnish a bond with qualified corporate surety for the sum of twice the amount of taxes paid on the land for the previous year in order to indemnify the United States against loss for the tax as assessed or levied but not yet due and payable. In lieu of the bond the State may submit a sum similar to that required in the bond, and if and when proper evidence is furnished showing the taxes on the land conveyed have been paid in full, the said sum will be returned to the State.

8. *Publication of Notice.*—The publication notice must give the name of the State making application, the serial number and date of the application, act under which application is filed, describe both the offered and selected lands (except that where the offered lands are unsurveyed no notice of such lands will be required) in terms of legal subdivisions of the public land surveys, and state that the purpose of the notice is to allow all persons claiming the selected lands or having bona fide objections to such exchange an opportunity to file their protests or other objections in the district land office, or in the General Land Office, together with evidence that a copy of such protest or objection has been served upon the State. Such notice must be published once a week for four consecutive weeks in some designated newspaper of general circulation in the county or counties in which may be situated the lands offered to the United States, and in the same manner in some like newspaper published in any county in which may be situated any lands to be selected in exchange. In the event of the designation of a daily newspaper, the publication should be made in the Wednesday issue thereof. A similar notice will be posted in the district land office during the required period of publication. Such notice for publication will be sent by the General Land Office to the register for forwarding by him to the applicant with instructions for publication in the newspaper or newspapers designated, but where there is no United States land office in the State applying for the exchange, the notice will be sent direct to the State with instructions for publication in the newspaper designated. Proof of publication of notice

shall consist of an affidavit by the publisher, or foreman, or other proper employe of the newspaper, showing the dates of publication, and attaching thereto a copy of the notice as published. The register shall transmit such evidence of publication to this office with his report as to whether or not protests or contests have been filed against the proposed exchange, and shall certify as to the posting of notice in his office.

The State will be responsible for payment of one half the cost of publication, and the publisher should bill the Commissioner of the General Land Office for the other half in accordance with instructions contained in the advertising order accompanying the notice for publication.

9. *Further Action by General Land Office.*—The publication of notice, conveyance, abstract of title, and other evidence required of the State will, upon receipt in the General Land Office, be examined, and if found regular and in conformity with law, and there are no objections, title will be accepted to the offered land and patent will issue for the land selected in exchange.

Should the report from the Director of the Division of Investigations, upon field investigation, disclose inequalities of value, the Commissioner of the General Land Office will advise the State and afford opportunity for adjustment so as to bring the exchange within the provisions of the law.

In the case of an equal area exchange, should the report of the Division of Investigations show that the selected lands are mineral in character, the State will be required to file consent to the reservation of all minerals therein to the United States. In making exchanges based upon equal areas, when the offered lands are mineral in character and the State holds title thereto, the State may, if desired, reserve the mineral rights in such offered lands in accordance with the provisions of paragraph 2 of subsection (c) of section 8 of the act.

Notices of additional requirements, rejection 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. Protests against exchanges should be filed in the district land office, from where they will be transmitted to the General Land Office for consideration and disposal.

Should the application for exchange be finally rejected or the selection canceled for any reason, any abstract of title filed will be returned to the State, and the State will be advised of its right to apply for a quitclaim deed under existing law for the land conveyed to the United States.

10. *State School Lands.*—It is provided in section 1 of the act that—

Nothing in this Act shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands, and which is maintained pursuant to such law except as otherwise expressly provided in this Act, nor to affect any land heretofore or hereafter surveyed which, except for the provisions of this Act, would be a part of any grant to any State, nor as limiting or restricting the power or authority of any State as to matters within its jurisdiction.

The words "Nothing in this Act shall be construed in any way * * * to affect any land heretofore or hereafter surveyed which, except for the provisions of this Act, would be a part of any grant to any State" were obviously intended to preserve school sections, both surveyed and unsurveyed, included within the boundaries of a grazing district established under the provisions of the Taylor Grazing Act, in exactly the same status for the purpose of any grant to any State as the lands would have had had the Taylor Grazing Act not been passed and had the lands not been included in the grazing district.

A grazing district is not a reservation within the meaning of the Act of February 28, 1891 (26 Stat. 796), and therefore school sections, surveyed or unsurveyed, within a grazing district, are not for that reason only valid base for indemnity school land selections under said act of 1891. The inclusion of unsurveyed school sections within a grazing district will not prevent the title to such lands from vesting in the State upon the acceptance of the plat of survey thereof by the Commissioner of the General Land Office.

Granted school sections owned by a State within or without the boundaries of a grazing district may be assigned by the State as a basis for an equal value, or equal area exchange, and unsurveyed school sections within or without the boundaries of a grazing district may be assigned by the State as a basis for an equal area exchange, as provided in subsection (c) of section 8 of the Taylor Grazing Act, as amended.

This circular supersedes Circular No. 1346, in so far as State exchanges are concerned.

State applications for exchange pending at the date of said act of June 26, 1936, will be governed by the provisions of the act of June 28, 1934, as amended by the act of 1936, and these regulations.

FRED W. JOHNSON, *Commissioner.*

Approved:

T. A. WALTERS,

First Assistant Secretary.

EXCHANGES OF STATE SCHOOL LANDS IN APACHE, NAVAJO, AND COCONINO COUNTIES, ARIZONA, UNDER SEC. 3, ACT OF JUNE 14, 1934

REGULATIONS

[Circular No. 1399]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 21, 1936.

REGISTER, U. S. LAND OFFICE, PHOENIX, ARIZONA:

Section 3 of the Act of June 14, 1934 (48 Stat. 960), entitled "An Act to define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes", provides as follows:

Upon the completion of exchanges and consolidations authorized by section 2 of this Act, the State of Arizona may, under rules and regulations to be prescribed by the Secretary of the Interior, relinquish to the United States such of its remaining school lands in Coconino, Navajo, and Apache Counties as it may see fit; and shall have the right to select from the vacant, unreserved, and nonmineral public lands in said counties lieu lands equal in value to those relinquished without the payment of fees or commissions.

Section 2 of said act contains the following provision:

The State of Arizona may relinquish such tracts of school land within the boundary of the Navajo Reservation, as defined by section 1 of this Act, as it may see fit in favor of said Indians, and shall have the right to select other unreserved and non-mineral public lands contiguous or noncontiguous, located within the three counties involved equal in value to that relinquished, said lieu selections to be made in the same manner as is provided for in the Arizona Enabling Act of June 20, 1910 (36 Stat. L. 558), except as to the payment of fees or commissions which are hereby waived.

In a letter approved by the Assistant Secretary of the Interior on May 28, 1936, this office was advised by the Commissioner of Indian Affairs that the State of Arizona has relinquished all of its lands within the Indian reservation, and it was requested that regulations be issued authorizing the State of Arizona to make exchanges under section 3 of said act.

1. Applications for selection by the State of Arizona in lieu of any remaining school lands within Coconino, Navajo, and Apache Counties, under the provisions of section 3 of this act, may be filed by the proper officers of the State, accompanied with the following affidavits and certificate:

(a) An affidavit as to the nonmineral and nonsaline character of the land applied for, showing that said land is unappropriated and is not occupied 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 relative to springs and water holes upon the land applied for, in accordance with existing regulations pertaining thereto.

(d) An affidavit that the lands relinquished and the lands selected are equal in value.

2. The exchange must be made by legal subdivisions or by entire sections, of equal value, and administration will be facilitated if an application for exchange does not include more than approximately 6,400 acres of selected lands, the area of the base lands assigned thereto being dependent upon the value thereof as compared with the value of the selected lands. The application should describe the land to be conveyed as well as the land selected, and nothing less than a legal subdivision may be surrendered or selected. Payment of fees or commissions will not be required in connection with such applications.

3. If the application for exchange appears regular and in conformity with the law and these regulations, you will assign a current serial thereto and at once transmit the application to this office with your report as to whether or not the selected lands are free from conflict, adverse filing, entry, or claim thereto.

4. Upon receipt of the application in this office, if all be found regular, a report will be requested from the Geological Survey as to the mineral or nonmineral character of the selected lands, and a report from the Division of Grazing, as to water holes, springs, and power possibilities in regard to the selected lands. A field examination and report will also be requested of the Division of Investigations as to both selected and base lands to determine whether or not their value is equal within the meaning of this act.

5. Upon receipt of satisfactory reports from the Geological Survey, the Division of Grazing, and the Division of Investigations, and no objection appearing, this office will issue notice for publication of the selection and will require the State to file proof of publication thereof, also a deed of conveyance of the offered lands, duly recorded, a certificate of the proper State officer showing that the offered lands have not been sold or otherwise encumbered by the State, and a certificate by the recorder of deeds or official custodian of the records of transfers of real estate, in the proper county, or by an abstractor or abstract company approved by the General Land Office, that no instrument purporting to convey or in any way encumber title to the offered land is of record or on file in his office. If, however, the offered lands were ever held in private ownership and were acquired by the State from such source, it will be necessary for the State to furnish an abstract of title showing that, at the time the deed of conveyance to the United States was recorded, the title to the lands covered by such deed was in the State making the conveyance, a

certificate that the lands so conveyed were free from judgments or mortgages, liens, pending suits, tax assessments, or other encumbrances, and a certificate by the proper official of the county in which the lands conveyed are situated showing that all taxes levied or assessed against the lands conveyed to the United States, or that could operate thereon as a lien, have been fully paid or that no taxes have been levied, or whether there is a tax due on such lands that could operate as a lien thereon but which tax is not yet payable, and that there are no unredeemed tax sales and no tax deeds outstanding against such lands conveyed to the United States.

The deed of conveyance to the United States must be executed, acknowledged, and duly recorded in accordance with the laws of the State and must be accompanied with a certificate of the proper State officer showing that the officer executing the conveyance is authorized to do so under the laws of the State. The deed should recite that it is made "for and in consideration of the exchange of certain lands as authorized by section 3 of the act of June 14, 1934 (48 Stat. 960)."

Notice of the selection must be published at the expense of the State once a week for four consecutive weeks in some designated newspaper of general circulation in the county or counties in which the selected lands may be situated. In the event of the designation of a daily newspaper, the publication should be made in the Wednesday issue thereof. A similar notice will be posted in your office during the entire period of publication. The notice for publication will be sent to your office to be forwarded to the State officer with instructions for publication in the newspaper or newspapers designated.

Proof of publication of notice shall consist of an affidavit by the publisher, or foreman, or other proper employee of the newspaper, showing the dates of publication, and attaching thereto a copy of the notice as published. You will transmit such evidence of publication to this office with your report as to whether or not protests or contests have been filed against the selection, certifying as to the posting of notice in your office. Any protests against the selection should be filed in your office and transmitted to this office for consideration and disposal.

6. Upon receipt in this office of satisfactory proof of publication of notice and deed of conveyance with the required certificates, should no objection appear of record, the exchange selection will be embraced in a clear list and submitted to the Secretary of the Interior with recommendation for approval with a view to the certification to the State of the selected lands.

In the case of an unfavorable report from the Division of Investigations, opportunity will be given the State to amend the application or to make such showing as may be desired. Notice of additional requirements, rejection 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.

FRED W. JOHNSON,
Commissioner.

I concur:

WILLIAM ZIMMERMAN, JR.,
Acting Commissioner of Indian Affairs.

Approved:

T. A. WALTERS,
First Assistant Secretary.

LEASING OF PUBLIC LANDS, EXCLUSIVE OF ALASKA, FOR GRAZING OF LIVESTOCK, UNDER TAYLOR GRAZING ACT AS AMENDED BY THE ACT OF JUNE 26, 1936

REGULATIONS

Circular No. 1401

[NOTE.—See Circular No. 1412, *post.*]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 28, 1936.

REGISTERS, UNITED STATES LAND OFFICES; DIRECTOR, DIVISION OF GRAZING; ACTING DIRECTOR, DIVISION OF INVESTIGATIONS:

Section 15 of the Act of June 28, 1934 (48 Stat. 1269, as amended by section 5 of the Act approved June 26, 1936 (49 Stat. 1976)), provides that:

The Secretary of the Interior is further authorized, in his discretion, where vacant, unappropriated, and unreserved lands of the public domain are so situated as not to justify their inclusion in any grazing district to be established pursuant to this Act, to lease any such lands for grazing purposes, upon such terms and conditions as the Secretary may prescribe: *Provided*, That preference shall be given to owners, homesteaders, lessees, or other lawful occupants of contiguous lands to the extent necessary to permit proper use of such contiguous lands, except, that when such isolated or disconnected tracts embrace seven hundred and sixty acres or less, the owners, homesteaders, lessees, or other lawful occupants of lands contiguous thereto or cornering thereon shall have a preference right to lease the whole of such tract, during a period of ninety days after such tract is offered for lease, upon the terms and conditions prescribed by the Secretary.

The above amendment to section 15 changes materially the procedure relative to the issuance of grazing leases as outlined in the regulations heretofore approved January 8, 1936, Circular No. 1375. The act, as amended, authorizes the Secretary of the Interior, in his

discretion, where vacant, unappropriated, and unreserved lands of the public domain are so situated as not to justify their inclusion in any grazing district to be established pursuant to this act, to lease *any such lands* for grazing purposes, upon such terms and conditions as the Secretary may prescribe. This section of the act, as amended, also provides that a preference shall be given to applicants for grazing leases who are owners, homesteaders, lessees, or other lawful occupants of contiguous lands to the *extent necessary to permit the proper use of such contiguous lands*. This act, as amended, also provides that when such isolated or disconnected tracts embrace 760 acres or less the owners, homesteaders, lessees, or other lawful occupants of lands contiguous thereto or cornering thereon shall have a preference right to lease the *whole of such tract* during a period of 90 days after such tract is offered for lease upon the terms and conditions prescribed by the Secretary of the Interior.

In general, the act, as amended, provides for the issuance of grazing leases to three classes of applicants, as follows:

- I. Leases where no preference right is involved.
- II. Preference right leases to applicants who are owners, homesteaders, lessees, or other lawful occupants of contiguous lands to the extent necessary to permit the proper use of such contiguous lands.
- III. Where isolated or disconnected tracts embrace 760 acres or less the owners, homesteaders, lessees, or other lawful occupants of lands contiguous thereto or cornering thereon shall have a preference right to lease the whole of such tract during a period of 90 days after such tract is offered for lease upon the terms and conditions prescribed by the Secretary of the Interior.

Since the issuance of grazing leases under section 15 of the original act and the amendment thereto is discretionary with the Secretary of the Interior, and since no leases have as yet been issued, all applications heretofore filed, which do not conform to these regulations, must be amended to conform herewith. However, it will not be necessary for these applicants to file any additional evidence or showing until so directed by this office.

The following rules and regulations are prescribed for the administration of section 15 of the act of June 28, 1934, as amended by the act of June 26, 1936:

I

APPLICATIONS FOR LEASE

1. An application for lease should be filed on form 4-721, approved July 28, 1936, in the United States district land office for the district

in which the lands applied for are situated, except that in the States in which there are no district land offices the application should be forwarded to this office.

2. The application must be filed in quadruplicate, except where it embraces lands within the jurisdiction of more than one district land office, in which event it must be furnished in quintuplicate and may be filed in either office. The original application, only, need be sworn to.

3. Any person who is a citizen of the United States or who has declared his intention to become a citizen, or any group or association composed of such persons, or any corporation organized under the laws of the United States, or of any State or Territory thereof authorized to conduct business in the State in which the lands involved are situated, may file such an application.

4. Owners, homesteaders, lessees, or other lawful occupants of lands contiguous to those applied for shall have a preference right to a lease for so much of said lands as may be necessary to permit proper use of such contiguous lands, except that owners, homesteaders, lessees, or other lawful occupants of lands contiguous to or cornering on a tract applied for embracing 760 acres or less, shall have a preference right during a period of 90 days after such tract is offered for lease, to lease the whole of such tract upon the terms and conditions prescribed by the Secretary of the Interior.

5. The application to lease should set forth as follows:

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

(b) A statement as to whether the applicant is a native-born or naturalized citizen of the United States, or has declared his intention to become a citizen. If naturalized, or a declarant, evidence thereof must be furnished.

(c) If the applicant is a corporation, a certified copy of the articles of incorporation must accompany the application; and if an association, a copy of the constitution and by-laws and evidence of the citizenship of each member must be submitted.

(d) A description of the lands applied for must be furnished in terms of the legal subdivisions of the public land surveys, together with a statement as to whether the lands contain any springs or water holes, and whether the lands are occupied or used for any purpose and by whom.

(e) A description in terms of legal subdivisions of the public land surveys of the lands upon which a preference right to a lease is based, the nature of the claims thereto, and the dates initiated or acquired.

(f) A statement as to the number and kind of stock to be grazed upon the lands, seasons of contemplated use, and the

manner in which the applicant plans to graze the lands applied for in connection with his general operations.

(g) A statement as to what previous use, if any, the applicant has made of the lands applied for, and whether the lands have been used by any one else. If so, by whom, for what purpose, and to what extent.

6. The filing of an application under this section in conformity with these regulations for an area of 3,840 acres or less will segregate the lands applied for from other disposition under the public land laws, subject to any prior valid adverse claim, except that at all times the mineral contents in the land shall be subject to prospecting, locating, developing, mining, entering, leasing, or patenting under the provisions of the applicable laws.

7. The filing of an application for 3,840 acres or less will not segregate the land applied for from application by other applicants for grazing lease. Conflicting or junior applications will be received, noted, and disposed of in the same manner as senior or prior applications.

