

DECISIONS
OF THE
DEPARTMENT OF THE INTERIOR

EDITED BY
MARIE COLE BERGER

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U. S. CIRCUIT COURT OF APPEALS,
THIRD CIRCUIT
The Property of the United States

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, 56 volumes have been published covering the period from July 1881 to November 28, 1938. 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.

Part I of this volume contains decisions of the Department and Opinions of the Solicitor arranged chronologically insofar as is practicable. Part II contains regulations and instructions of general interest to the public issued by the various bureaus of the Department.

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- Cate v. Northern Pacific Ry. Co. (41 L. D. 316); overruled, 43 L. D. 60.
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- Chapman v. Willamette Valley and Cascade Mountain Wagon Road Co. (13 L. D. 61); overruled, 20 L. D. 259.
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- Clarke, C. W. (32 L. D. 233); overruled so far as in conflict, 51 L. D. 51.
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- Coffin, Edgar A. (33 L. D. 245); overruled so far as in conflict, 52 L. D. 153.
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- Colorado, State of (7 L. D. 490); overruled, 9 L. D. 408.
- Cook, Thomas C. (10 L. D. 324); see 39 L. D. 162, 225.
- Cooke v. Villa (17 L. D. 210); vacated, 19 L. D. 442.
- Cooper, John W. (15 L. D. 285); overruled, 25 L. D. 113.
- Copper Bullion and Morning Star Lode Mining Claims (35 L. D. 27); see 39 L. D. 574.
- Copper Glance Lode (29 L. D. 542); overruled so far as in conflict, 55 L. D. 348.
- Corliss v. Northern Pacific R. R. Co. (23 L. D. 265); vacated, 26 L. D. 652.
- Cornell v. Chilton (1 L. D. 153); overruled, 6 L. D. 433.
- Cowles v. Huff (24 L. D. 81); modified, 28 L. D. 515.
- Cox, Allen H. (30 L. D. 90, 468); vacated, 31 L. D. 114.
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- Culligan v. State of Minnesota (34 L. D. 22); modified, 34 L. D. 151.
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- Dailey Clay Products Co., The (48 L. D. 429, 431); overruled so far as in conflict, 50 L. D. 656.
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- Davis, Heirs of (40 L. D. 573); overruled, 46 L. D. 110.
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- Dennison and Willits (11 C. L. O. 261); overruled, 26 L. D. 122.
- Deseret Irrigation Co. *et al.* v. Sevier River Land and Water Co. (40 L. D. 463); overruled, 51 L. D. 27.
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- Dickey, Ella I. (22 L. D. 351); overruled, 32 L. D. 331.
- Dierks, Herbert (36 L. D. 367); overruled by the unreported case of Thomas J. Guigham, March 11, 1909.
- Dixon v. Dry Gulch Irrigation Co. (45 L. D. 4); overruled, 51 L. D. 27.
- Douglas and Other Lodes (34 L. D. 556); modified, 43 L. D. 128.
- Downman v. Moss (19 L. D. 526); overruled, 25 L. D. 82.
- Dudymott v. Kansas Pacific R. R. Co. (5 C. L. O. 69); overruled, 1 L. D. 345.
- Dumphy, Elijah M. (8 L. D. 102); overruled, 36 L. D. 561.
- Dyche v. Beleele (24 L. D. 494); modified, 43 L. D. 56.
- Dysart, Francis J. (23 L. D. 282); modified, 25 L. D. 188.
- East Tintic Consolidated Mining Co. (41 L. D. 255); vacated, 43 L. D. 80.
- Easton, Francis E. (27 L. D. 600); overruled, 30 L. D. 355.
- El Paso Brick Co. (37 L. D. 155); overruled so far as in conflict, 40 L. D. 199.
- *Elliott v. Ryan (7 L. D. 322); overruled, 8 L. D. 110. (See 9 L. D. 360.)
- Emblem v. Weed (16 L. D. 28); modified, 17 L. D. 220.
- Epley v. Trick (8 L. D. 110); overruled, 9 L. D. 360.
- Erhardt, Finsans (36 L. D. 154); overruled, 38 L. D. 406.
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- Falconer v. Price (19 L. D. 167); overruled, 24 L. D. 264.
- Fargo No. 2 Lode Claims (37 L. D. 404); modified, 43 L. D. 128; overruled so far as in conflict, 55 I. D. 348.
- Farrill, John W. (13 L. D. 713); overruled so far as in conflict, 52 L. D. 473.
- Febes, James H. (37 L. D. 210); overruled, 43 L. D. 183.
- Federal Shale Oil Co. (53 L. D. 213); overruled in part, 55 I. D. 290.
- Ferrell *et al.* v. Hoge *et al.* (18 L. D. 81); overruled, 25 L. D. 351.
- Fette v. Christiansen (29 L. D. 710); overruled, 34 L. D. 167).
- Field, William C. (1 L. D. 68); overruled so far as in conflict, 52 L. D. 473.
- Filtrol Company v. Brittan and Echart (51 L. D. 649); distinguished, 55 I. D. 605.
- Fish, Mary (10 L. D. 606); modified, 13 L. D. 511.
- Fisher v. Heirs of Rule (42 L. D. 62, 64); vacated, 43 L. D. 217.
- Fitch v. Sioux City and Pacific R. R. Co. (216 L. and R. 184); overruled, 17 L. D. 43.
- Fleming v. Bowe (13 L. D. 78); overruled, 23 L. D. 175.
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- Florida, State of (47 L. D. 92, 93); overruled so far as in conflict, 51 L. D. 291.
- Florida Mesa Ditch Co. (14 L. D. 265); overruled, 27 L. D. 421.
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- Freeman, Flossie (40 L. D. 106); overruled, 41 L. D. 63.
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- Fry, Silas A. (45 L. D. 20); modified, 51 L. D. 581.
- Galliber, Marie (8 C. L. O. 57); overruled, 1 L. D. 17.
- Gallup v. Northern Pacific Ry. Co. (unpublished); overruled so far as in conflict, 47 L. D. 304.
- Garlis v. Borin (21 L. D. 542); see 39 L. D. 162, 225.
- Garrett, Joshua (2 C. L. O. 1005); overruled, 5 L. D. 158.
- Garvey v. Tuiska (41 L. D. 510); modified, 43 L. D. 229.
- Gates v. California and Oregon R. R. Co. (5 C. L. O. 150); overruled, 1 L. D. 336.
- Gauger, Henry (10 L. D. 221); overruled, 24 L. D. 81.
- Gleason v. Pent (14 L. D. 375; 15 L. D. 286); vacated, 53 I. D. 447.
- Gohrman v. Ford (8 C. L. O. 6); overruled, 4 L. D. 580.
- Golden Chief "A" Placer Claim (35 L. D. 557); modified, 37 L. D. 250.
- Goldstein v. Juneau Town Site (23 L. D. 417); vacated, 31 L. D. 88.
- Goodale v. Olney (12 L. D. 324); distinguished, 55 I. D. 580.
- Gotebo Town Site v. Jones (35 L. D. 18); modified, 37 L. D. 560.
- Gowdy v. Connell (27 L. D. 56); vacated, 28 L. D. 240.
- Gowdy v. Gilbert (19 L. D. 17); overruled, 26 L. D. 453.
- Gowdy *et al.* v. Kismet Gold Mining Co. (22 L. D. 624); modified, 24 L. D. 191.
- Grampian Lode (1 L. D. 544); overruled, 25 L. D. 495.
- Gregg *et al.* v. State of Colorado (15 L. D. 151); modified, 30 L. D. 310.

- Grinnell v. Southern Pacific R. R. Co. (22 L. D. 438); vacated, 23 L. D. 489.
- *Ground Hog Lode v. Parole and Morning Star Lodes (8 L. D. 430); overruled, 34 L. D. 568. (See R. R. Rousseau, 47 L. D. 590.)
- Guidney, Alcide (8 C. L. O. 157); overruled, 40 L. D. 399.
- Gulf and Ship Island R. R. Co. (16 L. D. 236); modified, 19 L. D. 534.
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- Halvorson, Halfor K. (39 L. D. 456); overruled, 41 L. D. 505.
- Hamilton, Hiram M. (51 L. D. 51); overruled in part, 54 L. D. 36.
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- Hardee, D. C. (7 L. D. 1); overruled, 29 L. D. 698.
- Hardee v. United States (8 L. D. 391; 16 L. D. 499); overruled, 29 L. D. 698.
- Hardin, James A. (10 L. D. 313); revoked, 14 L. D. 233.
- Harris, James G. (28 L. D. 90); overruled, 39 L. D. 93.
- Harrison, Luther (4 L. D. 179); overruled, 17 L. D. 216).
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- Hart v. Cox (42 L. D. 592); vacated, 260 U. S. 427. (See 49 L. D. 413.)
- Hastings and Dakota Ry. Co. v. Christenson *et al.* (22 L. D. 257); overruled, 28 L. D. 572.
- Hayden v. Jamison (24 L. D. 403); vacated, 26 L. D. 373.
- Haynes v. Smith (50 L. D. 208); overruled, 54 L. D. 150.
- Heilman v. Syverson (15 L. D. 184); overruled, 23 L. D. 119.
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- Heirs of Philip Mulinix (33 L. D. 331); overruled, 43 L. D. 532.
- *Heirs of Stevenson v. Cunningham (32 L. D. 650); modified, 41 L. D. 119. (See 43 L. D. 196.)
- Heirs of Talkington v. Hempping (2 L. D. 46); overruled, 14 L. D. 200.
- Heirs of Vradenburg *et al.* v. Orr *et al.* (25 L. D. 323); overruled, 38 L. D. 253.
- Helmer, Inkerman (34 L. D. 341); modified, 42 L. D. 472.
- Henderson, John W. (40 L. D. 518); vacated, 43 L. D. 106. (See 44 L. D. 112, and 49 L. D. 484.)
- Henning, Nellie J. (38 L. D. 443, 445); recalled and vacated, 39 L. D. 211.
- Herman v. Chase *et al.* (37 L. D. 590); overruled, 43 L. D. 246.
- Herrick, Wallace H. (24 L. D. 23); overruled, 25 L. D. 113.
- Hess, Hoy, Assignee (46 L. D. 421); overruled, 51 L. D. 287.
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- Hollensteiner, Walter (38 L. D. 319); overruled, 47 L. D. 260.
- Holman v. Central Montana Mines Co. (34 L. D. 568); overruled so far as in conflict, 47 L. D. 590.
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- Howard, Thomas (3 L. D. 409); see 39 L. D. 162, 225.
- Howard v. Northern Pacific R. R. Co. (23 L. D. 6); overruled, 28 L. D. 126.
- Howell, John H. (24 L. D. 35); overruled, 28 L. D. 204.
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- Hughes v. Greathead (43 L. D. 497); vacated, 49 L. D. 413. (See 260 U. S. 427.)
- Hull *et al.* v. Ingle (24 L. D. 214); overruled, 30 L. D. 258.
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- Inman v. Northern Pacific R. R. Co. (24 L. D. 318); overruled, 28 L. D. 95.
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- Jacks v. Belard *et al.* (29 L. D. 369); vacated, 30 L. D. 345.
- Jackson Oil Co. v. Southern Pacific R. R. Co. (40 L. D. 528); overruled, 42 L. D. 317.
- Johnson v. South Dakota (17 L. D. 411); overruled, 41 L. D. 22.