8. If an application embraces an area in excess of 3,840 acres, the applicant may designate a tract or tracts in compact form and not to exceed 3,840 acres which he desires to be segregated by virtue of the application. If such a designation is made by the applicant, the land not so designated will not be segregated by the filing of the application but thereafter may be segregated by appropriate instructions upon a satisfactory showing that the inclusion of more than 3,840 acres in the lease is warranted.

9. As the issuance of a lease is within the discretion of the Secretary of the Interior, the filing of an application for a lease will not in any way create any right in the applicant to a lease, or to the exclusive use of the lands applied for, pending the execution of a lease by the Secretary of the Interior.

10. Every applicant for a lease must pay to the register of the district land office, at the time of filing an application, a fee of five dollars if his lease application is for 1,000 acres or less, and an additional five dollars for each additional 1,000 acres or fractional part thereof, which fee will be carried as unearned pending action on the application. If the application is rejected the fee will be returned. If a lease, based on the application, is offered the applicant, and he refuses to accept the same, the fee will be retained and earned, as a service charge.

11. If a protestant against the issuance of a lease desires to lease all or part of the land embraced in the application against which a protest is filed, the protest should be accompanied by an application to lease.

II

ACTION ON APPLICATIONS

12. Upon receipt of an application, the register of the district land office will assign the current serial number thereto, note the same on his records, and if all is found to be regular, forward the original to this office, the duplicate to the Director of Grazing, and the triplicate to the Special Agent in Charge of the Division of Investigations for the division in which the lands are situated. The original, duplicate, and triplicate applications should be accompanied with a status report by the register of all the lands applied for.

13. The quadruplicate copy will be retained by the register for his files. In case the application embraces land in two land districts, the quintuplicate copy will be forwarded to the appropriate land office for notation and for a serial number.

14. The register of the land office receiving the quintuplicate copy will furnish a report to this office, the Special Agent in Charge, and the Division of Grazing as to the status of the land in his district embraced in the application for lease. The balance of the administrative work up to the point of issuing the lease will be handled through the office in which the complete application was filed.

15. Publication will be required in each case in which a senior applicant has not been required to publish notice of application to lease, for the same land or a part thereof, if no objection to the allowance of the application is shown by the land office records. Persons who have heretofore filed applications will be required by this office, in proper cases, to publish notice of such applications at the earliest possible date after the approval of these regulations. Persons hereafter filing applications will be required by the district land office, where there is such office, otherwise by this office, to publish notice of their applications at the earliest possible date after the filing thereof. Where a daily paper is designated as the medium of publication, the notice must be published in the Wednesday issue for four consecutive weeks; if weekly, in four consecutive issues; and, if semiweekly, in either issue for four consecutive weeks. If the lands applied for are situated in two or more counties, publication must be had in some newspaper having a general circulation in both counties. A copy of the notice must be posted in the district land office during the entire period of publication. The notice must contain a description of the lands applied for and a statement to the effect that such lands are offered for lease, subject to objections thereafter appearing, and that all persons having adverse or conflicting claims to such lands, or desiring to lease all or any part thereof

for grazing purposes under preference right, or other applications, must file notice of their claims, or proper applications, in the land office, within a period of ninety days from date of the first publication of the notice. Such period will be regarded as the preference right period allowed by section 15 of the act for the filing of applications to lease isolated or disconnected tracts embracing 760 acres or less.

Each applicant will be required to pay for the publication of notice of his application. However, if a lease for all or any part of the land is awarded to an applicant on whose application publication was not required, such applicant, prior to the execution of the lease, will be required to furnish evidence to the effect that he has reimbursed the applicant who paid the expense of publication for such cost, or a part thereof, to be determined as follows: Where part of the land is awarded to each of two applicants, each must pay one-half of the cost of publication; where the award is for part of the land to each of three applicants, each must pay one-third of the cost, etc., unless a more equitable division of the cost is directed by this office.

16. The Director of Grazing will submit a report immediately to the Special Agent in Charge as to whether the lands are so situated as not to justify their inclusion in any grazing district to be established under the provisions of this act.

17. As soon as possible after the expiration of the time allowed by the published notice for the filing of preference right applications, and upon clearance by the Division of Grazing, the Special Agent in Charge will have an investigation made and submit a report to this office as to the applicant's qualifications, the pertinent facts as to any and all conflicting applications, especially as to those where the questions of preference rights are involved and it is necessary to determine the extent of the preference to permit the proper use of contiguous lands.

18. The report of the Special Agent in Charge should also include a statement as to the carrying capacity of the lands applied for, the value of the lands for grazing purposes, and the rental value of the lands, due regard being given to the number and kind of livestock to be grazed thereon.

19. Upon termination of publication and upon expiration of the time specified in the published notice, the register will forward to this office all protests or objections against the issuance of the lease, together with a statement showing the facts as to any and all conflicting applications for the lands involved. Proof of publication and posting of the notice in the district land office should also be forwarded.

III

ISSUANCE OF LEASES

20. If upon receipt of an application and on consideration of the facts presented, it is decided by this office that the applicant is entitled to a lease for all of the lands applied for, a proposed lease will be prepared, in quadruplicate, and copies will be sent to the district land office for execution by the applicant. At the same time, protests will be denied and conflicting applications rejected, subject to the right of appeal to the Secretary of the Interior. If the proposed lease is properly executed and returned to this office, it will be transmitted, together with any appeals filed by the protestants or conflicting applicants, with appropriate recommendations, to the Secretary of the Interior for consideration. The same procedure will be followed where it is determined that more than one applicant is entitled to a lease and a division of the land is necessary, except that such conflicting applicants will be afforded an opportunity to agree as to the division of such lands. If a satisfactory adjustment cannot be made by the parties interested, the award of a lease, or leases, will be determined by the Secretary of the Interior on the basis of all the facts presented.

21. If approved by the Secretary of the Interior, the lease will be executed in triplicate. The original will be retained in this office; the duplicate original will be sent to the Comptroller General; and the triplicate original will be sent to the applicant through the district land office. The quadruplicate copy will be sent to the district land office.

IV

RENTAL

22. Each lessee shall pay to the proper district land office, in advance, such annual rental as may be determined to be a fair compensation to be charged for the grazing of livestock on the leased land.

V

DURATION OF LEASES

23. Leases will be issued in the discretion of the Secretary of the Interior for periods of not more than ten years each, and when a lease expires it may be renewed, in the discretion of the Secretary of the Interior, if the applicant is then qualified as a lessee.

VI

USE OF LANDS

24. After the issuance of a lease, the lessee may fence the land or any part thereof, develop water by wells, tanks, water holes, or otherwise, and make or erect other improvements for grazing and stock-raising purposes so long as such improvements do not impair the value of the lands. Upon the cancellation of a lease for any reason, or upon termination of a lease, except when a renewal is requested, the lessee will be afforded a reasonable period, to be determined by the Secretary of the Interior, for the removal of all structures that may have been erected by him; but if not removed or other disposition made within the period of time specified, such structure shall become the property of the United States.

VII

CAUSES FOR CANCELLATION

25. A lease may be canceled by the Secretary of the Interior:

(a) If the lessee persistently overgrazes the lands or uses them in any manner which causes soil erosion, or for any purposes detrimental to the lands or the livestock industry.

(b) If the lessee uses the leased premises, or any part thereof, for any purpose foreign to grazing or in violation of any terms of the lease.

(c) If the lessee shall fail to pay the annual rental, or any part thereof.

(d) If the lessee shall fail to comply with any part of these regulations or the terms of the lease.

(e) If a preference right lessee fails to retain ownership or control of the lands tendered as a basis for such preference right.

Each lessee must accept as final any decision rendered by the Secretary of the Interior with reference to the violations of the terms of the lease, and, if required by the decision, must surrender the leased premises to the United States.

VIII

INSPECTION

26. Representatives of the Secretary of the Interior shall at any time have the right to enter the leased premises for the purpose of inspection.

IX

ASSIGNMENT

27. Proposed assignments of a lease, in whole or in part, must be submitted to the Secretary for approval, must be accompanied by the same showing by the assignee as is required of applicants for a lease, and must be supported by a showing that the assignee agrees to be bound by the provisions of the lease. No assignment will be recognized unless and until approved by the Secretary of the Interior.

28. These regulations shall be considered to be a part of every grazing lease issued pursuant to the provisions of this act.

29. These instructions supersede the preliminary instructions of September 20, 1934 (Circular No. 1336), and January 8, 1936 (Circular No. 1375), as amended March 5, 1936 (Circular No. 1379).

30. Forms of application and lease are attached and made a part hereof.

FRED W. JOHNSON, *Commissioner.*

I concur:

JULIAN TERRETT,

Acting Director, Division of Grazing.

I concur:

B. B. SMITH,

Acting Director, Division of Investigations.

Approved:

T. A. WALTERS,

First Assistant Secretary.

APPLICATION FOR GRAZING LEASE

[Form 4-721. Approved July 28, 1936]

To be filed in quadruplicate if the lands applied for are all in one land district; in quintuplicate if in more than one land district.

United States Land Office _____, Serial No. _____
 _____, Receipt No. _____
 _____, Date _____, 19__.

(1) I, _____, of _____,
 (Name of applicant) (Post office address)

hereby apply to lease, under section 15 of the Act of June 28, 1934 (48 Stat. 1269), as amended by the Act of June 26, 1936 (49 Stat. 1976), the _____

 Section _____, Township _____, Range _____, Meridian _____, containing
 _____ acres, within the _____ land district.

(If the lands applied for are within two land districts, the application must be filed in quintuplicate. A description of the lands should be given by legal subdivision if surveyed, or, if not surveyed, by metes and bounds or such other description as will fully identify the land.)

(2) Describe by legal subdivisions the lands upon which a preference right to a lease is based, the nature of the claims thereto, and the dates initiated or acquired, and when the right will expire, if it is held for a period of years. Section _____, Township _____, Range _____, Meridian _____.

(a) How many acres of your privately owned lands are under cultivation? _____ acres.

(b) How many acres are used for grazing purposes? _____ acres.

(3) State briefly your experience in the livestock industry and give two references.

(4) State what interests, if any, you have in any other lease or pending application for lease under section 15 of the Act approved June 28, 1934, as amended by the Act of June 26, 1936.

(5) Are you a citizen of the United States? _____ By birth? _____ By naturalization? _____.

(If by naturalization, evidence of such naturalization must be furnished.)

If not a citizen, have you filed the necessary declaration of intention to become such? _____ When? _____ Where? _____.

(If the applicant is a corporation, a certified copy of the articles of incorporation, together with a copy, signed by proper official, of the minutes of the meeting authorizing the filing of the application and, if an association, a copy of the constitution and by-laws, and evidence of the citizenship of each member, must be submitted.)

(6) Do the lands applied for contain any springs or water holes? _____ If so, describe them, giving the location by section, township, and range.

(a) Are the lands applied for occupied or used for any purpose? _____ By whom? _____ For what purpose? _____.

(7) Do you own or control any source of water supply needed or used for livestock purposes? _____

Describe it _____

Where located _____

(Subdivision, section, township, and range)

(8) State the number and kind of stock to be grazed on the leased lands _____, seasons of contemplated use _____, the manner in which you plan to graze the lands applied for in connection with your general operations _____

(9) Have you previously used the lands covered by this application? _____ If so, for how many years and for what usual period each year? _____

(a) How many stock have you grazed thereon during the average year? _____

(10) Have the lands been used for grazing purposes in the past by any other person? _____ If so, by whom? _____

To what extent? _____

ing laws and regulations; and nothing herein contained shall restrict the acquisition, granting, or use of permits or rights of way under existing law.

(b) The right to close portions of the leased area to grazing whenever, because of drought, epidemic of disease, incorrect handling of the stock, overgrazing, fire, or other cause, such action is deemed necessary to restore the range to its normal condition. However, such temporary closing of any area shall not operate to exclude such area from the boundaries of a lease.

(c) The right to reduce the leased area if it is excessive for the number of stock owned by the lessee, or if it is determined that such area is required for the protection of camping places, sources of water supply to communities, stock driveways, roads and trails, townsites, mining claims, and for feeding grounds near villages for the use of draft animals or near the slaughtering or shipping points for use of stock to be marketed. However, a proportionate reduction will be made in the annual rental charges. It is further understood and agreed:

(a) That the lessee expressly agrees that authorized representatives of the Department of the Interior at any time shall have the right to enter the leased premises for the purpose of inspection, and that Federal agents, including game wardens, shall at all times have the right to enter the leased area on official business.

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

(c) That this lease is granted subject to valid existing rights and to all rules and regulations which the Secretary of the Interior has prescribed.

(d) That the lessee may construct, or maintain and utilize, any fence, building, corral, reservoir, well, or other improvements needed for the exercise of the grazing privileges of this lease, but any such fence shall be so constructed as to permit ingress and egress for miners, prospectors for minerals, and other persons entitled to enter such area for lawful purposes.

(e) That the lessee shall take all reasonable precaution to prevent and suppress forest, brush, and grass fires.

(f) That upon the termination of this lease by expiration or forfeiture thereof pursuant to paragraph (i) hereof, in the absence of an agreement to the contrary, if all rental charges due the Government have been paid, the lessee may, within a reasonable period, to be determined by the lessor, remove or make other disposition of all property belonging to him, together with any fence, building, or other removable range improvements of any kind owned or controlled by him, but if not removed within the period of time specified by the lessor, such property, buildings, and improvements shall become the property of the United States.

(g) That the lessee agrees to comply with all Federal and local laws regarding sanitation and such other sanitary measures as may be necessary.

(h) That the lessee will not so enclose roads or trails commonly used for public travel as to interfere with the traveling of persons who do not molest grazing animals.

(i) If the lessee shall fail to pay the rental as herein specified, or shall fail to comply with the provisions of the act, or make default in the performance or observance of any of the terms, covenants, and stipulations

hereof or of the general regulations promulgated and in force at the date hereof, and such default shall continue 60 days after service of written notice thereof by the lessor, then the lessor may, in his discretion, terminate and cancel this lease.

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.

IN WITNESS WHEREOF:

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

Witness to the signature of Lessee:

E. CLARK WHITE v. ALFORD ROOS

Decided July 28, 1936

HOMESTEAD APPLICATION—SEGREGATIVE EFFECT—DOCTRINE OF RELATION.

The rule that an application to make entry of land subject thereto by a qualified applicant is equivalent to an entry so far as the applicant is concerned, and while pending reserves the land from other disposition, cannot be invoked by a subsequent applicant to defeat a claim initiated before the prior application was rejected, as the rule is but an application of the doctrine of relation, which cannot be invoked by one not in privity with the first applicant.

MINING CLAIM—REJECTION OF CONFLICTING HOMESTEAD APPLICATION—EFFECT UPON MINING CLAIM.

A mere application to make a stock-raising homestead works no severance of the mineral from the surface estate, and upon the rejection of the application an intervening mining claim attaches to the surface as well as to the minerals.

DEPARTMENTAL DECISION DISTINGUISHED.

Case of *Filtrol Company v. Brittan and Echart* (51 L. D. 649), distinguished.

WALTERS, *First Assistant Secretary:*

E. Clark White has appealed from a decision of the Commissioner of the General Land Office dated October 14, 1935, which affirmed the local register in dismissing his contest application against the stock-raising homestead entry of Alford Roos (Las Cruces 041372), made October 30, 1930. The protest was based upon the alleged location of the Procrustean lode claim, made July 1, 1925, for part of the land within the entry. The contest application was rejected on the ground that at the date of the location of the claim the land embraced therein was included in a valid subsisting application (018208) of Wade Hotchkiss, made under the stock-raising act,

which was finally rejected April 2, 1928, for a reason that did not exist on July 1, 1925, and protestant had not amended his mining location since it was made.

The reason for the rejection was the failure of the stock-raising applicant to file a nonwater-hole affidavit as required by the regulations of May 25, 1926.

The Commissioner's reasons for his decision are as follows:

The Department in *Fittrol Company v. Brittan and Echart* (51 L. D. 649), held that a mining location made for land embraced in a stock-raising homestead entry would not automatically become enlarged to include the land as well as the minerals if the entry should be canceled, and in *Rippy v. Snowden* (47 L. D. 321) and in numerous other cases, it has held that a *prima facie* complete homestead application segregates the land as completely as though entry had been made.

The rules announced in the cases cited are in full force and effect and govern the Land Office in its decisions in like cases. Taken together they obviously mean that a mining location made for land embraced in a *prima facie* complete stockraising homestead application for land subject to entry does not include the land but entitles the locator merely to the minerals in the land and such use of the surface as is granted by section 9 of the stock-raising homestead act, and such a location does not automatically become enlarged upon rejection of the application so as to include the land as well as the minerals.

In the opinion of this office, the question raised in the application to contest comes within the rule established by the decisions referred to, and the owner of the mining claim therefore is entitled only to the minerals in the land, together with the right to the use of so much of the surface as may be reasonably necessary to mine and remove the minerals.

In *Rippy v. Snowden* (47 L. D. 321), the right of Rippy to make an additional stock-raising entry based on application to make enlarged entry, accompanied by petition for designation, subsequently acted upon favorably, was upheld on the ground that this application segregated the land completely and that he was later determined to be qualified to make a second entry.

The Department said, "Under such circumstances, all rights under the entry relate back to the date the application was filed * * *"; that an application to enter is an entry when accompanied by the required showing and payment. A correct statement of the rule is that an application to enter land subject thereto is equivalent to an entry, *so far as the rights of the applicant are concerned*, and while pending reserves the land from other disposition. *Goodale v. Olney* (12 L. D. 324); *Samuel J. Haynes* (Id. 645); *McMichael v. Murphy* (20 L. D. 535). The rule has been applied in favor of applicants to make entry in *Louise E. Johnson* (48 L. D. 349), *Condas v. Heaston* (49 L. D. 374), *Rudolf v. Balke* (50 L. D. 633), and many other cases. But the Department is not aware of any case where a stranger to the application has been given the benefit of the rule to support his subsequent application. The qualification indicated in

italics to the rule above is important, for the rule is but an application of the doctrine of relation, which is only applied for the security and protection of persons who stand in some privity with the party that initiated the proceedings and acquired the equitable claim or right to the title. It does not affect strangers not connecting themselves with the equitable claim or right. *Gibson v. Choteau* (13 Wall. 93); *McCune v. Essig* (118 Fed. 273, 277). The rule is not applicable in this case, first, because the Hotchkiss claim was never allowed, but was rejected, and therefore never related back to give his application the segregative force of an entry, and, second, because there is no privity between the entry of Roos and the application of Hotchkiss to enable the former to invoke the doctrine of relation.

In *Filtrol Company v. Brittan and Echart* (51 L. D. 649) it was held that the rights of a mineral claimant who has located a mining claim for mineral in land covered by a stock-raising homestead entry are not automatically enlarged to include the land upon cancelation of the entry. As the application of Hotchkiss never became an entry, so as to relate back to the date of its inception, the present case is not within the rule in the *Filtrol* case. The location of White, so far as it was a claim to the surface, could not attach while the application of Hotchkiss subsisted (*Ruben L. Givney*, decided July 8, 1936, unreported), but upon its rejection, no estate having been actually granted to Hotchkiss and no severance of the mineral and surface estate having been effected, we see no reason why White did not, in the absence of some superior claim, under the mining law, become invested with the full rights of a mining locator.

The Commissioner's decision, dismissing White's protest, must therefore be reversed.

Reversed.

ASSIGNMENT OF DUTIES TO THE GENERAL LAND OFFICE IN CONNECTION WITH ADMINISTRATION OF THE TAYLOR GRAZING ACT—DEPARTMENTAL ORDER NO. 884, OF MARCH 11, 1935, MODIFIED*

[Circular No. 1402, modifying Circular No. 1356]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 30, 1936.

REGISTERS, UNITED STATES LAND OFFICES:

You are advised that departmental order of March 11, 1935, allocating certain duties to the General Land Office in connection with

*NOTE.—Order appears at pages 224 and 225.

the administration of grazing districts, was, on June 30, 1936, modified by omitting section (3) thereof and amending sections (1) and (8) as follows:

(1) Act as office for filing and recording for all applications under the Taylor Grazing Act, with the exception of applications for licenses or permits, such applications to be filed in the Division of Grazing offices.

(8) Proceed with the preparation for public distribution of base maps on a suitable scale for each grazing district that may be established.

In view of the above, the duties of the district land offices as outlined in Circular No. 1356 of June 7, 1935, are modified as follows:

(a) You will receive for filing and recording in the district land offices and such other disposal as may be directed from time to time, all applications under the Taylor Grazing Law, except applications for grazing permits or licenses, which cases will hereafter be filed in the appropriate local office of the Division of Grazing. All applications except applications for grazing permits or licenses will be entered on the serial register and noted also on the plats and tract books.

(b) When applications for grazing licenses or permits are received in the district land offices no action of any kind need be taken thereon, but all such applications and related papers so received should be immediately forwarded to the appropriate local office of the Division of Grazing.

(c) Permits or licenses when issued (in triplicate) by the Division of Grazing, will be delivered to the register of the district land office in whose district the lands are situated, for serialization and notation upon the records of that land office, after which the original will be forwarded by the register to the permittee upon payment in advance of the fee prescribed in the "Rules for Administration of Grazing Districts", the duplicate placed in the files of the district land office, and the triplicate forwarded by the register to the General Land Office for notation upon its records.

(d) Permits or licenses involving exclusive rights to the use of a particular tract of land must be noted against the applicable sections and subdivisions on the plats and tract books unless an entire township is involved, in which event one notation per township will suffice, to be placed at the head of the township involved, similar to the present method of noting withdrawals, etc. In cases where such permits or licenses involving exclusive rights to the use of a particular tract of land embrace land in two land districts, the register to whom the license or permit is forwarded by the Division of Grazing will, in addition to the requirements under (c) hereof, make a copy of such instrument and forward same to the other land office for appropriate notation as to the land involved in that district.

(e) Permits or licenses to graze in common with other permittees over an entire grazing district will not be noted except on the serial register of the district land office receiving same from the Division of Grazing, regardless of the fact that such grazing district may embrace lands in more than one land district.

(f) You will be held responsible for the collection of all grazing fees and disposition of all moneys so received, under the general direction and supervision of the Secretary of the Interior and the Commissioner of the General Land Office, to the same extent, and in the same manner, as fiscal matters in connection with other public land matters are now being handled. In connection with the collection of fees under grazing licenses or permits your attention is directed to Circular No. 1382 of March 28, 1936, as amended by Circular No. 1392 of June 11, 1936.

(g) As and when requested you will make available for the Division of Grazing, office space, desk facilities, equipment and supplies, and temporary clerical assistance as needed, and in every way cooperate with the Division of Grazing, provided such assistance, etc., does not seriously interfere with the regular functional activities of your office. In this connection your especial attention is called to paragraph 6 of the Grazing Division order approved by the Secretary on March 11, 1935, above referred to, to the end that complete and full cooperation will be had between the Division of Grazing and the United States district land offices.

(h) In order that the Division of Grazing may have available all pertinent information at the time applications for permits to graze within grazing districts are passed upon by it, the register of each United States district land office is instructed to notify the local representative of the Division of Grazing as to all applications filed in grazing districts for exchanges under section 8 of the Taylor Grazing Act, whether the base or the selected lands are within such districts; also to notify the Division of Grazing of any applications purporting to be under section 14 or 15 of the Taylor Grazing Act for sales or leases where the lands involved are within grazing districts. This requirement is due to the fact that many of those seeking grazing privileges within grazing districts have erroneously applied for sales or leases, whereas the real purpose of such application was to secure a grazing permit. Furthermore, many applications for the sale or lease of lands under authority of sections 14 and 15, respectively, were filed prior to the inclusion of the lands involved in grazing districts.

D. K. PARROTT,

Acting Assistant Commissioner.

**DISPOSITION OF GRAZING PERMITS OR LICENSES IN DISTRICT
LAND OFFICES—COLLECTION OF FEES**

[Circular No. 1405, amending Circular No. 1402]

INSTRUCTIONS

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 11, 1936.

REGISTERS, UNITED STATES LAND OFFICES:

Paragraph (c) of Circular No. 1402, dated July 30, 1936, is hereby amended to read as follows:

Permits or licenses when issued (in triplicate) by the Division of Grazing, will be delivered to the register whose land district embraces the greater part of the grazing district in which the lands are situated, for serialization and notation upon the records of the district land office, after which the original will be forwarded by the register to the permittee upon payment in advance of the fee prescribed in the "Rules for Administration of Grazing Districts", the duplicate placed in the files of the district land office, and the triplicate forwarded by the register to the General Land Office for notation upon its records.

The purpose of this amendment is to have all grazing fees for a grazing district collected and accounted for by one office.

D. K. PARROTT,
Acting Assistant Commissioner.

**GIFTS OF LAND UNDER SECTION 8, TAYLOR GRAZING ACT, AS
AMENDED BY SECTION 3, ACT OF JUNE 26, 1936**

[Circular No. 1407]

REGULATIONS

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 17, 1936.

REGISTERS, UNITED STATES LAND OFFICES:

Subsection (a) of section 8 of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269), as amended by section 3 of the Act of June 26, 1936 (49 Stat. 1976), provides:

That where such action will promote the purposes of the district or facilitate its administration, the Secretary is authorized, for the purpose of this Act only, to accept on behalf of the United States any lands within the exterior boundaries of a grazing district as a gift.

1. *Offer to Convey.*—Gifts of lands within the exterior boundaries of a grazing district may be accepted by the Secretary of the Interior on behalf of the United States "where such action will promote the purposes of the district or facilitate its administration." Any person desiring to make such a gift of lands should submit to the Commissioner of the General Land Office at Washington, D. C., an offer to voluntarily convey and transfer to the United States any lands within a grazing district, describing such lands by legal subdivisions of the public land surveys. The offer should be accompanied by an affidavit showing that the offeror is the record owner in fee of the lands so offered, free and clear of all encumbrances, and that there are no persons claiming the land adversely to the offeror. The affidavit should also show whether there are any unpaid taxes or assessments levied or assessed against the offered land or that could operate as a lien thereon, and whether there is a tax or assessment due on such lands or that could operate as a lien thereon but which tax or assessment is not yet payable, and that there are no unredeemed tax deeds outstanding against such lands offered to be conveyed to the United States. The offer and affidavit should be submitted in triplicate.

2. *Action by General Land Office.*—The offer of gift and accompanying affidavit will be promptly considered upon receipt in the General Land Office, and if found regular and the records of said office show the land involved to be in private ownership and in a grazing district, the duplicate will be transmitted to the Director of Grazing for a report as to whether the acquisition of such lands will promote the purposes of the grazing district or facilitate in its administration. If the Director of Grazing reports that the acquisition of such lands will promote the purposes of the grazing district or facilitate in its administration, the General Land Office will transmit the triplicate to the Director of the Division of Investigations for report as to what the records of the county in which the land is situated disclose as to the ownership of such land and any taxes that may be unpaid in connection with such land, and as to whether there are any persons occupying and claiming the lands adversely to the offeror. These reports shall be expedited to the Commissioner of the General Land Office, and if upon consideration thereof it shall appear that the offeror has good title to the land offered as a gift and that the acquisition of such land by the United States would be warranted, the register of the district land office will be advised, with the approval of the Secretary of the Interior, of such offer and agreement to accept the same in behalf of the United States, and that a serial number should be assigned to the case and the General Land Office advised thereof, and that appropriate notations of the offer

should be made on the district land office records. The register shall be instructed to advise the offeror of the agreement to accept the land involved as a gift, and that the offeror should submit a voluntary deed of conveyance to the United States of the land so offered, an affidavit stating that such offeror has not conveyed or encumbered the land in any manner from the time of making the offer up to and including the date of recordation of the deed, and evidence by the proper county official showing that all taxes or assessments levied or assessed against the offered land or that could operate as a lien thereon have been paid in full, whether there is a tax or assessment due on such lands or that could operate as a lien thereon but which tax or assessment is not yet payable, and that there are no unredeemed tax deeds outstanding against such lands offered to be conveyed to the United States.

3. *Deed of Conveyance.*—The deed of conveyance to the United States must be executed, acknowledged, and duly recorded in accordance with the laws of the State in which the lands are situated. The deed should recite that it is made "as a gift", as authorized by section 8 of the Act of June 28, 1934 (48 Stat. 1269), as amended by section 3 of the Act of June 26, 1936 (49 Stat. 1976). Where such deed is made by an individual, it must show whether the person making the conveyance is married or single. If married, the wife or husband of such person, as the case may be, must join in the execution and acknowledgment of the deed in such manner as to bar effectually any right of curtesy or dower, or any claim whatsoever to the land conveyed, or it must be fully and satisfactorily shown that under the laws of the State in which the land conveyed is situated, such husband or wife has no interest whatsoever, present or prospective, which makes his or her joining in the deed of conveyance necessary. Where the deed of conveyance is by a corporation, it should be recited in the instrument of transfer that the deed was executed pursuant to an order or by the direction of the board of directors, or other governing body, and a copy of such order or direction must accompany such instrument of transfer and both should bear the impression of the corporate seal.

FRED W. JOHNSON,
Commissioner.

Approved:

T. A. WALTERS,
First Assistant Secretary.

EXCHANGES OF PRIVATELY OWNED LANDS UNDER SECTION 8,
TAYLOR GRAZING ACT, AS AMENDED BY SECTION 3, ACT OF
JUNE 26, 1936

[Circular No. 1408]

REGULATIONS

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., September 3, 1936.

REGISTERS, UNITED STATES LAND OFFICES:

Subsections (b) and (d) of section 8 of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269), as amended by section 3 of the Act of June 26, 1936 (49 Stat. 1976), provide:

(b) When public interests will be benefited thereby the Secretary is authorized to accept on behalf of the United States title to any privately-owned lands within or without the boundaries of a grazing district, and in exchange therefor to issue patent for not to exceed an equal value of surveyed grazing district land or of unreserved surveyed public land in the same State or within a distance of not more than 50 miles within the adjoining State nearest the base lands.

(d) Before any such exchange under this section shall be effected, notice of the contemplated exchange, describing the lands involved, shall be published by the Secretary of the Interior once each week for 4 successive weeks in some newspaper of general circulation in the county or counties in which may be situated the lands to be accepted, and in the same manner in some like newspaper published in any county in which may be situated any lands to be given in such exchange; lands conveyed to the United States under this act shall, upon acceptance of title, become public lands, and if located within the exterior boundaries of a grazing district, they shall become a part of the district within the boundaries of which they are located: *Provided*, That either party to an exchange based upon equal value under this section may make reservations of minerals, easements, or rights of use. Where reservations are made in lands conveyed either to or by the United States the right to enjoy them shall be subject to such reasonable conditions respecting ingress and egress and the use of the surface of the land as may be deemed necessary. Where mineral reservations are made by the grantor in lands conveyed by the United States it shall be so stipulated in the patent, and any person who prospect for or acquires the right to mine and remove the reserved mineral deposits may enter and occupy so much of the surface as may be required for all purposes incident to the prospecting for, mining, and removal of the minerals therefrom, and may mine and remove such minerals, upon payment to the owner of the surface for damages caused to the land and improvements thereon.) No fees shall be charged for any exchange of land made under this act except one-half of the cost of publishing notice of a proposed exchange as herein provided.

1. *Application for Exchange.*—Subsections (b) and (d) of section 8 of the act authorize the Secretary of the Interior to exchange for privately-owned lands within or without the exterior limits of a graz-

ing district surveyed grazing district lands or unreserved surveyed public lands in the same State or within a distance of not more than 50 miles within the adjoining State nearest the base lands, when the public interests will be benefited thereby. Whether or not an exchange will benefit the public interests is a question of fact to be determined by the Secretary of the Interior in the light of all the circumstances.

Persons, firms, or corporations desiring to exchange lands pursuant to this section should file in the district land office having jurisdiction over the selected lands, or in the General Land Office, when there is no United States district land office within the State, an application, in triplicate, setting forth by legal subdivisions of the public land surveys the lands offered to the Government and the lands to be selected in exchange therefor. The application should contain the full name and post office address of the applicant, state whether or not any reservation of minerals, easements, or other rights in or to the offered lands are desired, and what use thereof is contemplated. It should also show the reservations or easements which are acceptable to the applicant and are to be made by the United States affecting the selected lands.

The application must be accompanied by an affidavit showing that the applicant is legally capable of consummating the exchange, that he is the owner of the lands offered in exchange, that such offered lands are not the basis of another selection or exchange, and that the selected lands are unappropriated and are not occupied, claimed, improved, or cultivated by any person adversely to the applicant.

The application must be accompanied with a corroborated affidavit relative to springs and water holes on the selected lands, in accordance with existing regulations pertaining thereto. The application must also be accompanied with an affidavit showing that the lands relinquished and the lands selected are approximately of equal value. The act requires that the value of the selected lands shall not exceed that of the offered lands, consideration being given to any reservation of minerals or easements which may be made by the applicant or the United States. The values of both offered and selected lands are to be determined by the Secretary of the Interior.

No fee is required except that the applicant shall pay one-half of the advertising cost as hereinafter provided.

2. *Action by Register.*—If the application for exchange appears regular and in conformity with the law and these regulations, the register will assign the current serial number thereto and after making appropriate notations on his records, will transmit the original and triplicate copies of the application to the General Land Office, and if the offered or selected lands are within the limits of a grazing

district, he will transmit the duplicate copy of the application to the Director of Grazing, together with a report as to any conflicts of record. If the selected lands are within a grazing district, the Director of Grazing will report as to whether, in his opinion, the proposed exchange will benefit the public interests; whether, in his opinion, the exchange should be authorized, and as to whether there are any public watering places known to exist on any of the selected lands.

Upon receipt of the application from the register of the local land office, if none of the selected lands is within a grazing district, or upon receipt of a favorable report from the Director of Grazing, if any of the selected lands are within a grazing district, the Commissioner of the General Land Office will, all else being regular, transmit the triplicate copy of the application to the Director of the Division of Investigations and request him to have a field investigation made for the purpose of determining the values of the offered and selected lands; whether the selected lands are occupied, improved, cultivated, or claimed by another; whether the selected lands contain minerals, timber, springs, water holes, hot or medicinal springs; whether the reservations which the applicant desires to make in the offered lands, if they be within a grazing district, together with the contemplated use of such reservations, will, in any way, affect adversely the administration of the grazing district, or any special features which should be considered in acting upon the application; the estimated value of the offered land for use in determining the amount of stamp tax required on the deed of the offered land; whether there are any reasons why the exchange should not be consummated; and such facts as will aid in determination of whether the proposed exchange is in the public interests.

3. Evidence Required.—When the field investigation report is received and an exchange of equal values has been established, the Commissioner of the General Land Office, with the approval of the Department, unless he has reasons to do otherwise, will direct publication of notice of the contemplated exchange, and will require the applicant, through the register of the district land office, to submit proof of publication of notice, a deed of conveyance of the offered lands duly recorded, an abstract of title showing that at the time the deed of conveyance to the United States was recorded the title to the lands covered by such deed was in the party making the conveyance; a certificate that the lands as conveyed were free from judgments or mortgage liens, pending suits, tax assessments, or other encumbrances; and a certificate by the proper official of the county in which the lands are situated showing that all taxes or assessments levied or assessed against the lands conveyed to the United States,

or that could operate as a lien thereon, have been duly paid; whether there is a tax or assessment due on such lands or that could operate as a lien thereon but which tax or assessment is not yet payable; and that there are no unredeemed tax sales and no tax deeds outstanding against such lands conveyed to the United States.