- Jones, James A. (3 L. D. 176); overruled, 8 L. D. 448.
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- Kinney, E. C. (44 L. D. 580); overruled so far as in conflict, 53 I. D. 228.
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- Kiser v. Keech (17 L. D. 25); overruled, 23 L. D. 119.
- Knight, Albert B., et al. (30 L. D. 227); overruled, 31 L. D. 64.
- Knight v. Heirs of Knight (39 L. D. 362, 491; 40 L. D. 461); overruled, 43 L. D. 242.
- Kniskern v. Hastings and Dakota Ry. Co. (6 C. L. O. 50); overruled, 1 L. D. 362.
- Kolberg, Peter F. (37 L. D. 453); overruled, 43 L. D. 181.
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- Largent, Edward B., et al. (13 L. D. 397); overruled, 42 L. D. 321.
- Larson, Syvert (40 L. D. 69); overruled, 43 L. D. 242.
- Lasselle v. Missouri, Kansas and Texas Ry. Co. (3 C. L. O. 10); overruled, 14 R. L. 278.
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- Laughlin v. Martin (18 L. D. 112); modified, 21 L. D. 40.
- Law v. State of Utah (29 L. D. 623); overruled, 47 L. D. 359.
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- Lindberg, Anna C. (3 L. D. 95); modified, 4 L. D. 299.
- Linderman v. Wait (6 L. D. 689); overruled, 13 L. D. 459.
- *Linhart v. Santa Fe Pacific R. R. Co. (36 L. D. 41); overruled, 41 L. D. 284. (See 43 L. D. 536.)
- Little Pet Lode (4 L. D. 17); overruled, 25 L. D. 550.
- Tock Lode (6 L. D. 165); overruled, 26 L. D. 123.
- Lockwood, Francis A. (20 L. D. 361); modified, 21 L. D. 200.
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- Louisiana, State of (48 L. D. 201); overruled so far as in conflict, 51 L. D. 291.
- Lucy B. Hussey Lode (5 L. D. 93); overruled, 25 L. D. 495.
- Luton, James W. (34 L. D. 468); overruled, 35 L. D. 102.
- Lyman, Mary O. (24 L. D. 493); overruled, 43 L. D. 221.
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- McBride v. Secretary of the Interior (8 C. L. O. 10); modified, 52 L. D. 33.
- McCalla v. Acker (29 L. D. 203); vacated, 30 L. D. 277.
- McCornick, William S. (41 L. D. 661, 666); vacated, 43 L. D. 429.
- *McCraney v. Heirs of Hayes (33 L. D. 21); overruled, 41 L. D. 119. (See 43 L. D. 196.)
- McDonald, Roy, et al. (34 L. D. 21); overruled, 37 L. D. 285.
- *McDonogh School Fund (11 L. D. 378); overruled, 30 L. D. 616. (See 35 L. D. 399.)
- McFadden et al. v. Mountain View Mining and Milling Co. (26 L. D. 530); vacated, 27 L. D. 358.
- McGee, Edward D. (17 L. D. 285); overruled, 29 L. D. 166.
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- McGregor, Carl (37 L. D. 693); overruled, 38 L. D. 148.
- McKernan v. Bailey (16 L. D. 368); overruled, 17 L. D. 494.
- *McKittrick Oil Co. v. Southern Pacific R. Co. (37 L. D. 243); overruled, 40 L. D. 528. (See 42 L. D. 317.)
- McNamara et al. v. State of California (17 L. D. 296); overruled, 22 L. D. 666.
- McPeck v. Sullivan et al. (25 L. D. 281); overruled, 36 L. D. 26.
- Madigan, Thomas (8 L. D. 188); overruled, 27 L. D. 448.
- Maginnis, Charles P. (31 L. D. 222); overruled, 35 L. D. 399.
- Maginnis, John S. (32 L. D. 14); modified, 42 L. D. 472.
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- Mahoney, Timothy (41 L. D. 129); overruled, 42 L. D. 313.
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- Makemson *v.* Snider's Heirs (22 L. D. 511); overruled, 32 L. D. 650.
- Malone Land and Water Co. (41 L. D. 138); overruled in part, 43 L. D. 110.
- Maney, John J. (35 L. D. 250); modified, 48 L. D. 153.
- Maple, Frank (37 L. D. 107); overruled, 43 L. D. 181.
- Martin *v.* Patrick (41 L. D. 284); overruled, 43 L. D. 536.
- Mason *v.* Cromwell (24 L. D. 248); vacated, 26 L. D. 369.
- Masten, E. C. (22 L. D. 337); overruled, 25 L. D. 111.
- Mather *et al. v.* Hackley's Heirs (15 L. D. 487); vacated, 19 L. D. 48.
- Maughan, George W. (1 L. D. 25); overruled, 7 L. D. 94.
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- *Meeboer *v.* Heirs of Schut (35 L. D. 335); overruled, 41 L. D. 119. (See 43 L. D. 196.)
- Mercer *v.* Buford Townsite (35 L. D. 119); overruled, 35 L. D. 649.
- Meyer, Peter (6 L. D. 639); modified, 12 L. D. 436.
- Meyer *v.* Brown (15 L. D. 307); see 39 L. D. 162, 225.
- Miller, Edwin J. (35 L. D. 411); overruled, 43 L. D. 181.
- Miller *v.* Sebastian (19 L. D. 288); overruled, 26 L. D. 448.
- Milner and North Side R. R. Co. (36 L. D. 488); overruled, 40 L. D. 187.
- Milton *et al. v.* Lamb (22 L. D. 339); overruled, 25 L. D. 550.
- Milwaukee, Lake Shore and Western Ry. Co. (12 L. D. 79); overruled, 29 L. D. 112.
- Miner *v.* Marriott *et al.* (2 L. D. 709); modified, 28 L. D. 224.
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- *Mitchell *v.* Brown (3 L. D. 65); overruled, 41 L. D. 396. (See 43 L. D. 520.)
- Monitor Lode (18 L. D. 358); overruled, 25 L. D. 495.
- Monster Lode (35 L. D. 493); overruled so far as in conflict, 55 I. D. 348.
- Moore, Charles H. (16 L. D. 204); overruled, 27 L. D. 482.
- Morgan *v.* Craig (10 C. L. O. 234); overruled, 5 L. D. 303.
- Morgan *v.* Rowland (37 L. D. 90); overruled, 37 L. D. 618.
- Moritz *v.* Hinz (36 L. D. 450); vacated, 37 L. D. 382.
- Morrison, Charles S. (36 L. D. 126); modified, 36 L. D. 319.
- Morrow *et al. v.* State of Oregon *et al.* (32 L. D. 54); modified, 33 L. D. 101.
- Moses, Zelmer R. (36 L. D. 473); overruled 44 L. D. 570.
- Mountain Chief Nos. 8 and 9 Lode Claims (36 L. D. 100); overruled in part, 36 L. D. 551.
- Mt. Whitney Military Reservation (40 L. D. 315); see 43 L. D. 33.
- Muller, Ernest (46 L. D. 243); overruled, 48 L. D. 163.
- Muller, Esberne K. (39 L. D. 72); modified, 39 L. D. 360.
- Mulnix, Philip, Heirs of (36 L. D. 331); overruled, 43 L. D. 532.
- Nebraska, State of (18 L. D. 124); overruled, 28 L. D. 358.
- Nebraska, State of, *v.* Dorrington (2 C. L. L. 647); overruled, 26 L. D. 123.
- Neilsen *v.* Central Pacific R. R. Co. *et al.* (26 L. D. 252); modified, 30 L. D. 216.
- Newbanks *v.* Thompson (22 L. D. 490); overruled, 29 L. D. 108.
- Newlon, Robert C. (41 L. D. 421); overruled, 43 L. D. 364.
- New Mexico, State of (46 L. D. 217); overruled, 48 L. D. 98.
- New Mexico State of (49 L. D. 314); overruled, 54 I. D. 159.
- Newton, Walter (22 L. D. 322); modified, 25 L. D. 188.
- New York Lode and Mill Site (5 L. D. 513); overruled, 27 L. D. 373.
- *Nickel, John R. (9 L. D. 388); overruled, 41 L. D. 129. (See 42 L. D. 313.)
- Northern Pacific R. R. Co. (20 L. D. 191); modified, 22 L. D. 224; overruled, 29 L. D. 550.
- Northern Pacific R. R. Co. (21 L. D. 412; 23 L. D. 204; 25 L. D. 501); overruled, 53 I. D. 242. (See 26 L. D. 265; 33 L. D. 426; 44 L. D. 218; 177 U. S. 435.)
- Northern Pacific Ry. Co. (48 L. D. 573); overruled so far as in conflict, 51 L. D. 196. (See 52 L. D. 58.)
- Northern Pacific R. R. Co. *v.* Bowman (7 L. D. 238); modified, 18 L. D. 224.
- Northern Pacific R. R. Co. *v.* Burns (6 L. D. 21); overruled, 20 L. D. 191.
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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

PART I

EDWINA S. ELLIOTT
ON REHEARING

Decided June 30, 1936

OIL AND GAS—PERMIT APPLICATION—DEFECTIVE POWER OF ATTORNEY.

An application for an oil and gas permit executed by an attorney in fact accompanied by a power of attorney from the applicant stating her qualifications, to which no oath is affixed, has no segregative effect so as to debar a conflicting like application or to arrest the running of the 90-day period provided for in the act of August 21, 1935 (49 Stat. 674), which bars the allowance of permit applications filed within 90 days from its date. *Sour v. McMahon* (51 L. D. 587) followed and applied.

WALTERS, *First Assistant Secretary*:

Edwina S. Elliott has filed a motion for rehearing of departmental decision of May 18, 1936, affirming the action of the Commissioner of the General Land Office in denying reinstatement of her oil and gas prospecting permit application, Las Cruces 050089.

As stated in the previous decision with more detail, Elliott's application was executed by an attorney in fact, accompanied by a power of attorney stating qualifications of the applicant but not showing that any oath was administered to her. Elliott's application was filed June 23, 1934. On August 15, 1934, William H. Fort filed like application for part of the same land. Under the rule in *Sour v. McMahon* (51 L. D. 587), holding that a statement of qualifications must be on personal affidavit of the applicant and without this the application has no segregative effect, the Department by decision of February 21, 1935, held that Elliott's application was no bar to Fort's application. On August 8, 1935, Elliott filed her own affidavit and that of the notary who executed the acknowledgment on a printed form to her power of attorney, both

stating in substance that the power of attorney was in fact sworn to at the time of execution thereof. She contends that under the ruling in *Allen v. Pilcher* (51 L. D. 284), if she shows as a fact by extrinsic evidence that the statement of her qualifications was in fact sworn to, the defect is cured.

The case of *Sour v. McMahon* is subsequent to that of *Allen v. Pilcher*, and in the former and in the Instructions of October 19, 1926 (51 L. D. 602), issued pursuant to said decision, it was prescribed that—

Such application (applications filed by an attorney in fact) not accompanied by proof of authority and qualifications will be received and rejected, subject to the right to complete on appeal, but will not be noted on the tract books or plats prior to the filing of powers of attorney and affidavits by the applicant as to their qualifications.

The reason for the regulation above quoted requiring application filed by attorneys in fact be complete on their face is given in *Sour v. McMahon* as follows:

It has been found that not infrequently permit applications signed and filed by alleged attorneys in fact have not been accompanied by powers of attorney or affidavits by the applicants themselves as to their qualifications. It appears that it has been the practice in such cases to note the applications regularly upon the records and if the required powers of attorney and affidavits of qualifications have been furnished prior to adjudication the applications have been accepted as regular and satisfactory and permits have been issued upon recommendation therefor by the Commissioner, in the absence of protest. It is clear that this is not a satisfactory state of affairs. Even though there may be no conflicting application filed, it must nevertheless be recognized that the filing and notation upon the tract books and plats, or either, indicates a segregation which more or less effectively prevents or discourages the filing of any other application. In this manner it has been possible for applicants to secure priority of right to permits contrary to law and regulations.

There is authority for the view that an application for an oil and gas permit not showing that it was made under oath has no priority over a subsequent like application complete in all respects. In *Witbeck v. Hardeman*, 51 Fed. (2d) 451, 453, 454, affirmed on other grounds 286 U. S. 444, the court said:

* * * Hardeman testified at the trial that he did in fact swear to the application at the same time that the affidavit which is mentioned in it as attached, and which showed Hardeman's age and citizenship, was executed by his father. This, if true, occurred at a distance from the land office. The application disclosed no unsigned form of oath, or other indication that its contents were sworn to or intended to be. By requiring it and all other statements to the Secretary to be upon oath, and in such form and upon such blanks as he may require, we think the statute, section 190, intended written papers and an oath disclosed by the paper filed, so that the Secretary and the interested public could know by inspection whether the requirement had been complied with. No other construction of the statute is practicable, for otherwise there would be intolerable uncertainty, and a penalty for perjury

would be hard to inflict for want of knowing who had administered the oath, or whether one had been administered at all. Although ordinarily the omission of an oath can be supplied later, when the oath is made a condition of priority or advantage over another the amendment will operate only from its date. Because Hardeman filed no lawful application within thirty days from his posting of the land, he lost his priority right, and the permit was properly awarded to Witbeck.

It follows that the appellant had no pending application when the application of Fort was filed, and none 90 days prior to the approval of the act of August 21, 1935 (49 Stat. 674), which bars allowance of permit applications filed within said 90 days.

The motion is therefore denied.

Motion denied.

GEORGE P. MORGAN

Decided September 18, 1936

MINERAL LEASING ACT—CEDED UTE INDIAN LANDS—WITHDRAWAL—STOCKRAISING HOMESTEAD ENTRIES—RESERVED MINERALS.

The mineral deposits in ceded Ute Indian lands withdrawn from disposal by departmental order of September 19, 1934, under authority of the Wheeler-Howard Act of June 18, 1934 (48 Stat. 984), for possible restoration to tribal ownership, are removed from the operation of the Mineral Leasing Act of February 25, 1920, where the lands are embraced in an unperfected homestead entry under the stock-raising homestead act.

WALTERS, First Assistant Secretary:

By decision of November 9, 1935, the Commissioner of the General Land Office rejected the oil and gas prospecting permit application of George P. Morgan for certain tracts in Secs. 31, 32, 33, and 34, T. 33 N., R. 12 W., N. M. M., Colorado, because the said lands are a part of the ceded Ute Indian Reservation which was opened to entry under the act of June 15, 1880 (21 Stat. 199), but later withdrawn from disposal by departmental order of September 19, 1934 (54 I. D. 559), under authority of the Wheeler-Howard Act of June 18, 1934 (48 Stat. 984).

The applicant has appealed on the ground that his application antedated the said withdrawal.

The application was filed on January 2, 1934, which was prior to the date of the said withdrawal, but, as held by the Department in decision of January 30, 1935, in the case of *Eva C. Miller* (Denver 044787), the filing of the application did not confer any right that would prevent the Government from withdrawing the lands. See also *United States v. Wilbur*, 283 U. S. 414.

It appears that some of the tracts applied for are embraced in stock-raising homestead entries which were of record when this per-

mit application was filed. Such entries carry no right to any minerals that may be in the land, all minerals being expressly reserved therefrom for other disposal. In the similar case of *J. D. Moore* (Pueblo 055973), decided by the Department on December 19, 1935, it was held that lands covered by a stock-raising homestead entry were not affected by the said withdrawal, and that a prospecting permit could be properly granted for the reserved minerals. Upon reconsideration of the question, that view is deemed to be erroneous and the said decision will no longer be followed.

The purpose of the said withdrawal order was to withhold from disposal such ceded lands as might be found desirable for restoration to tribal ownership. The order applied to all undisposed-of lands of the specified Indian reservations, including the reservation here involved, that had been "opened" to sale, entry, or any other form of disposal under the public land laws, "or which are subject to mineral entry and disposal under the mining laws of the United States, with the exception of areas included in reclamation projects," and the lands were withdrawn "from disposal of any kind, subject to any and all valid existing rights." The "rights" of a stock-raising homestead entryman do not include the minerals, as all minerals in the lands are expressly reserved and excepted from the entry. Furthermore, there is the possibility that such existing entry may be canceled, in which case the entire interest, both the surface estate and the minerals, would fall under the effect of the withdrawal and be withheld from disposal so long as the withdrawal shall remain in force.

The decision appealed from is accordingly affirmed.

Affirmed.

MATTIE A. ZOBRIST

Decided September 18, 1936

PRACTICE — DESERT-LAND APPLICATION — REQUEST FOR HEARING — DEMURRER — SOURCE OF WATER.

The Department rejected an application for a desert-land entry on the ground that the water conservation district on which the applicant relied as a source of water had been denied approval by the Department, but the applicant was allowed to apply for a hearing stating what she expected to prove. She filed a request for a hearing in which she said "that we expect to show that there is an ample water supply for the lands embraced in the exterior boundaries of the Arizona Water Conservation District." A special agent demurred to the request.

Held: 1. Such a request should be sufficiently specific to inform the Government of the nature of the proof it will be required to meet; only in this

way can issues be framed, the limits of the subject matter of the hearing fixed, and the Government intelligently prepare its case.

2. The request filed is insufficient because it is too general and furnishes no guide to what is intended to be proved.

3. While the disapproval of the district remains in force, the applicant cannot be allowed entry upon the basis of water to be supplied by the district, but she may be allowed entry if able to show a satisfactory source otherwise available, as long as there is compliance with statute and regulations.

4. The demurrer should be sustained, with leave to the applicant to request again a hearing in writing. With such request, the information, proof, and plans required when an original application is filed, should be submitted. A copy should be served on the special agent. Upon the papers so filed and such written statement as the special agent may submit, the Commissioner of the General Land Office should then determine whether a hearing should be allowed.

WALTERS, First Assistant Secretary:

On December 22, 1926, Mattie A. Zobrist filed a desert-land application for the S $\frac{1}{2}$ Sec. 22 T. 5 N., R. 3 W., G. & S. R. M. The source of water supply was stated to be the Nadaburg Irrigation District, later known as the Arizona Water Conservation District. On January 5, 1933, the district was denied approval as a source of water supply. Accordingly, on January 6, 1933, the application of Mrs. Zobrist was rejected by the Commissioner of the General Land Office, subject to her right to appeal or to apply for a hearing. She appealed to the Department, contending that her application should be suspended rather than rejected. On May 23, 1933, the Department held the application was properly rejected and the case was "remanded with directions that the applicant be allowed an opportunity to apply for a hearing, stating what it is expected to be established thereat."

On July 31, 1933, the applicant filed a request for a hearing. The only portion which attempts to set forth what was expected to be established was this: "We further represent that we expect to show that there is an ample water supply for the lands embraced in the exterior boundaries of the Arizona Water Conservation District." On July 17, 1934, a special agent filed a demurrer to the request for a hearing. This demurrer was overruled by the register. The special agent appeals from the decision of the Commissioner of the General Land Office, dated September 21, 1935, affirming the holding of the register.

It is quite true, as the Commissioner in his decision stated, the applicant should not be denied a right to be heard in support of her contention that an adequate water supply to irrigate the lands exists and is available. But orderly procedure requires that in advance of a hearing she state what she intends to prove thereat. Such statement should be sufficiently specific to inform the Government of the nature

of the proof it will be required to meet. Only in this way can issues be framed, the limits of the subject matter of the hearing fixed, and the Government intelligently prepare its case.

The statement filed by the applicant in attempted compliance with the direction of the Department is wholly inadequate. It is too general. It furnishes no adequate guide to what is intended to be proved. The Government could not possibly prepare to meet the applicant's proof or make any independent investigation of the facts in advance of the hearing.

The statement can be read to mean that the applicant intended to rely on the district, as such, as a source for water, despite the decision of the Department eliminating the district as an acceptable source. So read, a hearing would be futile. Mrs. Zobrist filed an application stating the irrigation district to be the source of water supply. Her application has been rejected because the district failed of recognition. While the disapproval of the district remains in force, the applicant cannot be allowed entry upon the basis of water to be supplied by the district.

Nevertheless, she may be able to prove that an adequate source of water supply exists and that she has acquired a water right or has "initiated and prosecuted, as far as then possible, appropriate steps looking to the acquisition of such a right" (G. L. O. Circular No. 474, 50 L. D. 443, 449, 450). Though she may not be able to obtain water or acquire a water right from an approved district, she may be able to show a satisfactory source otherwise available. The location of the source; its relation to the boundaries of the disapproved district; these are immaterial, as long as there is compliance with statute and regulations.

The demurrer should be sustained. But it does not follow from this that a hearing should be denied the applicant. If she still desires a hearing, she should request it in writing. With such request she is to submit the information, proof and plans required to be submitted when an application is filed (Rules 12 and 13, G. L. O. Circular No. 474; 50 L. D. 449, 450). A copy should be served on the special agent. Upon the papers so filed and such written statement as the special agent may submit, the Commissioner should then determine whether a hearing should be allowed. In order to expedite final disposition of the case it is suggested that the decision of the Commissioner be submitted to the Department for approval.

The decision of the Commissioner is reversed; the demurrer of the special agent is sustained; and the case remanded for appropriate action consistent with the foregoing conclusions.