4. *Publication of Notice.*—The publication notice must give the name and post office address of the applicant, serial number and date of the application, act under which application is filed, describe both the offered and selected lands in terms of legal subdivisions of the public land surveys, and state that the purpose of the notice is to permit all persons claiming the selected lands or having bona fide objections to such exchange an opportunity to file their protests or other objections in the district land office, or in the General Land Office if there is no local land office in the State in which the selected land is situated, together with evidence that a copy of such protest or objection has been served upon the applicant. One-half of the cost of publication of the notice must be at the expense of the applicant, and the notice must be published once a week for four consecutive weeks in some designated newspaper of general circulation in the county or counties in which may be situated the lands offered to the United States, and in the same manner in some like newspaper published in any county in which may be situated any lands selected in exchange. In the event the newspaper is a daily, the publication should be made in the Wednesday issue thereof. A similar notice will be posted in the district land office during the required period of publication and the register shall certify as to the posting. Publication of notice will be directed by the General Land Office in a certain newspaper or newspapers designated by the Commissioner of the General Land Office in instructions to the register. Each newspaper will collect 50 percent of the cost of publication from the applicant and submit proper vouchers to the United States for the remaining 50 percent of such cost. Proof of publication of notice shall consist of an affidavit by the publisher, or foreman, or other proper employee of the newspaper, showing the dates of publication, and attaching thereto a copy of the notice as published. The register shall transmit such evidence of publication to the General Land Office with his report as to whether or not protests or contests have been filed against the proposed exchange, and shall certify as to the posting of notice in his office.

5. *Deed of Conveyance.*—The deed of conveyance to the United States must be executed, acknowledged, and duly recorded in accordance with the laws of the State in which the lands are situated. Such revenue stamps as are required by law must be affixed to the deed and canceled. The deed should recite that it is made "for and

in consideration of the exchange of certain lands, as authorized by section 8 of the act of June 28, 1934 (48 Stat. 1269), as amended by the act of June 26, 1936 (49 Stat. 1976)." Where such deed is made by an individual, it must show whether the person making the conveyance is married or single. If married, the wife or husband of such person, as the case may be, must join in the execution and acknowledgment of the deed in such manner as to bar effectually any right of curtesy or dower, or any claim whatsoever to the land conveyed, or it must be fully and satisfactorily shown that under the laws of the State in which the land conveyed is situated, such husband or wife has no interest whatsoever, present or prospective, which makes his or her joining in the deed of conveyance necessary. Where the deed of conveyance is by a corporation, it should be recited in the instrument of transfer that the deed was executed pursuant to an order or by the direction of the board of directors, or other governing body, and a copy of such order or direction must accompany such instrument of transfer and both should bear the impression of the corporate seal.

6. *Abstract of Title.*—The abstract of title must show that the title memoranda contained therein are a full, true and complete abstract of all matters of record or on file in the offices of the recorder of deeds and in the offices of the clerks of courts of record of that jurisdiction, including all conveyances, mortgages, pending suits, judgments, liens, lis pendens or other encumbrances or instruments which are required by law to be filed with the recording officer and which appear in the records of the offices of the clerks of courts of record affecting in any manner whatsoever the title to the land to be conveyed to the United States. The abstract of title may be prepared and certified by the recorder of deeds or other proper officer under his official seal, or it may be prepared and authenticated by an abstracter or by an abstract company, approved by the General Land Office, in accordance with section 42 of the mining regulations of April 11, 1922 (49 L. D. 15, 69).

7. *Taxes.*—In case taxes have been assessed or levied on lands conveyed to the United States, and such taxes are not due and payable until some future date, the applicant, in addition to the certificate above required relative to taxes and tax assessments, may furnish a bond with qualified surety for the sum of twice the amount of taxes paid on the land for the previous year in order to indemnify the United States against loss for the tax as assessed or levied but not yet due and payable. In lieu of the bond the applicant may submit a sum similar to that required in the bond, and if and when proper evidence is furnished showing the taxes on the land conveyed have been paid in full, the said sum will be returned to the applicant.

8. *Action by General Land Office.*—The publication of notice, conveyance, abstract of title and other evidence required of the applicant will, upon receipt in the General Land Office, be examined, and if found regular and in conformity with law, and there are no objections, title will be accepted to the offered land and patent will issue for the land selected in exchange.

Should the report from the Director of the Division of Investigations, upon field investigation, disclose inequalities of value, the Commissioner of the General Land Office will advise the applicant and afford him an opportunity to adjust matters so as to bring the exchange within the provisions of the law.

Notice of additional requirements, rejection, 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. Protests against exchanges should be filed in the district land office, from where they will be transmitted to the General Land Office for consideration and disposal.

Should the application for exchange be finally rejected or the selection canceled for any reason, the abstract of title will be returned, and the applicant will be advised of his right to apply for a quitclaim deed under existing law for the land conveyed to the United States.

An application for exchange will be noted "suspended" by the register, and, unless disallowed, the lands applied for in exchange will be segregated upon the records of the district land office and the General Land Office.

Notice shall be given to the Director of Grazing of final action taken on applications hereunder in those cases where either offered or selected lands are within a grazing district.

FRED W. JOHNSON,
Commissioner.

I concur:

JULIAN TERRETT,
Acting Director, Division of Grazing.

I concur:

B. B. SMITH,
Acting Director, Division of Investigations.

Approved:

CHARLES WEST,
Under Secretary.

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14. The contest of a homestead entry abates where there has been no service of notice on the contestee within thirty days from date of issuance of the contest notice-----

315

15. The rules of practice of the Department provide, in contests, for three modes of service, namely, personal service, by registered mail, and by publication where the party cannot be found after diligent search and inquiry, and affidavit to that effect is filed within thirty days from allowance of the application to contest; and the contestant assumes the risk of service when he elects to adopt the method of service by registered mail. If he has reason to apprehend that such service will not be effected within the thirty days allowed, he should employ one of the other methods of service-----

315

16. Matters arising subsequently to initiation of a contest may be made the grounds of a second contest, but proceedings thereon must be suspended to await termination of the first contest. A contest affidavit based on such matters is not subject to dismissal on the ground that it was premature-----

468

17. An entryman's absence from the homestead due to judicial restraint is not an abandonment of the land, rendering the entry subject to contest, and final proof may be submitted during the statutory lifetime of the entry-----

471

Cultivation.

18. Instructions of September 11, 1935, as to elimination of cultivation on certain homesteads. (Circular No. 1368)-----

347

Disabled World War Veterans.

19. Instructions of October 4, 1935, as to homestead proof by disabled World War veterans. (Circular No. 1371)-----

352

Divorced Persons.

20. Divorce terminates a wife's rights in the homestead of her former husband-----

471

Homestead—Continued.

Divorced Persons—Continued.

21. The wife of an entryman who has obtained a divorce from him for other cause than voluntary abandonment or desertion is not qualified as a deserted or abandoned wife within the terms of the Act of October 22, 1914 (38 Stat. 766), and accordingly is not entitled, under the provisions of said act, to submit proof upon and obtain patent to such an entry----- 471

22. Where it is established that an entryman's wife supplied the money by which the relinquishment of a former entryman was obtained, and later, in reliance upon assurance from the entryman (at the time serving a term in the penitentiary for commission of crime, and a divorce being contemplated by both parties) that the entry was hers, returned to the land, improved it and has since maintained residence thereon, in the meantime obtaining a divorce from the entryman, her title to the land will be held superior to the entryman's although not derived from the marriage relation----- 471

Final Proof.

23. Where final proof on a homestead entry is rejected because of insufficient showing as to compliance with law, a supplemental showing by *ex parte* affidavits may be accepted, without requiring new publication of notice, where the defect has since been cured and the Government is satisfied of the entryman's good faith (Case of *Roscoe L. Wykoff*, 43 L. D. 66, cited).----- 572

Forest.

24. Cultivation requirements not eliminated by Act of August 19, 1935. (Circular No. 1368)----- 347

Laches.

25. A protest against an existing homestead entry based upon an equitable title to the land under a prior entry, erroneously canceled after the lapse of two years from the date of final receipt, is insufficient where the prior entryman and his transferees have acquiesced in the erroneous cancellation until after the intervention of an adverse claim and the present entryman sets forth facts tending to show that neither the prior entryman nor his transferees have asserted any claim to the land since its er-

Homestead—Continued.

Laches—Continued.

roneous cancelation and have exercised no rights of ownership thereover. The burden in such a case is on the protestant to show that the equitable title acquired by the prior entryman has not been abandoned and has not been lost by laches in asserting it----- 485

Reclamation.

26. Instructions of March 21, 1935, as to noneffect of Executive withdrawals of November 26, 1934, and February 5, 1935, upon lands withdrawn under Reclamation laws. (Circular No. 1351)----- 247

27. A water users' association may receive patent from the United States to one reclamation homestead, conformed to a farm unit, if it shows that it does so for security purposes only and that it owns no other units on which construction charges remain unpaid. It may, however, bid in at tax sale unlimited acreage, but will be required within a reasonable time thereafter to assign the interests so acquired to persons qualified to receive patent thereto under the terms and conditions of the Reclamation Act and the governing regulations----- 241

Settler.

28. A proviso to section 2 of the Act of February 8, 1887 (24 Stat. 391), granting to the New Orleans Pacific Railway Company lands for a right-of-way, excepted from the grant and made subject to entry under the public land laws "lands occupied by actual settlers at the date of the definite location of the said road and still remaining in the possession of their heirs or assigns." *Held*, That in order to be entitled to the benefit of said proviso the claimant must show unbroken occupation of the land on the part of the settler, his heirs and assigns, and that all the occupants had been otherwise qualified to make homestead entry----- 4

Soldiers' Additional.

29. An enlisted man, discharged upon condition that he reenlist to serve three years and who shortly after reenlistment deserted, was not "honorably discharged" within the meaning of section 2304 of the Revised Statutes, and no rights under section 2307 can be predicated upon his military service----- 108

Homestead—Continued.

Soldiers' Additional—Continued.

30. The Department of the Interior will not return papers filed in support of a claim of soldiers' additional right under section 2306, Revised Statutes, where the claim is found to be invalid, since such papers, if returned, could afford opportunity for fraudulent barter and sale and useless harassment of the Government.-----

Page

107

Stock-raising.

31. Regulations of May 16, 1935, to govern filing of applications for homestead entry under Section 7 of Taylor Grazing Act. (Circular No. 1353)-----

257

32. The filing of an application, prior to the order of withdrawal of November 26, 1934, to amend an entry on account of mistake in the numbers of the tract entered, constitutes a "valid existing right" excepted from the order.-----

308

33. The clause in the Executive order of November 26, 1934, which renders the public-land withdrawal provided for therein subject to "valid existing rights", includes the case of one whose application to make a stock-raising homestead entry was subsequent to the date of the order, but who, before the order became effective, purchased the improvements and relinquishment of a prior entryman, established residence on the land with his family, and has since maintained residence thereon.-----

306

34. Where one who has perfected a homestead entry under section 6 of the enlarged homestead act applies to make an additional entry under section 5 of the stock-raising act he is only required to show that at the time of filing application he owned and resided in good faith upon the land embraced in his original entry. Case of *Sanford H. Wallis* (53 I. D. 274), cited and applied. Paragraph 19 of Circular No. 523 modified.-----

341

35. The making and perfecting of a forest homestead entry under the Act of June 11, 1906 (34 Stat. 233), for less than the maximum acreage permitted does not exhaust the homestead right, and, accordingly, one who has made acceptable final proof on such an entry and sold and disposed of the land is qualified to make original stock-raising entry of such quantity of land, designated as stock-raising,

Homestead—Continued.

Stock-raising—Continued.

outside the national forest, as, when added to the forest homestead, will not exceed 640 acres; and this regardless of whether the two tracts are more than 20 miles apart.-----

353

36. The right conferred upon an applicant by section 2 of the stock-raising homestead act, and that created by section 8 thereof, are not vested rights, but are mere preference rights, not attaching to the land unless and until it is designated as subject to said act. There can be no appropriation of the land, therefore, under either section of the law, prior to such designation. Accordingly, the Department of the Interior, in the face of the withdrawal of the land by the President's order of November 26, 1934, is without jurisdiction to designate it as subject to entry under said stock-raising homestead act.-----

448

37. Where one who has perfected a homestead entry under section 6 of the enlarged homestead act applies to make an additional entry under section 5 of the stock-raising act, he is only required to show, as to residence, that at the time of filing application he owned and resided in good faith upon the land embraced in his original enlarged homestead entry.-----

576

38. Where, following approval and acceptance by the Department of final proof submitted by an entryman under section 5 of the enlarged homestead act, the entryman applies to make additional homestead entry under section 6 of the stock-raising homestead act, it is within the province of the Department to inquire into, and the entryman may be required to show, all the facts and circumstances relating to the character and extent of his residence upon the land embraced in the original entry, for the purpose of determining whether he was residing upon such land in good faith at the time of application for the additional entry, this being contemplated by section 5 of the stock-raising act.-----

576

39. A mere application to make a stock-raising homestead works no severance of the mineral from the surface estate, and upon the rejection of the application an intervening mining claim attaches to the surface as well as to the minerals.-----

605

Homestead—Continued.

Widows, Minor Heirs, Devisees, Etc.

40. In order that a minor child of a homestead entryman may be eligible to receive the benefit of section 2292 of the Revised Statutes, both its parents must be dead.....

572

41. An unperfected homestead entry is not a part of the entryman's estate, but, by the terms of section 2291 of the Revised Statutes, if there be no widow, proof may be made by the heirs or devisee. The devisee is merely the person nominated in the will as the party who may avail himself of the privilege granted by Congress to complete the proof and secure to himself the property, and he is entitled to preference over heirs in making proof.....

572

42. Under the established practice of the Department, if it be shown in the record prior to issuance of patent that an entryman, since deceased, has made a will purporting to devise his interest in an entry made by him, the patent is issued to his heirs or devisees, where there is no widow or minor orphan children entitled to claim under section 2292 of the Revised Statutes; and it is left to the local courts to determine, in such case, who are the heirs and what their individual interests may be.....

572

43. The inchoate right or privilege granted to the statutory successors of an entryman by section 2291 of the Revised Statutes is one which may be availed of by making satisfactory final proof as basis for patent. It may be relinquished or abandoned, but it is not subject to transfer and does not descend by inheritance (Case of *Bernier v. Bernier*, 147 U. S. 242, cited).....

572

Honorable Discharge From Military Service.

See *Homestead*, 19.

Indian Reorganization Act.

See *Indians and Indian Lands; Indian Tribes*.

Indians and Indian Lands.

See, also, *Ataska*, 3; *Indian Reorganization Act; Indian Tribes*.

Alaska.

1. Instructions of June 22, 1935, regarding allotments of public

Page Indians and Indian Lands—Con. Page

Alaska—Continued.

lands in Alaska to Indians and Eskimos. (Circular No. 1359)..... 282

Allotment.

2. As a general rule, the courts consider an Indian allotment an assignment of the right of occupancy to an individual Indian, and under allotment laws providing for patents an allotment is made when the allottee becomes entitled to a patent as evidence of the allotment and promise of a fee title, and an allottee may become entitled to a patent even before the approval of his allotment selection whenever the applicable allotment law makes such approval mandatory after the showing of certain prescribed conditions and such conditions have been shown..... 295

3. The word "allot" and its derivatives, "allottee" and "allotments", have been used in various statutes, decisions, and by the Department of the Interior in both the broader sense referring to the completed process evidenced by trust patents and in the narrower and primary sense meaning the parcelling out and assigning of a specified number of acres of land to each Indian; and because of the variety of allotment laws, a case under one is not necessarily applicable to another..... 295

4. Where an act of Congress directed allotment of lands of an Indian reservation to the Indians therein, and the task of allotment selection had been completed but trust patents had not been issued as to some of the selections prior to the enactment of the Act of June 18, 1934, prohibiting future allotments, the later legislation does not prohibit the trust patenting of approved allotments nor the approval and patenting of allotment selections equitably vested in the allottee..... 295

5. An act of Congress (41 Stat. 1355) directed the Secretary of the Interior to prepare a final roll of the Indians of the Fort Belknap Reservation and allot the lands of said reservation *pro rata* among the Indians so enrolled. *Held*, that the Act of June 18, 1934, forbidding further allotment of lands to Indians, did not have application to the cases of enrolled Indians of this reservation who had selected allotments prior to the

Indians and Indian Lands—Con. Page

Allotment—Continued.

passage of the later act but whose allotment selections were then unpatented without fault on their part----- 295

Boundaries.

6. In determining the boundaries of an Indian reservation the recognition by the Interior Department of a boundary as such for more than 60 years will be deemed controlling----- 560

7. *Held*, That the location of the eastern portion of the south boundary of the San Carlos Indian Reservation in Arizona is the summit or crest of the Gila Mountains, such location of boundary being recognized in various public records, in harmony with action taken by the Interior Department, and supported by the natural import of the language employed in the Executive order of August 5, 1873----- 560

8. Giving to the words "valley of the Gila River" their ordinary and usual interpretation when employed in the Executive order of August 5, 1873, restoring to the public domain certain lands formerly embraced within the San Carlos Indian Reservation, an entire drainage area is not intended, the word "valley" being limited to its usual meaning as embracing lowlands in contradistinction to mountain slopes and ridges----- 560

Grazing.