Reversed and Remanded.

ASSESSMENTS FOR OPERATION AND MAINTENANCE CHARGES OF IRRIGATION PROJECT AT FORT HALL INDIAN RESERVATION

Opinion, September 24, 1936

INDIAN IRRIGATION PROJECT—FORT HALL INDIAN RESERVATION—OPERATION AND MAINTENANCE CHARGES.

As provided in the act of March 1, 1907 (34 Stat. 1015), with the single exception of Indian lands which are leased for a term longer than three years, the Indian owners of lands on the Fort Hall Indian Reservation have the right to receive water without payment of assessments for operation and maintenance, regardless of the nature of or restrictions on their title, or whether the lands are still held by the original allottee or his heirs. When a tract of Fort Hall Indian Reservation land has been under lease for three years or for periods aggregating three years, then, from that time on, it is subject to operation and maintenance assessments whenever and for whatever period it is leased.

STATUTORY CONSTRUCTION—ACTS OF AUGUST 1, 1914, AND MARCH 1, 1907—REPEAL BY IMPLICATION.

The act of August 1, 1914 (38 Stat. 589), did not impliedly repeal the provision of the act of March 1, 1907 (34 Stat. 1024), limiting the obligation of Indian landowners on the Fort Hall Indian Reservation to pay operation and maintenance charges to those who lease their lands for more than three years.

STATUTORY CONSTRUCTION—REPEAL BY IMPLICATION.

Repeals by implication are not favored. They will be implied only if the two statutes are irreconcilable and it is impossible reasonably to give effect to both. The implication must be necessary. The intention of the legislature to repeal must be clear and manifest. Where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general. The special statute is not to be considered as repealed or modified by the later general statute unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all. A statute should not be held to have been impliedly repealed by a later statute if it has been treated by subsequent legislation as subsisting.

STATUTORY CONSTRUCTION—GRANTS OF PERMISSIVE OR MANDATORY POWER—USE OF WORDS "MAY" AND "SHALL."

When the word "may" is used in the statutory grant of a power, it is assumed the power was intended to be permissive, discretionary, rather than mandatory. Only where the context or subject matter compels such construction, is it ever construed to mean "shall" and the power to be mandatory. Where neither the context nor subject matter of the act of August 1, 1914, compels such construction and "may" is used in contradistinction to "shall," held, the provision using "may" grants a permissive power.

STATUTORY CONSTRUCTION—DEPARTMENTAL PRACTICE IN ADMINISTERING AND CONSTRUING STATUTE.

The construction of a statute which the Department charged with its administration has uniformly and consistently placed on it, is used by the courts

as an aid in interpretation. Because the practice of the Department in administering and construing the 1907 and 1914 acts has neither been uniform, consistent, nor unchallenged, it presents no obstacle to the conclusion that the later statute did not repeal the earlier one.

STATUTORY CONSTRUCTION—STATUTES RELATING TO INDIANS.

In the Government's dealings with the Indians, statutes should be liberally construed and doubts resolved in their favor.

Solicitor's opinions of December 13, 1916, D-40929, and March 15, 1929, M-18556, unpublished, overruled in so far as inconsistent. 33 Ops. Atty. Gen. 25, distinguished.

You have referred to me for opinion a question submitted by the Commissioner of Indian Affairs:

Have the Indians on the Fort Hall Indian Reservation the right to receive water from the irrigation project there located without payment of assessments for operation and maintenance (a) where the restricted fee patented land is still held by the original allottee or his heirs, (b) where restrictions have been removed and the land is still held by the original allottee or his heirs, and (c) where the restricted Indian land is leased for one or more years?

In my opinion, the answer is that with the single exception of Indian lands which are leased for a term longer than three years, the Indian owners of lands on the Fort Hall Indian Reservation do have the right to receive water without payment of assessments for operation and maintenance, regardless of the nature of or restrictions on their title, or whether the lands are still held by the original allottee or his heirs.

The act of March 1, 1907 (34 Stat. 1015), was the Indian Department Appropriation Bill for the year ending June 30, 1908. In it special provision was made for construction of an irrigation system at the Fort Hall Reservation. For such purpose \$350,000 was appropriated. This sum was to be reimbursed the United States from moneys obtained from the sale of water rights to owners of lands in private ownership at the rate of \$6 per acre. These lands were in that part of the reservation which the Fort Hall Indians had theretofore ceded to the United States.

Among other things, it was provided:

The land susceptible of irrigation under the system herein provided and owned by Indians in severalty or in common shall be deemed to have a right to so much water as may be required to irrigate said lands without cost to the Indians so long as the title remains in said Indians or tribe, but any such lands leased for a longer term than three years shall bear their pro rata part of the cost of the maintenance of the system that may be constructed, and when the Indian title is extinguished these lands shall also bear their pro rata cost of maintenance.

(34 Stat. 1024. This will hereafter be referred to as the 1907 exemption provision.)

Thus it was unequivocally said that with the one exception of lands leased for more than three years, Indian-owned lands were to receive water without the imposition of operation and maintenance charges. This provision was not the result of any general condition common to all Indians. It was justified by special circumstances peculiar to these particular Indians, and known to Congress when the statute was enacted.

The original appropriation bill did not provide for a Fort Hall irrigation system. Senator DuBois moved to add the provisions therefor to the act. In support of the amendment he submitted to the Senate a written statement of his own and a letter from the Commissioner of Indian Affairs to him. They were referred to the Committee on Indian Affairs and ordered printed. The Committee, of which the Senator was a member, approved the amendment and incorporated his statement and the letter of the Commissioner in its report. (Cong. Rec., Vol. 41, p. 1427; Senate Doc. No. 230, 59th Cong. 2d sess.; Senate Rep. No. 5689, 59th Cong. 2d sess., pp. 14, 15.)

These documents reveal that the following factors induced Congress to enact the exemption provision. The white-owned lands on the ceded portion of the reservation were worthless without water. The white owners were to be charged \$6 per acre for water rights. "A large sum of money" belonging to these Indians had already been spent on an irrigating canal. These Indians had by treaties three times ceded portions of their lands to the United States. The Lemhi Indians were about to be moved to the Fort Hall Reservation and take lands in severalty. "Under all the circumstances it does not seem fair nor equitable that the Indians should pay for this additional irrigation system * * *. It is fair that the whites should pay for this storage system." The bill was to accomplish the desired object, "without working an injustice to the Indians of the Fort Hall Reservation, who are certainly entitled to some consideration in the matter of securing water for their lands."

The act of August 1, 1914 (38 Stat. 582), was an appropriation act for the Bureau of Indian Affairs for the year ending June 30, 1915. It did not expressly repeal or even mention the act of March 1, 1907, or any part of it. But the claim has been made that it impliedly repealed the 1907 exemption provision.

In 1907 Congress granted the Fort Hall Indians an exemption which, in its considered judgment, was equitably due them. If for no known reason it intended seven years later to withdraw the grant, it could easily enough have said so. May we justifiably say that such an intent is implicit in the words of the 1914 statute? The evidence to support a conclusion that it is, should be clear, convincing, unmistakable.

**U. S. CIRCUIT COURT OF APPEALS,
THIRD CIRCUIT**
The Property of the United States

1

Repeals by implication are not favored. They will be implied only if the two statutes are irreconcilable and it is impossible reasonably to give effect to both. The implication must be necessary. The intention of the legislature to repeal must be clear and manifest. More particularly, "where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general." "When the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms or treating the subject in a general manner and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all." *Washington v. Miller*, 235 U. S. 422, 428; *Posadas v. National City Bank*, 296 U. S. 497, 503, 504; *Rodgers v. United States*, 185 U. S. 83, 88, 89.

Among other things, the later act appropriated \$335,000 for general irrigation work on Indian reservations. Attached to the provision therefor were several provisos, three of which relate to payment of construction and maintenance charges. These three provisos, separately discussed hereafter, make no mention of any particular Indians, reservations, or irrigation systems. They constituted general legislation. The 1907 exemption provision applied to a particular group of Indians, the Fort Hall Reservation and its irrigation system. It was special legislation enacted as a result of conditions peculiar to the Fort Hall Indians. Thus its survivorship is aided by the general rule against the implication of a repeal, as well as the even more emphasized subsidiary rule against the implied repeal of a special statute by a general one. Guided by these rules, I think the conclusion that there was no implied repeal is inescapable.

(a) The only one of the three 1914 provisos which mentions maintenance charges is this:

* * *; and for lands irrigable under any such system or project the Secretary of the Interior may fix maintenance charges which shall be paid as he may direct, such payments to be available for use in maintaining the project or system for which collected.

(38 Stat. 583. This will hereafter be referred to as the maintenance proviso.)

When the word "may" is used in the statutory grant of a power, it is assumed the power was intended to be permissive, discretionary,

rather than mandatory. Only where the context or subject matter compels such construction, is it ever construed to mean "shall" and the power to be mandatory. Neither context nor subject matter compels such construction here. In the next proviso it is said that moneys "shall" be reimbursable. And in the following one, the Secretary is "authorized and directed to apportion." The statute clearly distinguishes between the permissive and the mandatory. By this proviso the Secretary was merely authorized, not directed, to fix and collect maintenance charges. *Farmers Bank v. Federal Reserve Bank*, 262 U. S. 649; *United States v. Thoman*, 156 U. S. 353; *Terre Haute v. Indiana*, 194 U. S. 579.

A permissive power to collect maintenance charges has a flexible range. To authorize, but not direct, the exercise of a power, presupposes the existence of occasions when it need not or is not to be exercised. The 1907 act made provision for one such occasion. The result of giving effect to both is simply this: The Secretary has the general power to collect maintenance charges. At Fort Hall, too, he may collect these charges, but the burden of payment is to be borne by those users who are not Indian landowners and those Indian landowners who lease their lands for more than three years. The later statute expressly grants a general permissive authority. The earlier one merely regulates its exercise in a limited area. There is consistency, compatibility, harmony. Both may reasonably be given effect without conflict. A repeal cannot be implied. *Washington v. Miller; Rodgers v. United States; Posadas v. National City Bank*, supra; *Ex parte Crow Dog*, 109 U. S. 556; *United States v. Healey*, 160 U. S. 136; *Knapp v. Byram*, 21 Fed. (2d) 226.

In the second portion of the proviso, it was provided that the moneys collected were to be available for maintaining the project for which collected. This concerned merely the mechanics of handling such moneys as were collected; not how nor from whom the money was to be collected. It therefore does not merit serious consideration in determining whether there was an implied repeal. And yet legislative records present convincing proof that it was this portion of the proviso in which the primary purpose animating its enactment found expression.

The maintenance proviso is actually the second half of a longer proviso. The two portions are separated by a semicolon. The first half provides "that the proceeds of sales of material utilized for temporary work and structures shall be covered into the appropriation made therefor and be available for the purpose of the appropriation." Both portions have this in common: Moneys received were again to be directly used for particular irrigation purposes. Both were intended to achieve related objectives.