9. Grazing regulations adopted December 28, 1935, to govern tribal lands----- 435

Heirs; Wills.

10. Regulations of May 31, 1935, as to determination of heirs and approval of wills of Indians except members of the Five Civilized Tribes and the Osages----- 263

Railroad Right of Way; Title.

11. Where an act of Congress authorized the condemnation and taking of Indian lands for a railroad right of way upon precedent compliance with certain requirements, among them full compensation for the lands acquired and a provision that claims for damages to persons holding title to the lands or having an interest therein should be first satisfied or secured, and these prerequisites

Indians and Indian Lands—Con. Page

Railroad Right of Way; Title—Con. were not fulfilled, title to such lands remains in the Indians or their successors in interest----- 451

12. The second proviso to section 14 of the Act of April 26, 1906 (34 Stat. 137), is operative, according to its own terms, only where a railroad has theretofore acquired an interest in the land in the nature of an easement, the lands permitted to be acquired by abutting land owners being Indian lands "reserved from allotment because of the right of any railroad * * * company therein in the nature of an easement for right of way", etc. It follows from this that the act does not operate to vest title to the land of a proposed right of way irrespective of whether or not a railroad company has acquired an interest in the land----- 456

13. A railroad company acquired the right to take and condemn lands for a railroad right of way in the Choctaw and Chickasaw Nations under an enabling act of general application to railroads, containing a provision that "before any railroad shall be constructed or any lands taken or condemned", full compensation should be made for all land taken and damage sustained. The road was not constructed by the company or any successor thereto, nor were lands condemned or damages paid in connection with a right of way. *Held*, that the conditions named in the act as precedent to acquirement of right of way not having been fulfilled, the lands involved remained lands of the Choctaw and Chickasaw Nations, and were not subject to the provisions of a later act of Congress making a particular disposition of Indian lands reserved from allotment "because of the right of any railroad or railway company therein in the nature of an easement"--- 451

14. An act of Congress provided that title to certain Indian lands reserved from allotment because of the "right of any railroad * * * company therein in the nature of an easement for right of way" shall vest in the owners of the abutting lands if the railroad company "shall cease to use such land for the purpose for which it was reserved." *Held*, That such act did not have appli-

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Railroad Right of Way; Title—Con-
 cation to Indian lands which by
 the terms of an earlier act of Con-
 gress were made available for rail-
 road rights of way upon the ful-
 fillment of certain prescribed con-
 ditions, which conditions were
 never fulfilled, and that title to
 such lands consequently remained
 in the Indians-----

456

15. The payment of money for
 right of way, damage, etc., required
 by the Act of April 26, 1906, was
 made a condition precedent where-
 by a railroad company might ob-
 tain the fee estate in land *over*
which it had acquired a right, in
the nature of an easement, by the
 payment of damages as prescribed
 by the Act of February 28, 1902;
 and such payment under the Act of
 April 26, 1906, has no reference to
 the payment of damages already
 prescribed by the Act of 1902. Ac-
 cordingly, nonpayment of damages
 under the earlier act does not
 make operative that clause of the
 1906 act which vests title in the
 owners of abutting lands-----

456

16. Where a deed of conveyance
 recited that the grantors (the
 Choctaw and Chickasaw Nations)
 conveyed to the grantee a certain
 tract "less 6.26 acres occupied as
 a right of way" by a certain rail-
 way, and the railway company
 failed to occupy the tract thus ex-
 cepted, title to the 6.26 acres did
 not pass to the grantee under the
 conveyance-----

456

17. The Choctaw and Chickasaw
 Nations are invested with the title
 to land selected by the Choctaw and
 Chickasaw Railroad Company for
 a railroad right of way under the
 Act of February 28, 1902 (32 Stat.
 43), since said railroad company
 has never paid compensation for
 such right of way nor made use
 of it-----

456

18. There has been a continuous
 and long-standing departmental
 construction of the Acts of Febru-
 ary 28, 1902 (32 Stat. 43), and
 April 26, 1906 (34 Stat. 137), in
 harmony with the conclusion
 reached in the opinion of January
 30, 1935-----

457

Riparian Rights.

19. Where, prior to the admis-
 sion of a Territory to statehood,
 an Indian reservation located
 therein had been established by the

Indians and Indian Lands—Con. Page

Riparian Rights—Continued.

United States which included lands
 on both sides of a river traversing
 a portion of the reservation, and
 after the admission of the State
 into the Union an island formed
 in said river, the island is a part
 of the reservation and its status
 Indian property, and not the prop-
 erty of the State-----

475

Trust Funds.

20. Under the Act of June 28,
 1906 (34 Stat. 539), and amendat-
 ory legislation, the right of in-
 dividual members of the Osage
 Tribe of Indians in Oklahoma to
 receive trust funds segregated and
 placed at interest to their credit
 in the United States Treasury and
 to share in the Osage tribal min-
 eral estate at the end of the trust
 period fixed by Congress, and dur-
 ing that period to receive the in-
 terest on the segregated trust
 funds and to participate in the dis-
 tribution of bonuses and royalties
 from the mineral estate, is an
 Osage "headright"-----

489

21. As the right to receive the
 segregated trust funds at the end
 of the trust period is part of the
 Osage "headright", the trust funds
 themselves fall into the same cate-
 gory as the headright in so far as
 voluntary and involuntary aliena-
 tion is concerned-----

489

22. The beneficial title in and to
 the segregated trust funds of Osage
 Indians rests in the individual
 members, and such title may be
 transmitted by descent (section 6
 of Act of June 28, 1906), or devise
 (section 8 of Act of April 18,
 1912). But the devisee or heir
 succeeds to the beneficial title sub-
 ject to the trust imposed upon the
 funds by Congress, and such trust
 may be released or terminated only
 when and as authorized by Con-
 gress-----

489

23. In the absence of legisla-
 tion by Congress providing for
 payment of the segregated trust
 funds of deceased Osage Indians
 to executors or administrators of
 their estates, such payments, oper-
 ating as they do to terminate or
 release the trust imposed upon such
 funds, are not authorized, whether
 the deceased member did or did not
 have a certificate of competency
 at the time of death-----

489

24. The authority contained in
 section 2 of the Act of February

Indians and Indian Lands—Con.	Page.	Indian Tribes—Continued.	Page
Trust Funds—Continued.		Administrative Action—Continued.	
27, 1925 (43 Stat. 1008), as amended by section 4 of the Act of March 2, 1929 (45 Stat. 1478), for payments to executors and administrators, does not extend to the segregated trust funds, but is confined to those funds which have accrued or which may accrue from the interest on said segregated trust funds and from the mineral royalties and bonuses-----	490	tribal authorities in the administration of these powers, have not terminated or impaired the legal rights and powers vested in the various Indian tribes-----	15
25. The Secretary of the Interior has only such authority over restricted Indian property as Congress has expressly or by necessary implication confided in him, and such authority cannot safely be construed as extending to the purchase by the Secretary, <i>independently of the Indian owner's wishes or consent</i> , of single premium annuity policies from moneys derived from the sale, under authority of section 8 of the Act of June 25, 1910 (36 Stat. 855), of timber on Indian allotments held under a trust or other patent containing restrictions on alienation, such a transaction involving the transfer of substantial sums of Indian moneys in consideration of an unsecured obligation to pay a stipulated sum monthly, beginning usually at some future date.-----	500	Descent and Distribution of Property.	
		4. Except with respect to allotted lands, the inheritance laws and customs of the Indian tribes are still of supreme authority----	15
		Domestic Relations—Custom Marriage and Divorce.	
		5. The domestic relations of members of an Indian tribe are subject to the customs, laws, and jurisdiction of the tribe-----	15
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		Government, Form of.	
		8. It is the prerogative of any Indian tribe to determine its own form of government-----	15
		Inheritance Laws and Customs.	
		9. With respect to all property other than allotments of land made under the General Allotment Act, the inheritance laws and customs of Indian tribes, except where otherwise provided by Congress, are of supreme authority, and this is clearly recognized by the Supreme Court (citing <i>Jones v. Meehan</i> , 175 U. S. 1, and other cases)-----	426
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		10. It is within the sovereign powers of an Indian tribe to adopt police regulations governing the property and contracts of members of the tribe-----	16
		Membership.	
		11. It is within the power of an Indian tribe to determine its own membership, but such power is sub-	
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Generally.			
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Administration of Justice.			
2. The judicial powers of a tribe are coextensive with its legislative or executive powers, and, except as criminal or civil jurisdiction has been transferred by statute to Federal or State courts, plenary civil and criminal jurisdiction rests with the duly constituted authorities of the Indian tribe. Such authority is not destroyed or limited by administrative action of the Interior Department in the establishment and operation of courts of Indian offenses-----	16		
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16. Conquest has brought the Indian tribes under the control of Congress, but except as Congress has expressly restricted or limited the internal powers of sovereignty vested in the Indian tribes such powers are still vested in the respective tribes and may be exercised by their duly constituted organs of government.....	15
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17. The foregoing powers are vested in the various Indian tribes under existing law, except as modified for particular tribes by special treaties or by special legislation.....	16
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Indian Tribes—Continued.

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the tribe and approved by the Secretary of the Interior pursuant to section 16 of the Act of June 18, 1934 (48 Stat. 984).....	16
Supervision of Federal Employees.	
20. Although the power to supervise Federal employees is not an inherent power of Indian tribal sovereignty, it is a power which is specifically granted to the Indian tribes by Revised Statutes, section 2072 (U. S. Code, title 25, sec. 48), subject to the discretion of the Secretary of the Interior.....	16
Tribal Property—Powers of Tribe Over.	
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Judicial Restraint.

See *Homestead*, 17.

"Known Mineral Land."

See *Mineral Lands*, 533; *School Land Grant*, 1, 2; *Words and Phrases*.

Lake, Nonnavigable.

See *Riparian Rights*.

Lease, Oil and Gas.

See *Oil and Gas Lands*.

Legislative History.

See *Statutory Construction*, 1.

Legislative Representatives.

1. One employed in an Executive Department of the Federal Government, with compensation derived from congressional appropriations, who is designated by the head of his Department to represent him in legislative matters, and who, in the course of such employment, calls upon a Member of Congress without invitation, seeking his support for proposed legislation, is not guilty of a violation of section 201 of title 18, United States Code-----

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Makela Decision.

See *Homestead*, 35.

Michigan, State of.

See *Riparian Rights*, 3.

Military Bounty-Land Warrants.

1. Instructions of December 11, 1934-----

99

2. As a condition to obtaining title from the United States, a claimant to public land by virtue of cash substitution for a military bounty-land warrant, will be required to waive rights to mineral or minerals in the land sought, the United States not having been divested of its equitable title, should the Geological Survey report said land is known to be valuable, or has prospective value, for oil or gas or any other mineral named in the Act of July 17, 1914, as amended---

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Mineral Lands.

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See, also, *Coal Lands*; *Oil and Gas Lands*; *School Land Grant*; *Sodium*; *Words and Phrases*, 5.

1. Instructions: Procedure on geological reports unfavorable to nonmineral entries-----

111

Generally.

2. Regulations adopted April 14, 1936, governing fees to accompany applications for coal, sodium, potash, and other mineral licenses, permits, and leases. (Circular No. 1333)-----

433

3. The authority finally to determine the issue of fact as to the known mineral character of public land is conferred by law on the Secretary and no statute has ever authorized any delegation by him of that authority. Departmental rules and regulations referring issues of fact to officials of the General Land Office were "designed to facilitate the Department in the dispatch of business, not to defeat the supervision of the Secretary." (See *Knight v. United States Land Association*, 142 U. S. at p. 178.) They cannot and do not operate to deprive the Secretary of any authority which he possesses under the law. *West v. Standard Oil Company*, 278 U. S. 200-----

533

4. Lands the surface of which is open to entry under the Act of June 22, 1910, or the Act of July 17, 1914, the mineral deposits defined therein being reserved to the United States, unless otherwise reserved, are to be construed as reserved only to the extent of the defined minerals and unreserved insofar as the surface is concerned. Lands having this status at the date of the Executive order of November 26, 1934, were reserved by that order, and are not now open to entry, except where valid rights existed at the date of the order, which rights must be protected---

211

5. In determining whether a tract of public land was of known mineral character on a certain date the Secretary is not bound by an erroneous test since discredited and abandoned merely because that test happened to be improperly current in the Department on that date---

533

6. Lands may be "known mineral lands" and therefore excepted from a school land grant although no actual discovery of mineral has been made thereon. Such lands so excluded from the grant without proof of discovery would still be

Mineral Lands—Continued.

Generally—Continued.

subject to disposition under the mining laws upon proof of discovery just like other lands containing the same mineral.-----

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7. In determining whether lands within school grants are known mineral lands the same test is applicable as that applied to lands in railroad grants, Congress clearly having intended to dispose of all mineral lands in only one way, namely, under the mining laws. (Cited, *Mining Company v. Consolidated Mining Company*, 102 U. S. 167; *Detteback v. Hawk*, 115 U. S. 392.) The fact that railroad grants except mineral lands expressly whereas school grants except them only by inference strengthens rather than weakens the argument that the same test is properly applicable in both classes of cases, for the existence of the express exception in the one was one of the important factors which led the Supreme Court to infer the existence of the same exception in the other.-----

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8. The California school grant act (Act of March 3, 1853, 10 Stat. 246), construed in *Mining Co. v. Consolidated Mining Co.*, 102 U. S. 167, was enacted many years before the Federal mining laws and long before Congress made any provision for the acquisition of mineral land on proof of discovery. The basis for the exception of mineral land from that grant, read into the act by the Supreme Court, had nothing to do with discovery, but was spelled out from a long and varied list of Congressional enactments, including railroad grants, dealing with the disposition of the public domain, and which reflected a consistent Congressional practice not to give away the mineral lands, but rather to reserve them for future disposition in accordance with such policies as Congress should from time to time deem expedient.-----

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Application for prospecting permit.

9. The mere filing of an application for a prospecting permit does not give the applicant any right as against the Government, but merely a prior right over any subsequent applicant, the Department involved being under no obligation to issue a permit if it is in the general interest that no permit be issued.-----

13

10. Expenditures in connection with the land made by an appli-

Mineral Lands—Continued.

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Application for prospecting permit—Continued.

cant for permit before the granting thereof are at his own risk and establish no equity obligating the Department to grant a permit.-----

13

Oil shale.

11. Instructions of June 4, 1935, modifying oil shale withdrawal to allow sodium prospecting permits and leases. Circular No. 1220 modified.-----

280

Phosphate.

12. Regulations of August 9, 1935, amending sections 7 to 10, inclusive, of Circular No. 696.-----

317

Mineral Leasing Act.

See, also, *Mineral Lands; Mining Claim; Withdrawal of Public Lands; Words and Phrases*, 6.

Generally.

1. As used in section 14 of the Mineral Leasing Act of February 25, 1920, the expression "compact" relates to squares, so that, to be "compact", the selection of primary lease acreage must be in the form of a square wherever possible, and where that is not possible, a rectangle or approximate rectangle approaching as nearly as possible a square would conform to the statutory requirement.-----

382

2. The Executive withdrawal order of November 26, 1934, does not prevent the granting of permits and leases under the Mineral Leasing Act of February 25, 1920, since that act, with certain specified exceptions, is operative within reserved areas, and for the further reason that the Taylor Grazing Act expressly disclaims the purpose of interfering with such use. Nor does the Executive order affect rights of way or other rights granted within reserved areas, provided the use for which the right is granted shall not be inconsistent with the purpose of the reservation.-----

211

3. The so-called "unitization provision" included in lease forms issued under the Act of February 25, 1920, which provides for unitary development and operation of lands containing oil and gas by lessees, where deemed by the Secretary in the public interest, is designed to prevent recognized existing destructive practices in the oil and gas industry, and, there-

Mineral Leasing Act—Contd.

Generally—Continued.

fore, its inclusion in the lease forms is a proper exercise of the Secretary's authority to give effect to the recognized conservation policy of the act.-----

4. The Mineral Leasing Act provides that the permittee, upon the establishment of the required facts, shall be granted a lease, but does not contemplate that he has acquired a vested right to a particular form of lease, as, for instance, that form in use at the date a prospecting permit was granted to him.-----

Compactness.

5. It is a reasonable assumption that Congress, in changing the wording of section 14 of the Mineral Leasing Act by inserting the word "reasonably" before the word "compact" in the Act of August 21, 1935 (49 Stat. 674), was aware of and had in mind the construction placed by the Department upon the word "compact" in connection with the selection of primary lease acreage under the Mineral Leasing Act, and in adding the word "reasonably" did so with a view to allowing the lease applicant more latitude of choice in making his mineral selection.-----

6. The Act of August 21, 1935, plainly contemplates the discontinuance of the existing permit system provided for in the Mineral Leasing Act, and consequently the amendment to section 14 thereof contained in the Act of August 21, 1935, by inserting the word "reasonably" before the word "compact", can apply only to cases in which leases are applied for under existing permits or allowable pending applications for permits.-----

Mining Claim.

See, also, *Mineral Lands; Mineral Leasing Act; Power Site Lands.*

Generally.

1. Instructions of March 12, 1935, concerning mining claims on the public domain. (Circular No. 1278 revised)-----

1½. Regulations, Par. 37 (b) See Circular No. 1337, amending Circular No. 430.-----

2. The provisions of section 3 of the Act of June 9, 1916 (39

Mining Claim—Continued.