The following is from the justification submitted by the Assistant Commissioner of Indian Affairs to the House Committee:

Under the present laws and decisions by the comptroller, the funds derived from the sale of such articles must be deposited to the credit of the United States and are no longer available for construction of the projects for which they were appropriated; and this, so far as the irrigation work is concerned, amounts to a reduction of the appropriation * * *. The acreage cost for maintenance on these projects is fixed by the Secretary of the Interior each year, and the necessity for some specific authority of law for collecting maintenance charges has become apparent. The Comptroller of the Treasury has decided in the case of Fort Hall, which would undoubtedly apply to other reservations, that the money so collected must be deposited to the credit of the United States. It is therefore unavailable for the purpose for which it was intended, unless later appropriated by Congress. * * * If legislation as suggested in the draft of the bill prepared by the Indian Office is passed, the amount of money available for the construction of a project will equal the appropriation, and the money collected for maintenance * * * will be used for the purpose of maintaining and operating the various systems.¹

Moneys paid in discharge of obligations to pay for operation and maintenance charges were to be used as indicated instead of being deposited to the credit of the United States. This purpose is wholly unrelated to an existing exemption from liability to pay such charges.

It is true there was some mention of the necessity for authority to collect maintenance charges. But the necessity was not for *creating* the authority; it was for obtaining "*specific* authority of law." The implied power had theretofore been assumed to exist, unchallenged, so far as appears. Thus in a letter from the Assistant Secretary to the Fort Hall Superintendent of Irrigation, dated April 2, 1913, it was said that "although there appears to be no specific authority of law for the assessment of maintenance charges, yet the express authority for the Secretary of the Interior to do whatever is necessary to carry out the purposes of the act of March 1, 1907 * * * is believed to cover the situation." The 1907 exemption provision itself furnishes proof of the existence of the implied power. In enjoining collection from a particular group, the existence of a general power to collect is implicit.

¹ Hearings before Subcommittee of House Committee on Indian Affairs, on the Indian Appropriation Bill, 1913, page 34; incorporated by reference in Hearings before Senate Committee on Indian Affairs on H. R. 12579, 1914, page 278; relevant Senate Hearings included by reference, Senate Rep. No. 519, 63d Cong. 2d sess., page 8.

Here, as elsewhere in this opinion, legislative records are used as an aid in ascertaining legislative intent. That such use is sanctioned, see *Penn. Mutual Co. v. Lederer*, 252 U. S. 523, 534; *Gooch v. United States*, 297 U. S. 124, 127; *Duparquet v. Evans*, 297 U. S. 216, 220; *Omaechevarria v. Idaho*, 246 U. S. 343, 351; *O'Hara v. Luckenbach*, 269 U. S. 364, 367, 368; *Fed. Tr. Comm. v. Raladam Co.*, 283 U. S. 643, 650; *District of Columbia v. Reuter*, 15 App. D. C. 237, 241; The Courts and Committee Reports, J. P. Chamberlain, 1 Univ. of Chicago Law Rev. 81; A Note on "Statutory Interpretation," Landis, 43 Harvard Law Rev. 886.

Legislative records relating to the maintenance proviso reveal its purposes to be clearly consistent with the survival of the 1907 exemption provision.

(b) The next proviso is this:

That all moneys expended heretofore or hereafter *under this provision* shall be reimbursable where the Indians have adequate funds to repay the Government, such reimbursements to be made under such rules and regulations as the Secretary of the Interior may prescribe.

(38 Stat. 583. This will hereafter be referred to as the reimbursable proviso.)

All these provisos were attached to a general irrigation appropriation. In addition to the three already mentioned there was another. It provided that "no part of this appropriation shall be expended on any irrigation system or reclamation project for which specific appropriation is made in this Act or for which public funds are or may be available under any other Act of Congress." Previous appropriation bills also included such general irrigation appropriations and similar commands against the use thereof. Both in the 1914 Act and previous ones, specific appropriations were made for the Fort Hall project (act of April 4, 1910, 36 Stat. 270, 274; act of March 3, 1911, 36 Stat. 1059, 1063; act of August 24, 1912, 37 Stat. 518, 524; act of June 30, 1913, 38 Stat. 78, 87; act of August 1, 1914, 38 Stat. 583, 589).

The reimbursable proviso speaks of moneys being "*reimbursable* where the Indians have adequate funds to *repay* the Government." The meaning of both reimbursement and repayment is the return of an equivalent received. Congress could not have intended that reimbursement or repayment of the general irrigation appropriations was to be made by persons who had not received and were not to receive any benefit therefrom.

That this proviso was intended to apply to those projects which were financed out of this and previous general appropriations and not such projects as Fort Hall is made clear by legislative history and records. Referring to the general irrigation appropriation, the Senate Committee reported—

This is the general item for irrigation work amongst the Indians. The appropriation provides for the general irrigation force of the Indian Office, the payment of salaries and expenses, *as well as providing for the construction of small irrigation projects for Indians who are without funds. In other portions of the bill are found specific items for irrigation which are reimbursable. This item is a gratuity, excepting for the proviso: "That all moneys * * *"*

(Report of Senate Committee on Indian Affairs, Sen. Rep. No. 519, 63d Cong., 2d sess., p. 8.)

Assistant Commissioner Merritt testified during committee hearings to the same effect. He said this proviso was intended to apply to certain small irrigation projects which had been constructed out of previous general appropriations for Indians who were without funds. In the belief that they might "ultimately be able to pay for the construction cost" the Department desired the authority to require the Indians whose lands had been irrigated "to pay for that construction." (Senate Committee Hearings, *supra*, pp. 190, 276; incorporated by reference, Senate Committee Report, *supra*, pp. 7, 8.)

In the House consideration was being given to a maintenance appropriation for Gila River Reservation, which as it then stood was not made reimbursable. Representative Mondell pointed out that part of the general irrigation appropriation seemed to be intended for the same purpose as this one; that the former was reimbursable and the latter was not. He moved to amend the item so as to make it reimbursable and the House agreed to it. The maintenance item for Fort Hall similarly had not been made reimbursable and an amendment making it reimbursable was later also moved and agreed to. (Cong. Rec., Vol. 51, pp. 3572, 3573, 3659.) In thus agreeing to the amendments, it evidently was assumed that this reimbursable proviso would not apply to projects for which specific appropriation was otherwise made in the act. *United States v. St. Paul*, 247 U. S. 310, 318; *Fox v. Standard Oil*, 294 U. S. 87, 96.

The Fort Hall project then was not intended to be included within the terms of this proviso. In no sense is the latter repugnant to the 1907 exemption provision. Both are effective in different areas. There is no conflict and no implication of a repeal.

(c) The next proviso is as follows:

That the Secretary of the Interior is hereby authorized and directed to apportion the *cost of any irrigation project constructed for Indians and made reimbursable out of tribal funds of said Indians* in accordance with the benefits received by each individual Indian so far as practicable from said irrigation project, said cost to be apportioned against such individual Indian under such rules, regulations, and conditions as the Secretary of the Interior may prescribe. * * *

(38 Stat. 583. This will hereafter be referred to as the apportionment proviso.)

This proviso has no application to the Fort Hall project. The "cost" of that project was not "made reimbursable out of tribal funds." Its cost was intended to be reimbursed out of the moneys received from the sale of water rights to the white owners. (Act of March 1, 1907. See pp. 2 and 3 hereof.)

Moreover, this proviso refers to reimbursement for cost of construction, not operation and maintenance. "Cost" of a project in the ordi-

nary sense means the original cost, not that plus cost of maintenance. That this meaning was here intended is made plain by the surrounding context. The words "cost of any irrigation project" are used in contradistinction with "maintenance charges" in the maintenance proviso. Two separate provisos thus covered two differently characterized subjects and treated them differently. "Cost of any irrigation project" is followed by "constructed"; not constructed and maintained.

The second half of the sentence, the first half of which constitutes the quoted proviso, also supports this interpretation. Being in the same sentence, separated by a comma and connected by "and," we may assume the general subject matter of both portions to be the same. The latter portion requires the Secretary to submit annually to Congress a "cost" account of each irrigation project. It enumerates what this report was to include. No mention is made of maintenance expenses. On the contrary, the only expenditures enumerated are: "amount expended on construction"; "amount necessary to complete"; and "cost per acre when completed." Thus, "cost" is related and limited to construction as distinguished from maintenance expenses.

Abundant evidence that cost of construction, not operation and maintenance charges, was intended to be apportioned, may be found in the legislative records. (Senate Committee Report, *supra*, pp. 7, 8; Senate Committee Hearings, *supra*, pp. 277, 191, incorporated by reference in its report, pp. 7, 8; Cong. Rec., Vol. 51, p. 3660.)

Even as to construction costs this proviso on its face assumes the existence of an obligation to reimburse. It merely provides for an equitable method of apportionment of "cost * * * made reimbursable out of tribal funds." There is no attempt, express or implied, to create an obligation to reimburse if none existed.

The apportionment proviso and the 1907 exemption provision have no common subject matter. There can be no incompatibility. A repeal cannot be implied.

2

We come now to a consideration of the maintenance appropriation provisions for Fort Hall since 1914. Prior to 1914 they were made without provision for reimbursement. (36 Stat. 1063; 37 Stat. 524; 38 Stat. 87.)

(a) In the 1914 act, the appropriation was provided to be "reimbursable to the United States out of any funds of the Indians occupying the Fort Hall Reservation now or hereafter available." (38 Stat. 589.) In effect, by the joint resolution of March 4, 1915, the same appropriation was made and it too was similarly made reimbursable. (38 Stat. 1228.) A similar provision was expressly included in the act of May 18, 1916. (39 Stat. 132.)

These provisions did not effect an implied repeal of the 1907 exemption provision. In these three instances Congress merely provided for three exceptions to the application of the latter provision. To the extent thereby provided, there was inconsistency, and a resulting modification. But the older statute otherwise survived. *Wood v. United States*, 41 U. S. 341, 362; *Posadas v. National City Bank*, 296 U. S. 497, 503, 504; Solicitor's Opinion, September 18, 1920, unpublished, D-48409.

(b) The act of March 2, 1917, however, provided:

For improvement and maintenance and operation of the Fort Hall irrigation system, \$25,000: *Provided*, That expenditures hereunder for *improvements* shall be reimbursable to the United States *in accordance with the provisions of the act of March first, nineteen hundred and seven.*

(39 Stat. 976.)

Except for the amount, the very same words are repeated in the acts of May 25, 1918 and June 30, 1919 (40 Stat. 571, 41 Stat. 13).

Here is convincing proof that Congress never intended to repeal the 1907 provision by the 1914 act. Operation and maintenance expenditures were not made reimbursable. Only improvement expenditures were. But this is immaterial. The quoted reference to the 1907 act is unmistakable evidence that three, four, and five years after the enactment of the 1914 act, Congress considered the provisions of the 1907 act concerning reimbursement of irrigation expenditures at Fort Hall to be still alive.

In *Rural Special School District v. City* (218 S. W. 661, 142 Ark. 279) it was held that one statute did not impliedly repeal another. A statute enacted later than both had referred to the earlier of the two statutes as follows: "as provided in Act 321 of the Acts of 1909 * * *." One ground for the decision was that there was no conflict between the two statutes. The other was that a "court should be slow indeed to construe an act repealed by implication which had been treated by subsequent legislation, touching the same subject matter, as a living, and not a dead, letter of the law." (218 S. W. 663.)

(c) To five of the appropriations was merely added the word "reimbursable." (40 Stat. 840; 41 Stat. 1171; 42 Stat. 447, 1165; 43 Stat. 402.) The addition of the word "reimbursable" was neutral in effect. Reimbursement should then have been made according to existing law. Pursuant to the 1907 act, reimbursement of these appropriations should have been made by the Indian owners of lands leased for more than three years, and the white owners on the ceded tract.

(d) Besides those already mentioned, there were nineteen Fort Hall maintenance appropriations.² None of these made provision for reimbursement. They present no difficulties; they are consistent with and support the conclusion that the exemption provision was not impliedly repealed.

3

The construction of a statute which the Department charged with its administration has uniformly and consistently placed on it, is used by the courts as an aid in interpretation. *United States v. Healey*, 160 U. S. 136, 145; *Norwegian Nitrogen Co. v. United States*, 288 U. S. 294, 315; 46 Harvard Law Review 1033. Since 1914 the practice of the Department in assessing operation and maintenance charges at Fort Hall has not been uniform. Opinions on whether the 1907 exemption provision survived the 1914 act have been conflicting.

Prior to 1914, the assessments had been levied only against the white-owned lands on the ceded portion of the reservation. (Assessment orders of March 10, 1911, December 2, 1911, February 28, 1912, undated telegram from First Assistant Secretary to Dietz, fixing 1913 charges.) For the 1914, 1915, and 1916 irrigation seasons, the white owners were assessed. Though this is not quite clear the Indians were apparently merely debited the amount of the maintenance appropriations, which during these years were made reimbursable out of any available funds of the Indians. (Orders of September 11, 1914, February 26, 1915, March 21, 1916.) For the seasons from 1917 to 1925, inclusive, "each acre of land irrigable from the Fort Hall system," was assessed.³ There was thus indicated an opinion that the 1914 act had rendered inoperative the injunction of the 1907 act against charging the Indians.

In 1926 there was a change. The Assessment Order of the Secretary provided for assessment "against all lands in white ownership and on which fee patents shall have been issued to the Indian and where trust patent lands are leased." (Order of March 3, 1926.) This order was based upon a letter of the Commissioner of Indian Affairs to the Secretary dated February 26, 1926. In it he said: "The order fixing the charges for 1926 is similar to the order fixing such charges in 1925 except that specific mention is made relative to trust patent Indian lands in view of the provisions of an act of March

² 38 Stat. 1157; 39 Stat. 31; 41 Stat. 418, 1234; 42 Stat. 568, 1189, 1539; 43 Stat. 1152; 44 Stat. 464, 945, 1257; 45 Stat. 212, 1574; 46 Stat. 290, 1127; 47 Stat. 830; 48 Stat. 370; 49 Stat. 187; 49 Stat. 1757.

³ Orders of February 21, 1917, February 4, 1918, February 21, 1919, February 9, 1920, February 4, 1921, March 10, 1922, February 27, 1923, March 20, 1924, March 28, 1925.

1, 1907 * * *." A summary of the exemption provision followed. The 1907 act was still considered quite alive. This, though even this order did not fully comply with the 1907 provision. According to the statute, Indian owners, regardless of the nature of or restrictions on their title, were not to pay; the only exception was when their lands were leased for more than three years. This order assessed Indians if fee patents had been granted them, or if trust patent lands were leased, regardless of the term of the lease. The orders of January 27, 1927, February 7, 1928, and January 21, 1929, contained the very same language as that quoted from the 1926 order.

On March 6, 1929, however, the Commissioner wrote the Secretary recommending a modification of the January 21, 1929, order. After quoting the exemption provision of the 1907 act, he said:

In view of the provisions of the law above cited, it is recommended that the order be modified so as to authorize the assessment of operation and maintenance charges for the season 1929 at the rate designated against "all lands in white ownership and against lands in Indian ownership under lease for a longer term than three years."

The suggested modification would have resulted in complete compliance with the 1907 act and is in my opinion the form in which all operation and maintenance assessment orders should have been and now should be promulgated. Because of an opinion of the Solicitor (M-18556), dated March 15, 1929, hereinafter more fully discussed, the recommendation was not accepted and the order not modified.

In 1930 the assessment was levied "against all lands in white ownership, and *against all lands in Indian ownership on which the restrictions have been removed, and against all restricted lands that are leased.*" (Order of February 10, 1930.) The same language has been used in all succeeding orders (March 5, 1931, December 29, 1931, January 6, 1933, February 28, 1934; the latter order is effective until further notice). Within the terms of these current orders there is not full compliance with the 1907 act. Indians are charged if their restrictions have been removed, or if they have leased their lands, regardless of the terms of the leases.

Three unpublished opinions of the Solicitor similarly reflect vacillation and doubt. On December 13, 1916, it was held the assessments should be levied against all, white and Indian alike (D-40929). On September 18, 1920, the holding was that the 1907 provision had not been repealed, except as the act of 1914, joint resolution of 1915 and act of 1916 made the operation and maintenance appropriations provided by these statutes reimbursable (D-48409). On March 15, 1929, it was held that the 1914 act had completely repealed the 1907 provision (M-18556).

The practice of the Department in administering and construing the 1907 and 1914 acts presents no obstacle to a conclusion that the 1907 act is still in force. It has neither been uniform, consistent nor unchallenged. *United States v. Healey*, 160 U. S. 136, 145; *Norwegian Nitrogen Co. v. United States*, 288 U. S. 294, 315; 46 Harvard Law Review 1033.

4

(a) In the 1916 opinion Solicitor Mahaffie held that the Indian lands should bear their proportionate share of the operation and maintenance charges. His only reason for so holding was that the three successive reimbursable appropriations of the 1914, 1915, and 1916 acts evidenced an intention that the Indians as well as the whites should pay the charges. That Congress never so intended is made abundantly clear by subsequent legislation. None of the Fort Hall appropriations made since 1916 was accompanied by any such provision for reimbursement of operation and maintenance charges. The three appropriation acts immediately following those on which Solicitor Mahaffie relied contain affirmative evidence that the 1907 provision was still considered by Congress to be alive; and nothing in later legislation supports a contrary conclusion.

(b) The 1920 opinion of the Solicitor concerned both construction and operation and maintenance charges. Again, no consideration was given the three 1914 provisos. The opinion refers to the one of 1916, and to the four statutes enacted since that opinion, three of which provided for reimbursement "in accordance with the provisions of the act of March 1, 1907," and the fourth made no provision for reimbursement (acts of March 2, 1917, May 25, 1918, June 30, 1919, and February 14, 1920). It concludes: "The provision in the act of March 1, 1907, exempting lands in Indian ownership has not been abrogated by subsequent law, except as to expenditures made from the appropriations provided by the acts of August 1, 1914, joint resolution of March 4, 1915, and act of May 18, 1916." With this conclusion I am in complete accord.

Even as regards construction charges the 1920 opinion did not mention the reimbursable proviso. It only gave consideration to the apportionment proviso. The assumption is implicit that the latter proviso concerned construction and not maintenance charges. Moreover, it was held that the Fort Hall project was "not within the purview of this provision. The cost is not made reimbursable out of tribal funds of the Indians." (P. 3.)

(c) The 1929 opinion held the 1907 provision was repealed by the 1914 act. Apparently the reimbursable and apportionment provisos were not considered material, for no mention was made of them. The maintenance proviso alone is discussed. I agree with so much of the

opinion as held the power granted to the Secretary by that proviso was discretionary. For the reasons hereinbefore fully set forth, I cannot agree there was a repeal. His opinion relied on the language of the law, a portion of the report of the Senate Committee, and an opinion of the Attorney General. There is nothing in the language of the law from which the implication of a repeal would necessarily follow. The portion of the Senate Committee report which is referred to both in this opinion and that of the Attorney General had no application to the maintenance proviso or to maintenance charges. What was being discussed was the apportionment proviso, which concerned only construction charges and in any event did not apply to Fort Hall. (Senate Committee Report, *supra*, pp. 7, 8.)

The Attorney General's opinion (33 Opinions, Attorney General, 25) concerned the liability of purchasers of Indian lands on the Wind River Reservation for payment of construction charges. It held there was no such liability because (a) the purchasers had bought in reliance on representations there would be no such charges, and (b) the 1914 apportionment proviso did not necessarily apply to white purchasers. Construction, not operation and maintenance charges, were involved. The only portion of the 1914 act considered directly involved was the apportionment proviso. It was said: "A question arose as to whether the proviso in the act of 1914 directing the apportionment of costs was applicable at all to the Wind River Reservation, and the Solicitor for your Department gave an opinion that it does so apply." But in the 1920 Fort Hall opinion, the Solicitor said: "The Fort Hall project is not within the purview of this provision. The cost is not made 'reimbursable out of tribal funds of the Indians.' In this respect it differs from the Wind River project, subject of my opinion of May 25, 1920 * * *." There was no such statute as the Fort Hall exemption provision in the case of Wind River. No question of implied repeal was involved. The Attorney General's opinion furnishes no support, by analogy or otherwise, for a conclusion contrary to mine.

To the extent that the Solicitor's opinion of March 15, 1929, is inconsistent with this opinion, it is overruled.

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I think there can be no substantial doubt with regard to the conclusion that the 1907 exemption provision is still in force. But even if there were such doubt, it should be resolved in favor of the Indians. *Choate v. Trapp*, 224 U. S. 665, 675.

In that case the question was whether allotted Indian lands could be taxed despite a provision in the statute under which patents

had been issued that the lands were to be nontaxable during the period involved. It was held the exemption there considered was a constitutionally protected contract and property right of which the Indians could not be deprived without due process of law. The analogy between exemption from taxation and exemption from payment of maintenance charges is close. So that if we were to construe the 1914 act as an attempt to repeal the 1907 exemption provision, it might well be argued that the attempted repeal was beyond the power of Congress.

But apart from this, the *Choate* case is authority for a rule of construction directly applicable to our problem. The argument had been made that tax exemptions are strictly construed. The Court applied another rule of construction, "recognized, without exception, for more than a hundred years," 224 U. S. 675 :

But in the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.

In my opinion, the only Indian owned lands on the Fort Hall Reservation which may be assessed for operation and maintenance charges are those whose owners have leased them for more than three years. All other Indian owners have the right to receive water without payment of such charges.

Approved: September 24, 1936.

OSCAR L. CHAPMAN,
Assistant Secretary.