Generally—Continued.

Stat. 218), revesting in the United States title to lands forfeited by the Oregon and California Railroad Company, expressly refrained from extending the mining laws to power site lands.-----

3. A mere application to make a stock-raising homestead works no severance of the mineral from the surface estate, and upon the rejection of the application an intervening mining claim attaches to the surface as well as to the minerals. Case of *Filtrol Company v. Brittan and Echart* (51 L. D. 649), distinguished.-----

4. The Secretary of the Interior has authority to determine that a mining claim is invalid for lack of discovery, for fraud, or other defect, or that it is subject to cancellation for abandonment.-----

5. Congress, in extending the operation of the mining laws to the Death Valley National Monument, "or as it may hereafter be extended", by the Act of June 13, 1933, did not thereby abrogate its control over the lands involved, which is evidenced by the fact that the act itself expressly provides that the surface use of locations, entries, or patents shall be subject to general regulations to be prescribed by the Secretary of the Interior.-----

Segregation Survey.

6. Section 37 (c) of the Mining Regulations forbids the allowance of an agricultural claim for any portion of a lot, or legal subdivision of 40 acres, where there is no approved survey of the mining claims intruding therein; and even where there is such an approved survey, evidence is required of the agricultural applicant of the mineral character of the claim whose segregation is sought as a basis for the segregation of the residue of the land (citing *Roos v. Altman et al.*, 54 I. D. 47, 55)-----

Annual Work and Labor.

7. Instructions of June 26, 1935, regarding suspension of annual assessment work. (Circular No. 1360)-----

8. Instructions of May 19, 1936, regarding suspension of annual assessment work. (Circular No. 1388)-----

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Mining Claim—Continued.

Annual Work and Labor—Contd.

9. Under section 2324 of the Revised Statutes, a default in performance of annual work on a mining claim renders it subject to relocation by another claimant, but does not affect the locator's right as between him and the United States, and he is entitled to preserve his claim by resumption of work after default and before such relocation----- 287

10. The excepting clause in section 37 of the General Leasing Act, saving existing valid claims "thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws", held to preclude the United States from declaring a forfeiture of a mining claim, otherwise valid, for default in performance of assessment work----- 288

Development Expenditure.

11. An aerial tramway used and essential for the transportation of ore from a mine is available toward meeting the requirement of the statute respecting expenditures prerequisite to patent----- 348

12. Department decisions in the cases of *Copper Glance Lode* (29 L. D. 542), *Monster Lode* (35 L. D. 493), and *Fargo No. 2 Lode* (37 L. D. 404), in so far as in conflict with decision in this case in the accrediting of expenditures, held not controlling----- 348

Location.

13. Subject to the exception embodied in section 2332 of the Revised Statutes, the rule is well settled that the right of possession to a mining claim results only from a location made in conformity with the mining laws----- 430

Valid Possession.

14. Section 2332 of the Revised Statutes, which provides that where a mining claim has been held and worked for a period equal to the time prescribed by the local State or Territorial statute of limitations for mining claims, evidence of such possession and working for such period shall be sufficient to establish a right to a patent, in the absence of any adverse claim, contemplates valid possession of the land, and is without application where the land is at

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Mining Claim—Continued.

Valid Possession—Continued.

the time within a railroad grant or otherwise not subject to mining location----- 430

15. An attempted mining location absolutely void when made, because upon land to which the United States was without title, is not later rendered valid by reason of the revestment of title in the United States followed by the opening of the land to location under the mining laws----- 430

16. Mere possession and working under a void mining location for a period insufficient to acquire a possessory title under the provisions of section 2332, Revised Statutes, is insufficient to prevent the operation of the Federal Water Power Act----- 430

Lode.

17. The depiction of certain lines of a lode mining location over patented land on an official plat of mineral survey filed with an application for patent to the location, where the patented land is expressly excluded from the application, does not create a cloud on the patentee's title----- 254

Mistake in Land Description.

See *Homestead*, 32.

National Park Service.

Title and Title Records.

1. The Director of the National Park Service is clothed with authority, by virtue of Sec. 2 of the Act of March 3, 1899 (30 Stat. 1346), Secs. 3 and 4 of the Act of February 26, 1925 (43 Stat. 983), and Executive Order No. 6166, dated June 10, 1933, made pursuant to the Act of March 3, 1933 (47 Stat. 1517), to correct the United States title records therein referred to to show ownership in the occupant, provided the occupant submits sufficient proof of uninterrupted possession----- 479

2. Congress, having conferred upon the Director of Public Buildings and Public Parks authority over "all official records, papers, etc., in the possession of the Secretary of War or Chief of Engineers of the United States Army" pertaining to the title to lot 810, square 825, District of Columbia, and having later transferred all said duties and records to the Di-

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National Park Service—Contd.

Title and Title Records—Continued.
 rector of the National Park Service, it follows that the Director is clothed with authority to correct a record pertaining to said lot 810—

3. Where an act of Congress authorizing a correcting of land title records does not specify the method of correction, but merely requires that the records be so corrected that they shall show title in the occupant, and the purpose of the act is in effect to divest the United States of claim of title, a quitclaim deed is within the authority of the act and suffices—

4. Where a statute requires the occupant of land to file proof that he or his predecessors in claim have had actual possession of the land uninterruptedly for 20 years, it is not sufficient that the facts as to such possession are stated on information and belief, but they must be within actual knowledge of the affiants—

Navajo Indians.

See also *Indians and Indian Lands*, 6-8.

1. The personal estate of a deceased member of the Navajo Tribe should be distributed according to tribal custom, regardless of any law of the State of domicile or any regulation of the Department inconsistent therewith—

2. No necessity appears on grounds of law or public policy for regulation of the inheritance of personal property of Navajo Indians, and the Department's regulations adopted May 31, 1935 (55 I. D. 263), relating to the determination of heirs and approval of wills, specifically restrict departmental supervision over the inheritance of personal property of Indians to reservations which have been allotted; also, the law and order regulations adopted November 27, 1935, provide that Indian judges shall apply tribal custom in the distribution of personal property—

Navigable Waters.

See *Riparian Rights; Water Rights*.

Nonencumbrance Certificate.

See *School Land Selection*, 3, 4.

Nonnavigable Waters.

See *Oil and Gas Lands*, 5; *Riparian Rights; Water Rights*, 2.

Page Notice.

See *Homestead*, 14, 15; *Practice and Rules of Practice*, 5.

Officer of the United States.

See *Attorneys and Agents*.

1. One not appointed to a position by the President, a court of law, or the head of a Federal department, and whose employment does not embrace the ideas of tenure and duration, is not an officer of the United States—

Oil and Gas Lands.

See also *Mineral Lands; Oil Shale; School Land Grant*.

Generally.

1. Instructions of January 19, 1935, governing procedure on reports of Geological Survey. (Circular No. 1344)—

2. Regulations of November 14, 1934, *in re* suspension of annual payments of rental under coal, oil, and gas leases—Act of February 9, 1933, amending Act of February 25, 1920. (Circular No. 1341, amending Circular No. 1294)—

3. Regulations of August 28, 1935, concerning Act of August 21, 1935, amending Oil and Gas Leasing Act. (Circular No. 1367)—

4. Regulations of May 7, 1936, under sections 13, 14, 17, and 28 of the General Leasing Act of February 25, 1920, as amended by the Act of August 21, 1935. (Circular No. 1386)—

5. Lands beneath the waters of a nonnavigable lake which is surrounded by tracts which have been patented by the Government are not subject to oil and gas prospecting under the terms of the Mineral Leasing Act of February 25, 1920—

Acreage.

6. Where an act of Congress fixes a maximum of acreage of oil and gas lands which may be leased by the Government to any one applicant, a construction of the act which would permit of obtaining more than the maximum through the device of assignments of leases is unwarranted as being illogical and unreasonable—

7. Section 27 of the General Leasing Act of 1920 reads in part as follows: "That if any of the lands or deposits leased under the provisions of this act shall be subleased, trusted, possessed, or controlled by any device permanently, temporarily, directly, indirectly, or in any

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Oil and Gas Lands—Continued. Page

Acreage—Continued.

manner whatsoever, so that they form part * * * 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." *Held*, That this language, being made applicable to any lease and any acreage limitation in the act, necessarily includes section 18 thereof, and accordingly, oil or gas leases in the hands of an assignee of the original holder or holders are subject to the acreage limitations of section 18 of the act----- 397

Compactness.

9. Certain provisions in section 27 of the Leasing Act (41 Stat. 437), as amended by the Act of July 3, 1930 (46 Stat. 1006), and substantially reenacted in the Act of March 4, 1931 (46 Stat. 1523), authorized the Secretary of the Interior to alter, change, or revoke drilling, producing, and royalty requirements of leases of oil and gas lands in order to bring about agreements for their unit or cooperative development. *Held*, That these provisions empowered the Secretary to alter or waive requirements of compactness, contained in section 14 of the Leasing Act, in order to effectuate such agreements; and action looking to the disturbance of leases previously allowed is not only of doubtful wisdom but lacks sufficient legal basis----- 547

Determinative Test.

8. Upon the question whether land is valuable as oil land in contemplation of the Federal public-land laws, *held* sufficient if its value as oil land is present or prospective----- 121

Form and Contents of Lease.

10. Under the authority granted by section 32 of the Act of February 25, 1920 (41 Stat. 437), "to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this act", which act, furthermore, does not set forth the form of either the permit or lease, the Secretary of the Interior may insert in an oil and gas lease such reasonable provisions as are necessary to effectuate the purposes of the act----- 189

Oil and Gas Lands—Continued. Page

Prospecting Permit.

11. Absolute property in and dominion and sovereignty over the soils beneath their tide waters have been reserved to the several States, so that land in the State of California below the line of ordinary high tide is not subject to prospecting under a Federal oil and gas prospecting permit, title to said land having passed to the State, subject only to the paramount right of navigation over the waters so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States... 1

12. Lands beneath the waters of a nonnavigable lake which is surrounded by tracts which have been patented by the Government are not subject to oil and gas prospecting under the terms of the Mineral Leasing Act of February 25, 1920----- 310

13. One who exercised a preferential right to an oil and gas lease under section 20 of the Leasing Act of February 25, 1920 (41 Stat. 437), the land being at the time within the limits of a defined producing area, and who later surrendered the lease, which was duly canceled, is not qualified to receive an oil and gas prospecting permit for the same land, since embraced within the permit application of another, even though said land has been eliminated from the proven area of the oil field and become subject to oil and gas prospecting-- 530

Unit Plan of Development.

See, also, *Words and Phrases*, 8.

14. The so-called "unitization provision" included in lease forms issued under the Act of February 25, 1920, which provides for unitary development and operation of lands containing oil and gas by lessees, where deemed by the Secretary in the public interest is designed to prevent recognized existing destructive practices in the oil and gas industry, and, therefore, its inclusion in the lease forms is a proper exercise of the Secretary's authority to give effect to the recognized conservation policy of the act----- 189

15. *Held*, That the action of the Secretary, on January 31, 1931, in certifying, upon the authority of the Act of July 3, 1930, "that each and every lease that has been or

- Oil and Gas Lands—Continued.**
- Unit Plan of Development—Contd.**
 may be issued that is subject to this agreement for a unit plan of development and operation for the North Dome of Kettleman Hills shall continue beyond the twenty years specified in the lease and until the termination of the plan", affected all leases subject to the agreement, including those of tracts not in compact form, and of necessity had the effect of validating such leases of tracts not compact included in the unitization agreements; and by this action a solemn assurance was given, within the scope of the Secretary's authority to give the same, that all such leases were to be deemed valid and effective-----
- Boundaries of Geological Structure.**
 16. The defining of the boundaries of the geological structures of producing oil or gas fields, under authority of section 32 of the Leasing Act, is for administrative purposes and is not a guaranty of geologic character. Accordingly, such boundaries are not to be taken as absolutely and accurately showing the extent in each instance of the geological structure producing oil or gas, but they may later be extended or reduced to accord with the facts-----
- Oil Shale.**
 See *Mining Claim*, 287.
- Oregon and California Railroad Lands.**
 See *Mining Claim*, 2.
- Osage Indians.**
 See *Indians and Indian Lands*, subheading, "Trust Funds."
- Overruled and Modified Cases.**
 See *Table*, page xviii.
- Papago Indian Reservation.**
 1. Instructions of February 27, 1935, governing mining upon reservation. (Circular No. 1347)-----
- Patent.**
 See *Riparian Rights*, 2.
- Patented Land.**
 See *Mining Claim*, 17.
- Permit, Oil and Gas.**
 See *Oil and Gas Lands*, subheading, "Prospecting Permit."
- Phosphate.**
 See *Mineral Lands*, 12.
- Pipe Line.**
 See *Rights of Way*, 3.
- Plea in Confession and Avoidance.**
 See *Practice and Rules of Practice*, 14.
- Possession, Enforcement of Right.**
 1. To enforce the right to possession of public lands, resort must be had to the local courts, the Land Department not possessing the instrumentalities necessary to effect this object-----
- Power Site Reservations.**
 See also *Mining Claim*, 2; *Withdrawal of Public Lands*, 25, 26.
 1. Congress, in the exercise of its duly delegated legislative powers under the Constitution, had full authority to prohibit access to the Federally owned land embracing the Hetch Hetchy Project, by any individual or corporation, and full authority to dispose of such land or of the right to generate electric energy thereon under such conditions as it saw fit to impose-----
 2. Section 6 of the Act of December 19, 1913 (38 Stat. 242, 245), commonly termed the Raker Act, provides: "That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee: * * *"
Held, That a sale by the grantee, the City and County of San Francisco, to a private utility corporation, of the electric energy developed under its grant, with a view to resale and distribution by said corporation to consumers of electricity, constitutes a violation of the act-----
- 321**
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Power Site Reservations—Con. Page

ciation." The grantee entered into a contract with a private company for the distribution of the power so generated, which company has since distributed and sold electric current in San Francisco. Held, That although the contract entered into was stated to be one of agency or consignment, and not one of sale, and the language of consignment was employed, the contract, when judged by the substance of its terms, must be held to be one of sale, the disposition of the electric power being under conditions necessarily contemplating its resale to consumers-----

321

4. The legislative history of the Baker Act clearly shows that the purpose of section 6 thereof was to prevent the water or power developed on the Hetch Hetchy Project from ever falling into the hands of a private corporation or monopoly. From the facts it appears that the power developed on the Hetch Hetchy Project has fallen into the hands of just such a corporation or monopoly-----

322

Practice and Rules of Practice.

See Table, page xxxvii; see also *Attorneys and Agents*.

1. Mere informality in bringing a matter to the attention of the Secretary should not prevent a consideration of its merits-----

532

2. A case should not be reopened on the basis of additional facts unless proof of those facts would warrant a change in the previous action-----

532

3. A stipulation in one action affects another between the same parties only if it is of such a nature as to warrant a dismissal of the action as a matter of law or if either the agreement upon or the performance of its terms tends toward a determination of the issue involved-----

532

4. A stipulation made pursuant to a joint resolution of Congress is not binding upon the parties beyond the limits fixed by the resolution-----

532

5. The rules of practice of the Department provide; in contests, for three modes of service, namely, personal service, by registered mail, and by publication where the party cannot be found after diligent search and inquiry, and affidavit to that effect is filed within thirty days from allowance of the

Practice and Rules of Practice—Continued. Page

application to contest; and the contestant assumes the risk of service when he elects to adopt the method of service by registered mail. If he has reason to apprehend that such service will not be effected within the thirty days allowed, he should employ one of the other methods of service-----

315

6. Rule 2 of the Rules of Practice requires that an application to contest an entry must be under oath, and Rule 3 requires that the statements therein must be corroborated by at least one witness under oath-----

112

7. The rules of practice of the Land Department relating to depositions and interrogatories do not contain any authority for dispensing with the signatures of witnesses to their testimony. Rule 39, making provision for waiving the signatures of witnesses, is applicable only to hearings-----

389

8. Failure to secure the signatures of witnesses to depositions and interrogatories is a curable defect, and does not warrant dismissal of adverse proceedings brought by the Government against an entry, and upon receipt of depositions, duly signed, which were formerly inadmissible as evidence because of the absence of signature, the defendant should be afforded opportunity to adduce testimony-----

389

9. Notice and authentication of a deposition are for the benefit of the party against whom the deposition is to be used, and hence may be waived by him, and requirements that the deposition be read to and subscribed by the witness may be waived by stipulation; but in the absence of a stipulation between the parties or some explicit provision in the rules of practice, the requirement of signature of a witness to his deposition cannot be waived by any paper signed solely by the party at whose instance the deposition was taken-----

389

10. Where in a trial of issues before the Land Department, the parties shall, by stipulation filed with the record so agree, or where the defendant has failed to appear or fails to participate in the trial, and the contestant shall, in writing, so request, the witnesses' sub-

Practice and Rules of Practice—Continued.	Page	Railroad Grant Lands.	Page
scription to their testimony may be dispensed with-----		See <i>Homestead</i> , 28; <i>School Land Grant</i> , 1.	
11. Where, at a <i>hearing</i> or <i>trial</i> , the defendant fails to participate therein, and the contestant makes written request that the witnesses shall not be required to subscribe their names to their testimony, such will not be required; but where depositions are taken under other circumstances than a hearing or trial, such subscription may not be dispensed with, the conditions under which such request could be granted being nonexistent.	389	Raker Act (38 Stat. 242).	
12. There is a substantial difference in consequences between a failure to appear at the trial of a case duly and regularly ordered and a failure to appear at the taking of oral depositions on behalf of one of the parties. In the former instance the defendant not only foregoes his right to present his case and cross-examine the plaintiff's witnesses, but also his right to object to the testimony offered-----		See <i>Power Site Reservations</i> .	
13. There are no rules of practice of the Department relating to the time or manner in which objections to depositions may be taken other than the requirement that they be made at the hearing.	390	Reclamation; Reclamation Acts.	
14. While there is no specific rule for replications under the rules of practice of the Land Department, a plea in confession and avoidance as a defense requires a demurrer or reply-----		See, also, <i>Homestead</i> , 27.	
		1. Instructions of March 21, 1935, as to noneffect of Executive withdrawals of November 26, 1934, and February 5, 1935, upon lands withdrawn under Reclamation laws. (Circular No. 1351)-----	247
		2. Public land included in a State irrigation district and burdened with an obligation to pay a proportionate share of irrigation charges is unaffected by the withdrawal order of November 26, 1934, which order declares its operation as a land withdrawal is subject to "existing valid rights"-----	445
		Relation, Doctrine of.	
		See <i>Homestead</i> , 6.	
	390	Relinquishment.	
		See <i>Homestead</i> , 12, 13.	
		Replication.	
	390	See <i>Practice and Rules of Practice</i> , 14.	
		Reserved Lands.	
		See <i>Water Rights; Withdrawal of Public Lands</i> .	
	468	Res Judicata.	
		1. A Department decision denying an application based on a construction of a statute is <i>res judicata</i> so far as the General Land Office is concerned, notwithstanding the construction of the statute is changed by a subsequent decision of the Department in another case-----	107
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Preference Right.			
See <i>Color of Title</i> 1; <i>Homestead</i> , subheading, " <i>Contest</i> ."			
President.			
See <i>Taylor Grazing Act</i> , 1; <i>Withdrawal of Public Lands</i> .			
Public Moneys.			
1. Instructions of May 31, 1935, concerning deposit of public moneys. (Circular No. 1354)-----	262		
Public Sale of Lands.			
See <i>Isolated Tracts</i> .			
Public Use of Lands.			
See <i>Water Rights</i> .			
		Rights of Way.	
		Generally.	
		1. The right to appropriate water does not necessarily carry with it a right of way over public land for the use of such water, and Congress has in various laws provided for permitting rights of way over public and reserved lands of the United States for the use of waters, which rights of way vary as to conditions and purposes and may be altogether prohibited-----	378

Rights of Way—Continued.