The following is from a letter dated September 19, 1938, from the Acting Commissioner of Indian Affairs to the Superintendent of the Fort Hall Agency:

During the period since this opinion was rendered there has been considerable correspondence as to the exact meaning of the phrase, "have leased them for more than three years," but on February 25, 1938, in a letter addressed to the Chief Field Counsel, the Office of the Solicitor makes the following statement:

"* * * I think that the words 'any such lands leased for a longer term than three years' may reasonably be construed to mean any such lands which have been leased for a period longer than three years regardless of whether such leasing has been under one lease or more than one lease; that if an Indian has so leased his lands for more than three years, they are thereafter subject to operation and maintenance assessments whenever and while they are under lease."

From this it is clear that when a tract of Fort Hall Indian land has been in a lease status, that is, under lease for a period of three years or for periods

aggregating three years, during which time it has been exempt from operation and maintenance charges, then from that time on it shall be subject to operation and maintenance charges whenever it is leased and for whatever period it is leased. It is entitled to free water for a total of three years and no more. This does not affect the right of the Indian owner to free water whenever the tract is not under lease.

Approved: September 24, 1938.

W. C. MENDENHALL

Acting Assistant Secretary.

ENGLISH v. BIRCHFIELD ET AL.

Decided September 30, 1936

STOCK-RAISING HOMESTEAD—CONTEST BY MINERAL CLAIMANT—SUFFICIENCY OF EVIDENCE TO WARRANT CANCELATION.

Where in a contest brought by a mineral claimant against two stock-raising entries based only upon priority of right, the evidence fails to show the character of any mineralized vein, on what claim or claims the mineral was found, or with what entry the mining claims are in conflict, the evidence is insufficient to warrant cancellation of the entries and warrants dismissal of the contest.

Ainsworth Copper Co. v. Beu (53 I. D. 382); *Southern Pacific Railroad Company* (50 L. D. 577), followed and applied.

PRACTICE—FAILURE TO APPEAL FROM REGISTER'S DECISION.

Where contestee fails to appeal from an adverse decision of the register, under Rule 50 of Practice, in the absence of fraud or gross irregularity the decision becomes final, and the contestee loses all interest he has in the land and any rights he might have asserted, including objections to the sufficiency of the contest affidavits or other irregularities, leaving the question of the preference right of the contestant solely one between the contestant and the Government.

STOCK-RAISING HOMESTEAD—CONTESTANT'S PREFERENCE RIGHT OF ENTRY.

Where a contest against a stock-raising homestead entry includes a charge that the entry is invalid by reason of conflict with prior valid mining claims and also, by subsequent amendment, a charge that the entryman failed to comply with the residence requirements, if the entry is canceled on proof of the latter charge, the contestant is entitled to a preference right of entry although he may not have claimed such right in his original or amended contest affidavits.

Duprat v. Ewing (4 L. D. 19); *Hodges v. Colcord* (24 L. D. 221); *Augur v. McGuire* (16 L. D. 372), cited and applied.

SAME—CONTESTANT'S TENDER OF COSTS.

Successful contestant who tendered the full costs of contest is entitled to his preference right of entry, even though the register under a misconception of contestant's rights refused to so apply the costs tendered and returned part of the costs to contestant, provided contestant thereafter pays the full costs of contest.

SAME—EFFECT OF ENTRY APPLICATION ON ENTRYMAN'S MINING CLAIMS FOR SAME LAND.

Successful mineral contestant cannot exercise a preference right of entry under the stock-raising homestead law and at the same time assert that he has a right to the land by virtue of prior mining locations. Upon the filing of his application to make stock-raising homestead entry, such filing will be held to have the legal effect of an abandonment of his asserted mining claims.

WALTERS, First Assistant Secretary:

May 15, 1928, William P. Birchfield, Jr., filed application Las Cruces 037216 which as subsequently amended was allowed November 3, 1930, under the stock-raising homestead law for lots 8, 9, 10, 11, and 12, Sec. 30 and lots 1, 2, 3, 4, 6, 7, 12, E $\frac{1}{2}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 31, T. 25 S., R. 7 W., N. M. P. M.

March 26, 1934, Howard A. Birchfield filed like application 049621 for lots 1, 5, 6, 7, E $\frac{1}{2}$ and E $\frac{1}{2}$ W $\frac{1}{2}$ Sec. 30, T. 25 S., R. 7 W., and Jack A. Curtis filed like application 049626 for E $\frac{1}{2}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 31 and lot 6, NE $\frac{1}{4}$, E $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 19 in the same township and range. Entry 049621 was allowed on the date it was filed and 049626 on March 29, 1934. It appears from the official plat of the township approved October 26, 1927, that the above-described entries together considered cover all of said Secs. 30 and 31.

March 31, 1934, Len S. English filed and served, without notice of contest by the register, a protest against the entries on the above-named entryman, charging:

That the said area included in sections 30 and 31 are well known to be heavily mineralized; that he has since 1915 resided upon one or another of his mineral claims therein; that he has 4 recorded mineral claims and 10 mineral locations in Sec. 30 and 23 recorded mineral claims in section 31; that all of said mineral claims and locations are and have been continuously worked, as required by law; that he verily believes the above named entrymen were well aware of his said several mineral claims at the time they made entries.

Affiant further sayeth that he has discovered and is working very valuable mineral deposits in the said area and that all of said area is more valuable for mineral than for any other purpose and that homestead entries thereon would be detrimental to the mining of the said valuable ores thereon.

April 30, 1934, the homestead entrymen filed answer alleging, among other things, that while there is some mineral in the Florita Mountains which embrace most of the entries that the protestant did not have a single valid claim on any of the property involved in the protest. By letter of June 6, 1934, the Commissioner of the General Land Office, observing that the entrymen having answered without questioning the service, directed a hearing under Rule 8 of Practice. The hearing was set before a United States Commissioner at Deming, New Mexico, on August 14, 1934, at which the parties appeared and

contestant applied to amend his affidavit of contest by adding the charge:

That William P. Birchfield, holding Homestead Entry 037216, has since said entry was allowed failed to establish residence upon said property or to place improvements thereon, tending to increase the value of said entry for stock-raising purposes and that said entryman has failed to place permanent improvements thereon equal to 62½ cents per acre during the first three years following said entry.

That said entryman has not resided upon said premises as much as seven months out of each year following the entry thereof, and has wholly failed to comply with the Stock-raising Homestead Act, under which said land was entered.

Counsel for contestees objected to the amendment on the ground that the case was at issue on the allegations contained in the original notice of contest, that contestees were surprised by the additional charges, that they were not in position to proceed with the hearing without sufficient time to prepare an answer, whereupon counsel for contestant expressed willingness to continue the case to such time as would give contestees opportunity to meet the issues presented by the amended affidavit, and thereupon it was stipulated between the parties that the case be continued to date of final hearing before the register on the 24th day of August 1934. The case went to trial before the register on the last-mentioned date, at which testimony was offered bearing upon the issues raised by the original and additional charge without, so far as it appears, any objection on that ground being made by contestees. There was filed a motion to dismiss the contest affidavits against the entries of Howard A. Birchfield and Curtis, but what action was taken thereon does not appear. It seems certain demurrers were overruled and one sustained by the register, but it must be presumed, as evidence on the charges was heard, that objections to their sufficiency were not sustained.

In the record there appears an answer to the additional charge by Birchfield in substance denying the allegations therein, the date of filing appearing to be August 27, 1934—after the hearing. In his answer it is stated that the answer is made without waiving his rights against the reception of the amended affidavit of contest and after the overruling of his objections thereto.

By decision of November 7, 1934, the register found that the evidence did not conclusively show that valid mining claims exist in Secs. 30 and 31, T. 35 S., R. 7 W.; that William P. Birchfield failed to show that he has established residence on the land in question or that he had resided upon said homestead for as much as seven months each year for three years following the entry thereof. He, therefore, recommended the dismissal of the contests against Curtis and Howard Birchfield, and the cancelation of the entry of William P. Birchfield,

but without award of a preference right of entry to contestant English on the grounds that no preference right was claimed in either his original or amended protest and that the evidence tended to show that contestant disposed of any claim he might have had in the land to contestee William P. Birchfield "as will be shown by reference to contestee's Exhibit No. 1."

No appeals were filed by any of contestees. Contestant appealed from that part of register's decision wherein he was denied preference rights as a successful contestant "to enter said land under the *enlarged-homestead act*." He alleges that he deposited at the beginning of the hearing \$25 for costs and upon claiming a preference right a demand for an additional sum of \$25 was made, being the amount estimated to defray the cost of making and transcribing the testimony of the witnesses at said hearing; that he received the register's receipt for \$50 to cover such costs; that the contestee's Exhibit 1 does not disclose any transfer of interest in land; that his preference right was seasonably claimed.

By decision of October 14, 1935, the Commissioner upon review of the record affirmed the register in holding "that the evidence submitted does not conclusively show that valid mining claims exist in Secs. 30 and 31"; that entryman (William P. Birchfield) did not establish and maintain a bona fide residence on the entry and that English—for reasons hereinafter set forth—was not entitled to a preference right of entry. As to the evidence relative to the purchase of improvements, rights, or lands by William P. Birchfield from English it was held that it was too ambiguous and susceptible of too many interpretations to arrive at any conclusion. The Commissioner therefore held the entry of William P. Birchfield for cancellation but denied contestant English a preference right of entry.

English has appealed, and further asks that the consent as to the Howard A. Birchfield entry be reopened for further testimony, insisting that he has prior valid mining claims in both Secs. 30 and 31; that the testimony shows that he had shipped ore therefrom in 1921 and 1922. Repeating the contention of his counsel made at the hearing that he may exercise his rights under the stock-raising homestead act as well as a locator of mining claims and exhibiting papers showing he had applied for a stock-raising entry for some of the land involved prior to the survey thereof which he withdrew on being advised by the register that the application was subject to rejection, he insists that his intention to make the stock-raising entry was timely made known.

It was incumbent upon the mineral claimant who alleges priority of right to land within a stock-raising entry to show that at the date of the inception of the stock-raising entryman's rights (the date of

an allowable application) he had a perfected mining location thereon, or a mining location, though not perfected by discovery, upon which he is in actual possession and in diligent prosecution of work in a search for mineral. *United States v. Hurliman* (51 L. D. 258); *Ainsworth Copper Co. v. Beas* (53 L. D. 382). As stated in *Southern Pacific Railroad Company* (50 L. D. 577):

* * * evidence should be adduced showing with as much certainty and precision as the available facts and circumstances admit, that such location lies in whole or in part within one or more of the subdivisions in question.