Pipe Line.

2. A stipulation required of applicants for rights of way for pipe lines over public lands, embodied in regulations promulgated under authority of section 28 of the Act of February 25, 1920, included the following: "and further expressly consents and agrees * * * that the use of the pipe line for the transportation of oil or gas shall be limited to oil or gas produced in conformity with State and/or Federal laws, * * * and further expressly consents and agrees to purchase and/or transport oil or gas available on Government lands", etc. *Held:* If the applicant is merely a carrier, and not a purchaser as well, the stipulations apply to it as a carrier only, and if it carries oil but not gas the applicant is affected only as a carrier of oil, the language of each term of the stipulation being in the disjunctive, and not intended to have the effect of changing the business of a pipe line right-of-way grantee.

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Riparian Rights.

See *Indians and Indian Lands, 19; Oil and Gas Lands, 5; Water Rights.*

1. In surveys by the United States Government, the meander lines which are run along or near the margins of streams or lakes are for the purpose of ascertaining the area of the upland, and not for the purpose of limiting the title of the grantee to such meander lines, the waters themselves constituting the real boundary.

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2. In the case of navigable waters, the submerged lands do not belong to the Federal Government, having passed to the State upon its admission to the Union. In the case of lands bounded by nonnavigable waters, title to the submerged lands is surrendered if the patent for the marginal uplands issues without reservation or restriction. In either case, the effect of the grant on the title to the submerged lands will depend upon the law of the State where the lands lie.

310

3. In the State of Michigan, in the absence of words of reservation or restriction, or unless the contrary appears, a grant of land bounded by a watercourse conveys riparian rights, and the title of the riparian owner extends to the

Riparian Rights—Continued.

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middle line of the lake or stream. The shore proprietor takes by virtue of shore ownership, and his interest in the bed of the lake or stream is acquired as appurtenant to the grant, the extent of his interest depending upon his frontage and the form, length, and breadth of the body of water upon which his land abuts.

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Rules of Practice.

See *Practice and Rules of Practice.*

Sale of Public Lands.

See *Isolated Tracts.*

San Carlos Indian Reservation.

See *Indians and Indian Lands, subheading, "Boundaries."*

San Francisco, City and County.

See *Power Site Reservations.*

School Land Grant.

See, also, *Mineral Lands, 6-8; School Land Selection; Words and Phrases, 5.*

Generally.

1. In determining whether lands within school grants are known mineral lands the same test is applicable as that applied to lands in railroad grants, Congress clearly having intended to dispose of all mineral lands in only one way, namely, under the mining laws. (Cited, *Mining Company v. Consolidated Mining Company, 102 U. S. 167; Deffeback v. Hawke, 115 U. S. 392*). The fact that railroad grants except mineral lands expressly whereas school grants except them only by inference strengthens rather than weakens the argument that the same test is properly applicable in both classes of cases, for the existence of the express exception in the one was one of the important factors which led the Supreme Court to infer the existence of the same exception in the other.

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2. Lands may be "known mineral lands" and therefore excepted from a school land grant although no actual discovery of mineral has been made thereon. Such lands so excluded from the grant without proof of discovery would still be subject to disposition under the mining laws upon proof of discovery just like other lands containing the same mineral.

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School Land Grant—Continued.

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California.

See, also, *Mineral Lands*, 8.

3. The Act of March 3, 1853 (10 Stat. 246, which provides for the grant of the sixteenth and thirty-sixth sections of each township of public land in California to that State for public school purposes does not in terms except mineral land from the grant. Such an exception, however, was early spelled out by judicial construction, and has been adhered to ever since, in a long line of decisions involving this statute, and is too firmly entrenched to be uprooted save by legislative action-----

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4. Title to Sections 16 and 36 does not pass to the State of California under its school land grant prior to the acceptance by the Department of the Interior of a survey officially identifying the land; and if the land was then known to be mineral in character, no title passed to the State under that grant-----

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5. In determining whether land was of known mineral (oil) character, as contemplated by the public-land laws, and, therefore, excepted from a grant of public lands, knowledge of actual mineral content need not be shown, it being sufficient if known conditions are shown from which mineral character reasonably can be inferred. (*United States v. Southern Pacific Company et al.*, 251 U. S. 1)-----

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6. The mineral (oil) character of land embraced in a school section may be established by evidence of physical conditions observed or observable prior to or at the time of the official approval of the plat of survey which support the conclusion that "an ordinarily prudent man, understanding the hazards and rewards of oil mining, would be justified in purchasing the lands for such mining and making the expenditures incident to their development, and * * * that a competent geologist or expert in oil mining, if employed to advise in the matter, would have ample warrant for advising the purchase and expenditure." This evidence may consist of the testimony of witnesses, including experts and geologists, as to the conditions observed by them which were observable on and prior to the date of the official approval of the plat of survey, and of extracts from scientific

School Land Grant—Continued.

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California—Continued.

and other publications showing the state of geological knowledge and belief concerning the land at the time of approval of the survey----

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7. The evidence shows that Section 36, T. 30 S., R. 23 E., M. D. M., was known to be mineral in character in 1903, and it was, therefore, excluded from the grant to the State of California for school purposes. The observable conditions before, on, and after January 26, 1903, were such as reasonably to engender, in a competent geologist or expert in oil mining, the belief that said Section 36, and each quarter-section thereof, contained oil and gas of such quality and in such quantity as would render extraction profitable, and these conditions were not only observable on and after January 26, 1903, but were observed before that date----

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8. The California school grant act (Act of March 3, 1853, 10 Stat. 246), construed in *Mining Co. v. Consolidated Mining Co.*, 102 U. S. 167, was enacted many years before the Federal mining laws and long before Congress made any provision for the acquisition of mineral land on proof of discovery. The basis for the exception of mineral land from that grant, read into the act by the Supreme Court, had nothing to do with discovery, but was spelled out from a long and varied list of Congressional enactments, including railroad grants, dealing with the disposition of the public domain, and which reflected a consistent Congressional practice not to give away the mineral lands, but rather to reserve them for future disposition in accordance with such policies as Congress should from time to time deem expedient----

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School Land Selection.

See, also, *School Land Grant*.

1. Regulations of October 19, 1934, as to issue of patents to States to designated school sections in place. (Circular No. 1338)-----

7

Indemnity.

2. The effect of filing and allowance of a school land indemnity selection is to segregate the land selected, even though it may thereafter be found that there are defects which render cancellation necessary; and such a selection, even though erroneously received, segre-

School Land Selection—Contd. Page

Indemnity—Continued.

gates the land so that no other application therefor may be received or rights initiated by its tender..... 249

3. In the absence of other objection, a reasonable period of additional time for the filing of non-encumbrance certificates as to base lands may be allowed, notwithstanding the withdrawal order of November 26, 1934..... 245

4. The Executive order of November 26, 1934, does not operate to withdraw from entry, etc., land within an indemnity school land selection in support of which there has been a failure to supply the required certificate of nonencumbrance, such failure being a curable defect and not *ipso facto* working a cancelation or forfeiture, the Land Department not being required by law to cancel such selection without affording opportunity to supply the certificate by granting additional time..... 245

5. Failure of a State to complete the selection of indemnity school lands, due to tendering defective base, is a curable defect, and in such cases the withdrawal order of November 26, 1934, does not operate to prevent the completion of the selection, said order expressly saving existing valid rights..... 249

Secretary of the Interior.

See, also, *Coal Lands; Indian Tribes; Mineral Lands; Mining Claim; Oil and Gas Lands; Taylor Grazing Act.*

1. The authority of the Secretary of the Interior is not appellate only, and he may inquire into a case *de novo*..... 533

2. The authority finally to determine the issue of fact as to the known mineral character of public land is conferred by law on the Secretary and no statute has ever authorized any delegation by him of that authority. Departmental rules and regulations referring issues of fact to officials of the General Land Office were "designed to facilitate the Department in the dispatch of business, not to defeat the supervision of the Secretary." (See *Knight v. United States Land Association*, 142 U. S. at p. 178.) They cannot and do not operate to deprive the Secretary of any authority which he possesses under the law. *West v. Standard Oil Company*, 278 U. S. 200..... 533

Secretary of the Interior—Con. Page

3. A dismissal by the Secretary of proceedings on the basis of an alleged rule of law, the decision of which is not reasonably necessary or incidental to a determination of the only proper issue in the case, would be beyond his authority..... 533

4. While the findings of registers upon the weight and interpretation to be given evidence adduced at hearings before them, and the affirmance of their findings by the General Land Office, are matters which may well be considered and given weight by the Secretary in cases before him on appeal, they do not preclude him from making other or different findings..... 534

5. The Secretary of the Interior has only such authority over restricted Indian property as Congress has expressly or by necessary implication confided in him, and such authority cannot safely be construed as extending to the purchase by the Secretary, *independently of the Indian owner's wishes or consent*, of single premium annuity policies from moneys derived from the sale, under authority of sections 8 of the Act of June 25, 1910 (36 Stat. 855), of timber on Indian allotments held under a trust or other patent containing restrictions on alienation, such a transaction involving the transfer of substantial sums of Indian moneys in consideration of an unsecured obligation to pay a stipulated sum monthly, beginning usually at some future date..... 500

6. A legal application to make entry of lands subject thereto, while pending, reserves the land applied for from disposition to another under any public land law until final action thereon; but the mere filing of an application for public lands, or rights in connection therewith, confers no absolute right where allowance is discretionary with the Secretary of the Interior, such as the privilege of making a grazing lease under section 15 of the Taylor Grazing Act. Accordingly, a lease application under this section, although prior in time to the inclusion of the land in a grazing district, does not segregate the land as against the United States and is not a bar to such inclusion. Case of *Goodale v. Olney* (12 L. D. 324), and cases there cited, distinguished..... 580

Settlement Rights.

See *Homestead*, 4.

Shore Proprietor.

See *Riparian Rights*.

Signatures of Witnesses; Waiver.

See *Practice and Rules of Practice*, 4-11.

Sodium.

See, also, *Mineral Lands*, 2.

1. Instructions of August 9, 1935, amending sodium regulations. (Circular No. 1364, modifying Circular No. 1194)-----

319

2. Instructions of June 4, 1935, modifying oil shale withdrawal to allow sodium prospecting permits and leases. (Circular No. 1220 modified)-----

280

3. Salt water was pumped from Salton Sea into solar vats upon adjoining lands and there evaporated, leaving sodium chloride in commercial quantities. *Held*, that such lands could properly be embraced in a prospecting permit and a lease under sections 23 and 24 of the Leasing Act of February 25, 1920, as amended by the Act of December 11, 1928.-----

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Soldiers' Additional Right.

See *Homestead*, 33, 34.

Solicitor's Opinions.

See *Table*, page IX.

Springs and Running Streams.

See *Water Rights*.

State Irrigation District.

See *Withdrawal of Public Lands*, 2½.

State, Law of.

See *Water Rights*, subheading, "State Control."

State Selection.

See *Withdrawal of Public Lands*, 27, 28.

Statutory Construction.

See *Color of Title; Indians and Indian Lands; Indian Tribes; Oil and Gas Lands; School Land Grant; Taylor Grazing Act; Words and Phrases*.

1. In the construction of statutes, where the meaning of the language employed is vague and ambiguous and cannot be ascertained by considering the words

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only, resort may be had to the legislative history of the act, and especially is this the case where the language is susceptible of two constructions, one reasonable and the other unreasonable.-----

384

2. Under the general rule of law, a statute is in force and operation during the entire day of its approval, subject to the exception that any person having a substantial right that may be affected thereby may prove that a claim filed on that day was actually initiated before the exact time of approval of the act.-----

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3. Section 201 of title 18, United States Code, being a criminal statute, must be strictly construed; and a construction adopted and acted upon for 15 years without objection is entitled to great weight.-----

103

4. Since the provision in section 1 of the Act of June 28, 1934, limiting to 80 million acres the area of lands which may be placed in grazing districts, is mentioned in the act only in relation to the authority to create grazing districts, it cannot be implied as a limitation upon the other powers contained in the act.-----

101

5. The excepting clause in section 37 of the General Leasing Act, saving existing valid claims "thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws," held to preclude the United States from declaring a forfeiture of a mining claim, otherwise valid, for default in performance of assessment work.-----

288

6. Congress, in extending the operation of the mining laws to the Death Valley National Monument, "or as it may hereafter be extended", by the Act of June 13, 1933, did not thereby abrogate its control over the lands involved, which is evidenced by the fact that the act itself expressly provides that the surface use of locations, entries, or patents shall be subject to general regulations to be prescribed by the Secretary of the Interior.-----

371

7. As a general rule, the courts consider an Indian allotment an assignment of the right of occupancy to an individual Indian, and under allotment laws providing for patents an allotment is made when

Statutory Construction—Contd.

the allottee becomes entitled to a patent as evidence of the allotment and promise of a fee title, and an allottee may become entitled to a patent even before the approval of his allotment selection whenever the applicable allotment law makes such approval mandatory after the showing of certain prescribed conditions and such conditions have been shown—

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Stockmen Associations.

See *Taylor Grazing Act*, 34.

Submerged Lands.

See *Riparian Rights*.

Surface Rights on Mineral Lands.

See *Mineral Lands*, 4.

Survey.

See *Riparian Rights; School Land Grant*.

1. Upon tender of final proof upon an agricultural entry, final receipt and final certificate should not be issued where the land applied for includes an indefinite fraction of legal subdivisions, not susceptible of proper description without segregation survey, and no basis under paragraph 37 (c) of the Mining Regulations has been shown for such survey. In such case the entryman should be called upon to make such showing—

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Taylor Grazing Act and Lands.

See *Isolated and Disconnected Tracts; Withdrawal of Public Lands*, subhead, "*Under Taylor Grazing Act*"; *Statutory Construction*, 4.

Acreage Limitation.

1. Since, by authority of section 1 of the withdrawal act of June 25, 1910, the President has the power of making temporary withdrawals for the purpose of classifying public lands, and since a classification is obviously necessary and proper to effectuate the purposes of the Taylor Grazing Act: *Held*, That the President may temporarily withdraw vacant and unappropriated public domain for that purpose, regardless of the aggregate acreage involved in the withdrawal—

70

2. The provision in section 1 of the Act of June 28, 1934, limiting to 80 million acres the area of

Taylor Grazing Act and Lands—Continued.

Acreage Limitation—Continued.

lands which may be placed in grazing districts, applies only to the acreage of vacant, unappropriated, and unreserved lands which may be included within grazing districts, and the area of public lands which may be leased, sold, or exchanged, is not limited by said act—

101

Appeals.

2½. Grazing Circular No. 4, of October 7, 1935, governing appeals from decisions of the Director of Grazing—

368

Arable Land.

3. Instructions of October 19, 1935, regarding Executive order of November 26, 1934, as amended by Executive order of May 20, 1935, in relation to Section 7, Taylor Grazing Act—

360

4. Regulations of May 16, 1935, to govern filing of applications for homestead entry under Section 7 of Taylor Grazing Act. (Circular No. 1353)—

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Assignment of Duties.

5. Assignment of duties to the General Land Office in connection with the administration of the Taylor Grazing Act—

224, 607

6. Instructions of June 7, 1936, as to duties of district land offices in connection with administration of Taylor Grazing Act. (Circular No. 1356)—

564

7. Regulations of July 30, 1936, to govern assignment of duties in connection with administration of Taylor Grazing Act; Departmental Order No. 884, of March 11, 1935, modified. (Circular No. 1402, modifying Circular No. 1356)—

607

8. Regulations of August 11, 1936, to govern disposition of grazing permits or licenses in district land offices and collection of fees. (Circular No. 1405, amending Circular No. 1402)—

610

Conflicting Applications.

9. Regulations of April 15, 1936, to govern conflicting applications under Sections 8, 14, and 15, of Taylor Grazing Act. (Circular No. 1384)—

484

Cooperation.

10. Section 9 of the Taylor Grazing Act provides that "the Secretary of the Interior shall provide, by suitable rules and regulations,

Taylor Grazing Act and Lands—Continued.	Page	Taylor Grazing Act and Lands—Continued.	Page
Cooperation—Continued.		Gift and Exchange—Continued.	
for cooperation with local associa- tions of stockmen, State land offi- cials, and official State agencies engaged in conservation of propaga- tion of wild life interested in the use of the grazing districts." <i>Held</i> , That, construed in the light of its legislative history, the language, "interested in the use of the grazing districts", qualifies the first sen- tence of the section in its enti- rety, and not merely the portion relating to wild life.-----	385	17. Regulations of June 26, 1936, concerning gifts of land under Sec- tion 8, Taylor Grazing Act, as amended by Section 3, Act of June 26, 1936. (Circular No. 1407)-----	610
Districts.		18. Regulations of July 22, 1936, governing applications for ex- changes of State lands under Sec- tion 8, Taylor Grazing Act, as amended by Act of June 26, 1936. (Circular No. 1398)-----	582
11. Grazing districts of any size or number, found desirable in the light of information developed at the general hearing had, may there- after be created without further hearing-----	89	19. Regulations of September 6, 1936, concerning exchanges of pri- vately-owned lands under Section 8, Taylor Grazing Act, as amended by Section 3, Act of June 26, 1936. (Circular No. 1408)-----	613
12. The Act of June 28, 1934, assumes a reasonable exercise by the Secretary of the discretionary power lodged in him in connection with the creation of grazing dis- tricts, and accordingly only areas reasonably contemplated for admin- istration as grazing districts may be included within proposed dis- tricts and by the publication of notice withdrawn from entry or set- tlement pending their final dispo- sition-----	89	20. Under the authority con- ferred by section 2 of the Taylor Grazing Act, the Secretary of the Interior is empowered to make rules and regulations and to do any and all things necessary to accomplish the purposes of the act, including those of section 8; and in the exer- cise of this authority he may prom- ulgate regulations governing the exchanges of lands authorized by section 8, determine the form of applications, the manner of their presentation, and the procedure by which they should be considered and ruled upon-----	9
13. A grazing district under the Taylor Grazing Act may be estab- lished on land withdrawn under the terms of the Executive order of November 26, 1934, since the order does not, directly or by implica- tion, prohibit the establishment of such districts, the withdrawal be- ing from "settlement, location, sale, or entry"-----	205	21. Applications, properly filed by States, to exchange State lands within a Taylor Act grazing dis- trict for other public lands, may be given the effect of segregating the lands applied for from further disposition under the public land laws pending disposition of the ap- plications; but the selected lands may nevertheless be included in a grazing district, authority to do so being an integral part of the Secretary's power to determine whether a proposed exchange will benefit the public interests in regu- lating grazing on the public range under the Taylor Grazing Act----	9
Excepting Clause.		22. Section 8 of the Taylor Graz- ing Act (48 Stat. 1269, 1272) au- thorizes such exchanges of State lands for public lands as will bene- fit the public interests in control of grazing on the public range un- der said act. Determination of whether such interests will be ben- efited by a proposed exchange is to be made by the Secretary of the Interior-----	9
See <i>Words and Phrases</i> , 10.		23. So long as the withdrawal provided for by the Executive or-	
14. "Existing valid rights" in withdrawal order of November 26, 1934, in aid of Taylor Grazing Act, construed. (Circular No. 1348)---	226		
Gift and Exchange.			
15. Regulations of February 8, 1935, governing gifts of land and filing of applications for exchanges of privately owned and State lands under Section 8 of Act. (Circular No. 1346)-----	192		
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Gift and Exchange—Continued.
 der of November 26, 1934, is operative on a tract of public land, said land is not the subject of exchange under section 8 of the Taylor Grazing Act, since such disposition may well be regarded as within the category of a location or entry, both of which are prohibited by the Executive order----- 205

24. An application by the State of Arizona under section 8 of the Taylor Grazing Act to exchange school sections without, for lands within, a withdrawal to effect exchanges authorized by the Act of June 14, 1934 (48 Stat. 960) is not allowable, and the application may not be suspended to await revocation of the withdrawal and possible restoration to such form of disposal----- 305

Grazing Fees.
 25. Instructions of May 15, 1936, amending rules approved March 2, 1936, in respect to grazing fees----- 528

Hearings.
 26. The Taylor Grazing Act (Act of June 28, 1934, 48 Stat. 1269), directs the Secretary of the Interior to provide, by appropriate rules and regulations, for local hearings on appeals from the decisions of administrative officers in matters arising in connection with the administration of the act, such hearings to be conducted "in a manner similar to the procedure in the land department" of the national Government. *Held*, That since registers of local land offices are by statute authorized to issue subpoenas and administer oaths to witnesses, who are entitled to receive fees and mileage for attendance, and since the Secretary of the Interior is directed by section 2 of the act to "establish such service * * * and do any and all things necessary" to accomplish the purposes of the act, it follows that regional graziers may be directed by the Secretary to issue subpoenas and administer oaths to witnesses in grazing appeals, and that the witnesses are entitled to receive fees and mileage for attendance----- 524

27. Complete discretion is left with the Secretary of the Interior, by the Act of June 28, 1934, as to the number of hearings which shall be held in any State preliminary

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Hearings—Continued.
 to the establishment of grazing districts therein, except that one such hearing must be had----- 89

Isolated or Disconnected Tracts.
 28. Instructions of March 14, 1935, concerning public sale applications under Sec. 2455, Rev. Stat. as amended. (Circular No. 1350)----- 246

29. Sale of public lands being in terms forbidden by the Executive withdrawal of November 26, 1934, isolated and disconnected tracts thereof may not be sold at public auction under authority of section 14 of the Taylor Grazing Act----- 206

30. The authority conferred upon the Secretary of the Interior by section 15 of the Taylor Grazing Act to lease isolated or disconnected tracts of public land is limited to "vacant, unappropriated, and unreserved lands", and, having become reserved by the operation of the Executive withdrawal order of November 26, 1934, may not be leased so long as that order remains in force----- 205

31. Section 15 of the Act of June 28, 1934, provides that only lands situated in such isolated or disconnected tracts as not to justify their inclusion in any grazing district established pursuant to the act may be leased for grazing purposes, and the determination of this matter is, by the terms of the act, left to the Secretary of the Interior----- 580

Lease Applications.
 32. Preliminary regulations (September 20, 1934) governing filing of applications for lease under the act. (Circular No. 1336)----- 114

33. A legal application to make entry of lands subject thereto, while pending, reserves the land applied for from disposition to another under any public land law until final action thereon; but the mere filing of an application for public lands, or rights in connection therewith, confers no absolute right where allowance is discretionary with the Secretary of the Interior, such as the privilege of making a grazing lease under section 15 of the Taylor Grazing Act. Accordingly, a lease application under this section, although prior in time to the inclusion of the land in a grazing district, does not segregate the land as against

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34. Associations of stock men may be granted leases under section 15 of the Taylor Grazing Act, but the lands of such associations must be contiguous to the public lands desired to be leased..... 385
- Withdrawal.**
35. No provision of the Taylor Grazing Act can be construed to repeal, supersede, or abridge any part of the withdrawal act of June 25, 1910, which act authorized the President to make temporary withdrawals of public lands for classification and other public purposes; and the Taylor Act does not purport to revoke that authority or any part of the earlier act, but, on the contrary, merely provides that under certain conditions a withdrawal shall be in effect without necessity for resort to the authority granted the President by said earlier act..... 70
- Tide and Submerged Lands.**
See *Oil and Gas Lands*, 11.
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- Utah, Law Governing Water Appropriation.**
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- Vested Right.**
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- Water Reserve.**
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- Water Rights.**
See *Rights of Way; Riparian Rights; Withdrawal of Public Lands*.
1. Reserved lands of the United States needed or used by the public for watering purposes are not subject to appropriation, either by individuals or any branch of the Government, but are required, while so reserved, to be kept and held open to the public use for such purposes..... 371
[See, also, *Solicitor's opinion on Underground Water Claims, Utah*, at page 378.]
2. Congress, in sections 2339 and 2340 of the Revised Statutes, and various later acts, surrendered to the States the right to control the appropriation and use of the waters of nonnavigable streams on the public lands; but this general rule does not apply to reserved public lands unless the water can be diverted at a point not affected by the reservation or unless a right of way has been obtained in accordance with Federal laws providing for rights of way over certain classes of reservations and under prescribed conditions, there being a clear distinction between water rights and rights of way over land for the use of such waters..... 371
3. The right to appropriate water does not, necessarily carry with it a right of way over public land for the use of such water, and Congress has in various laws provided for permitting rights of way over public and reserved lands of the United States for the use of waters, which rights of way vary as to conditions and purposes and may be altogether prohibited..... 378
4. The right to the use of water from springs located on lands of the United States not withdrawn for public watering purposes, may be acquired by use on riparian lands of the United States, or by appropriation under State laws, subject merely to prior vested rights..... 372
5. The Government, as riparian owner of lands in California, is recognized as entitled to such water as is needed for beneficial use, but the law of appropriation

Water Rights—Continued.

permits only such quantity as is beneficially used-----

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6. The Desert Land Act, passed March 3, 1877 (19 Stat. 377); left with each State the right to determine for itself to what extent the rule of appropriation or the common law rule in respect to riparian rights should obtain; does not bind or purport to bind the States to any policy; and simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the State and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation (*California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U. S. 142)-----

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State Control.

7. It is now well settled that State laws govern with respect to the right to appropriate and use the nonnavigable waters within the State on private lands or on the unreserved public lands of the United States, and also as regards navigable waters, except where the powers of the Federal Government with respect to navigable streams would be interfered with (citing *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U. S. 142)-----

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8. Where wells are developed on public lands of the United States, the Government can protect the use thereof for governmental purposes, in so far as the use of the waters depends upon the use of the land for the storage or carriage of such waters, by refusing to grant rights of way for such purpose. But under the law of Utah, if the waters are in flux, either on the surface or underground, they are subject to claim by the first appropriator thereof, for use on private land or on any public lands properly subject to such use-----

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9. No authority appears for the acquisition by the Federal Government of underground water rights in connection with wells on public lands of the United States in the State of Utah, except upon compliance with the water-right laws of the State of Utah-----

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10. Where the water from springs in the Death Valley National Monument does not flow

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beyond the confines of the reservation, the Government, as riparian owner, is sufficiently protected in the use thereof without appropriation under State laws; but where running streams are involved, as where water flows through the reservation and may be subject to appropriation and diversion, either above or below, it may be advisable for the Government to make appropriation under State laws, in order that claims may be adjudicated and equitable division awarded and established-----

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Water Users' Associations.

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Withdrawal of Public Lands.

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Generally.

1. Executive order of February 5, 1935, withdrawing for classification all public land in certain States-----

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2. Instructions of March 21, 1935, as to noneffect of Executive withdrawals of November 26, 1934, and February 5, 1935, upon lands withdrawn under Reclamation laws. (Circular No. 1351)---

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2½. Public land included in a State irrigation district and burdened with an obligation to pay a proportionate share of irrigation charges is unaffected by the withdrawal order of November 26, 1934, which order declares its operation as a land withdrawal is subject to "existing valid rights"-----

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3. An order of withdrawal executed by the President under authority granted by Congress has the force and effect of law, and the rules of presumption as applied to statutes have like application to Executive orders and regulations. Accordingly, in the absence of definite proof as to the exact time when an order of withdrawal of public land was signed by the President, it must be held that such order operated upon the status of the land affected during the entire day of the date of its issuance-----

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Withdrawal of Public Lands— Continued.	Page	Withdrawal of Public Lands— Continued.	Page
Generally—Continued.		Exception of "valid existing rights," etc.—Continued.	
4. Since the passage of the withdrawal act of June 25, 1910, the Chief Executive and the Department of the Interior have consistently regarded the power granted therein as existing concurrently with all other authority providing for or regulating the use and disposition of public lands, and such long-continued administrative practice, acquiesced in by Congress, has the force of law-----	70	under the Mineral Leasing Act of February 25, 1920-----	206
5. Withdrawals of public lands under authority of the Executive order of April 17, 1926, in keeping with constructions of other withdrawal orders of public lands, are deemed continuing in operation in the absence of words of limitation, and attach not only to lands which at the time of issuance of the order are known to be of the character and status defined therein, but also to public lands subsequently found to be of said character and status-----	466	9. Lands the surface of which is open to entry under the Act of June 22, 1910, or the Act of July 17, 1914, the mineral deposits defined therein being reserved to the United States, unless otherwise reserved, are to be construed as reserved only to the extent of the defined minerals and unreserved insofar as the surface is concerned. Lands having this status at the date of the Executive order of November 26, 1934, were reserved by that order, and are not now open to entry, except where valid rights existed at the date of the order, which rights must be protected----	211
6. The Executive order of withdrawal of November 26, 1934, was made by virtue of and pursuant to the authority vested in the President by the Act of June 25, 1910 (36 Stat. 847), as amended by the Act of August 24, 1912 (37 Stat. 497), which amended act authorizes him to withdraw temporarily from settlement, location, sale, or entry any of the public lands of the United States; and lands belonging to the United States do not cease to be a part of the public domain until a vested right thereto is acquired or patent is issued----	249	10. The exception of "valid existing claims" occurring in a withdrawal of public lands contemplates something less than a vested right, and in this view lands claimed, possessed, and improved under color of title long before and at the time of a withdrawal fall within the exception of "valid existing claims" and are not affected by the withdrawal-----	73
Exception of "valid existing rights," etc.		11. In the determination of what are "existing valid rights", as used in the excepting clause of the Executive order of November 26, 1934, the circumstances of each particular case must be considered, a precise and general definition not being practicable-----	206
7. "Existing valid rights" in withdrawal order of November 26, 1934, in aid of Taylor Grazing Act, construed. (Circular No. 1348)---	226	12. The clause in the Executive Order of November 26, 1934, which renders the public-land withdrawal provided for therein subject to "valid existing rights", includes the case of one whose application to make a stock-raising homestead entry was subsequent to the date of the order, but who, before the order became effective, purchased the improvements and relinquishment of a prior entryman, established residence on the land with his family, and has since maintained residence thereon-----	306
8. The saving clause of the Executive order of November 26, 1934, which excepted from the operation of the withdrawal "existing valid rights", held to include (1) valid entries; (2) prior valid applications for entry, selection, or location, substantially complete at date of the withdrawal; (3) claims under the Color of Title Act of December 22, 1928, where bona fide and substantial rights thereunder existed; (4) permits and leases		13. While the Executive order of November 26, 1934, temporarily withdrawing particular areas of public lands from certain forms of disposition, contains an excepting provision which operates to save preexisting valid appropriations, reservations, or withdrawals during	

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26. The purpose of the power site reservations as such was not abro- gated or in any way interfered with by the Executive withdrawal of November 26, 1934, and so long as lands remain in unconditional with- drawals for power sites under the Federal Water Power Act they are not subject to entry. In the event a restoration under section 24 of the act was made prior to the date of the Executive withdrawal, and the restored land not entered in the meantime, the Executive with- drawal, with its qualifications, attached.....	211

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Water Reserve.

See also *Water Reserve; Water Rights.*

27. A spring or water hole on public land is none the less within the meaning and contemplation of the withdrawal order of April 17, 1926, and the regulations thereunder, because developed or brought into being by human agency, in the absence of rights on the part of the State concerned incompatible with such withdrawal.

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28. The fact that a State selection list was filed prior to an interpretative order holding that a definite legal subdivision of public land was found to contain springs or water holes of the type intended by the withdrawal order to be withdrawn does not render said order inoperative as to such land, since the said withdrawal order embraced all subdivisions of the "vacant, unappropriated, unreserved public lands" containing the waters described in said order. The interpretative order is in effect an official finding that a certain tract described in terms of legal subdivision is of the character and has the status defined in the withdrawal order and is subject thereto.

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Witnesses.

See *Practice and Rules of Practice*, 6-12.

Words and Phrases.

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See also, *Mineral Leasing Act; Rights of Way; School Land Grant.*

1. The word "allot" and its derivatives, "allottee" and "allotments", have been used in various statutes, decisions, and by the Department of the Interior in both the broader sense referring to the completed process evidenced by trust patents and in the narrower and primary sense meaning the parcelling out and assigning of a specified number of acres of land to each Indian, and because of the variety of allotment laws, a case under one is not necessarily applicable to another.

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2. "Compact"; "reasonably compact"

382

3. "Existing valid rights"

445

4. "Head of a department or other officer or clerk in the employ of the United States"

215

5. "Known mineral lands"

533

6. "Reasonably compact"

382

7. "Settlement, location, sale, or entry"

205

8. "Unitization provision" in oil and gas leases

189

9. "Vacant, unappropriated, and unreserved lands"

205

10. "Valid existing rights"

306, 308

11. "Valley"

560

12. "Valley of the Gila River"

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World War Veterans, Disabled.

See *Homestead*, 19.