This should be done by adducing testimony from witnesses who show that they have actually identified, either by the aid of the monuments and markings on the ground, or by the calls and descriptive data in the location notice or certificate, or by the aid of both, the ground covered by the mining location, and who furnish in their testimony such diagrams or descriptive matter based on their knowledge, relative to the situation of the claim with respect to a proven, established United States public or mineral survey corner and the lines and corner of the containing subdivisions, as will enable the Department to clearly and certainly determine that the mining claim is included in or invades such subdivision or subdivisions and that the valuable mineral lands are within the boundaries of the claim. * * *

The contestant signally failed to adduce proof of the nature above required. His evidence in support of his asserted superior right as a mining claimant consists of: (1) the insertion in the record of copies of over 30 recorded mining location notices in which he appears as sole locator or as an associate locator and in which the description of the location of the claims is so vague that it cannot be determined that they affect the entries in question; (2) uncontradicted assertion that he made a discovery on 27 claims and that from Secs. 30 and 31 one carload of zinc ore and two carloads of silver ore were shipped by him in 1921 or before then, and that he had performed the annual assessment work as the law required. Other witnesses testified that ore was shipped and that contestant or his men were seen doing work of a mining nature. No evidence is offered as to the character of any mineralized vein discovered or showing made on what claim or claims mineral was found or from what claim it was shipped, nor any evidence to show with what entry assailed the claims conflicted if any.

The Department said of the evidence in *Ainsworth Copper Company v. Beas*, *supra*:

While the evidence of the extraction and shipment of ores from the land prior to the entry tends to show there were discoveries on some part of it, nevertheless, in the absence of evidence specifying from what claim or claims it came, the department is unable to pronounce judgment as to which claims are valid.

That comment applies to the evidence in the present case. The register was therefore right in dismissing the contests against the

entry of Curtis and Howard A. Birchfield, no allegation being made other than priority of right against them. The evidence is insufficient to show that any specific part of the entry contested was included in a valid mining claim, and therefore no cancelation was warranted. However, as above indicated it does not justify the judgment that there are no valid mining claims held by contestant in Sec. 30 or 31.

The reasons that the Commissioner sets forth for denying contestant a preference right are as follows:

There remains the question raised by English in his appeal wherein he claims a preference right to file on the land. It is a practice, easy to understand, that when the owner of a mining location contests a conflicting stock-raising homestead entry, he makes charges that the homestead entry has been improperly allowed or that the homestead laws on residence, improvements, etc., have not been complied with. In this manner the mineral contestant can sometimes attain his desired end even if he cannot show valid mineral locations existing prior to the homestead application. Thus the mere assertion in a mineral contest that the homestead entry is invalid could leave the homestead claimant in the dark and take him by surprise as to the real purpose of the contest—the purpose of the mineral claimant to secure a preference right to the land. The charge that the homestead laws had not been complied with was initiated and added to the mineral charge at the hearing at Deming, and the charge contained nothing indicating that a preference right to enter would be asked. English in his testimony said:

“Q. So the only object you have in this case is that you want to be permitted to have any mining—valid mining locations you have? A. Yes, sir; and to be left alone.”

The first intimation of a claim to a preference right appears later at the close of English's testimony, as follows:

“Q. You have a homestead right? A. Yes, sir.

“Q. If you are successful in this contest, do you anticipate using your preference right?

“Mr. NEWELL: We object to that question because by his pleadings, contestant cuts his right off.

“Mr. SHERMAN: It is the contention of the contestant that he may exercise his right under the stock-raising homestead as well as under mining locations; and that neither one conflicts with the other; and that as a result of this contest, *any of these entries should be canceled*, that under the laws he would be entitled to a preference right.”

In his closing argument the attorney for entryman Birchfield objected to contestant asking for a preference right.

Rules of Practice on applications to contest provide:

“Rule 2. Any person desiring to institute a contest must file, in duplicate, with the register, application in that behalf, together with statement under oath containing:

* * * * *

“(e) Statement of the law under which applicant intends to acquire title and facts showing that he is qualified to do so.

* * * * *

"Rule 3. The statements in the application must be corroborated by the affidavit of at least one witness having such personal knowledge of the facts in relation to the contested entry, as, if proven, would render it subject to cancellation, and these facts must be set forth in his affidavit."

Rules 6 to 11 prescribe the manner in which the contestee must be notified of the application to contest and of the charges. Rules 13 and 15 practically insure that not less than 50 days elapse between the day the contestee is notified of the charges and intention of the contestant and the day of the hearing.

The Rules of Practice provide for the orderly and fair litigation of public land rights and questions. They provide that a contestee shall be timely appraised of the nature of the case and enabled to prepare his defense without danger of surprise. They have the force of law and must be followed implicitly *where to permit change would not be equitable to all interested parties*. Secs. 30 and 31, T. 25 S., R. 7 W., N. M. P. M., were included in the general withdrawal of November 26, 1934, of all public land in twelve western States. They were included in the New Mexico Grazing District No. 3, established July 11, 1935. However the metalliferous mineral-land laws continue unabridged in effect, and the sections are still open to prospecting, development, extraction of mineral, and the location and patenting of bona fide mining claims. Thus with the cancellation of the homestead English has obtained all that he sought in his application to contest as properly filed and served on the contestee, and attention must be called to the statement in his application to contest "that homestead entries thereon would be detrimental to the mining of said valuable ores thereon." To grant English a preference right to homestead this land by deviating from the Rules of Practice would remove the land and its springs from the operation of the Taylor grazing law under which Birchfield can be expected to be an applicant for grazing privileges. Your decision is, therefore, affirmed and preference right in English to enter the land is denied.

The record of the hearing shows that counsel for contestant at the conclusion of the hearing before the register tendered the full costs of contest and claimed a preference right of entry under the stock-raising homestead law. The records of the General Land Office show that register's receipt was issued to contestant for \$50; that \$22.15 of this was retained by the register as earned and \$27.85 returned to contestant; that contestees obtained the register's receipt for \$25 of which \$5.17 was retained as earned and \$19.83 returned.

The contestant preferred in addition to his allegations of priority a sufficient charge of invalidity of the William P. Birchfield entry; the register entertained the charge and so far as it appears the objections made thereto were waived by stipulation before the United States Commissioner and were not later renewed. Upon the evidence adduced to sustain the charge, the register found it to be true, and cancellation was recommended on that ground. The contestee having failed to appeal from the register's decision it is final as to him except in case of fraud or gross irregularity. Rule 50 of Practice. By allowing the decision to become final, the contestee lost all interest he had in the land and any rights he might assert including objections to the sufficiency of the contest affidavits or other irregularities, leaving

the question of preference right of entry solely one between the contestant and the Government.

No gross irregularity in the proceedings is noticed that required the Commissioner to take notice thereof *sua spontes*. The precise ground for denying the preference right is not distinctly stated, but if by deviation from Rules of Practice is meant the absence of a corroborating affidavit to the original or amended charge, it may be said as to the original affidavit that the Commissioner by ordering a hearing thereon adjudged it sufficient, and the trial proceeded and objections to the defect could not thereafter be made. *Winans v. Mills et al.* (4 L. D. 254), and cases there cited. No objection was made to the lack of corroboration of the amended affidavit and consequently the objection is waived. *Butler v. Mohan* (3 L. D. 513). The amended charge was defective in that it did not comply with Rule 2 of Practice in containing "a statement of the law under which the applicant intends to acquire title and the facts showing he was qualified to do so." However, it has been held several times by the Department that the statement and showing required by this rule are designed to insure good faith on the part of contestants and to prevent the filing of speculative contests by those who are not qualified or who do not intend to acquire title to land under appropriate public land laws. *Holmes v. Kinsey* (40 L. D. 557); *Judson v. Woodward* (41 L. D. 518, 519); *Goodwin v. Goodin* (47 L. D. 298). The failure of contestant to disclose his intention in connection with the amended affidavit to acquire title under the homestead law in no way deprived the contestee of full knowledge of the issue he was required to meet. There is no suggestion in the record that contestant has not the qualifications of a homesteader.

The Commissioner appears to find further support for his action in that a charge of invalidity of the homestead entry was added to the charge of priority under the mineral laws without the contestant indicating an intention to claim a preference right. In several cases, and none are found to the contrary, a preference right of entry has been awarded though the contestant based his contest on a prior adverse claim, where the cancellation of the entry contested was the result of a contest prosecuted in good faith. *Duprat v. Ewing* (4 L. D. 19); *Hodges v. Colcord* (24 L. D. 221); *Augur v. McGuire* (16 L. D. 372).

In *Hodges v. Colcord*, *supra*, the Department said:

Section 2 of the act of May 14, 1880, declares that

"in all cases where any person has contested, paid the land office fees and procured the cancellation of any pre-emption, homestead or timber-culture entry he * * * shall be allowed thirty days * * * to enter said lands."

There is nothing in the language here used which makes the preference right of the contestant dependent upon the truth of the charge of disqualification of the entryman. If the cancellation of the entry—whether by the relinquishment of the entryman, or the judgment of the Land Department—was the result of the contest, the preference right of entry inures to the contestant by operation of law.

If there were such jurisdictional defects in the affidavits of contest, or irregularities in the proceedings as not to warrant any judgment of the issues tendered, then no action canceling the entry would be justified, but as no such fatal defects are seen and the cancellation being the result of the contest, contestant is entitled to his preference right provided he pay all the costs of contest, and should not be deprived of that right because the register, under a misconception of contestant's right refused so to apply the costs tendered. The amended application to contest was filed prior to the withdrawal of November 26, 1934, and establishment of the grazing district, and contestant's rights are not affected thereby.

As to the evidence of purchase by William P. Birchfield of certain lands, improvements and rights prior to the entry, there is no sufficient evidence of the conveyance of mining locations, it being well settled that the laws that govern the transfer of real estate govern the transfer of mining locations (see Lindley on Mines, Sec. 270), and assuming that the checks and letter of English offered by Birchfield establish a sale of certain improvements on the land prior to the application, nothing is seen in this that estops the former from contesting the entry on the ground that the requirements of the homestead law were not fulfilled.

The contestant, however, cannot be heard to say that he has a right of entry for the lands included in the entry of William P. Birchfield and at the same time assert that he has a right thereto by virtue of prior valid mining locations. The owner of a valid mining location under the mining laws has an exclusive right to the possession and enjoyment of the surface of his claim and the right to acquire the legal title thereto from the Government upon the performance of certain conditions. "While such claim continues to exist the Land Department cannot, with propriety, recognize any other disposition or appropriation of the land unless and until it be shown that the mining claim has been abandoned." *Henry W. Pollock* (48 L. D. 5, 10). The affidavit a stock-raising homestead applicant has to make in conformity with Circular No. 738 averring that no part of the land is claimed, occupied or being worked under the mining laws is incompatible with any contrary claim. If then, contestant pays the sum of \$5.17 to cover the full costs of contest and upon cancellation of the entry of Birchfield timely files a proper application to make stock-raising entry for all or any part of the land, those acts

will be construed and will be held to have the legal effect of an abandonment of all estate, right or interest he may have in any prior mining claims in conflict with the area applied for, and he will be relegated to such rights as he may exercise equally with others as to the minerals under the provisions of section 9 of the stock-raising homestead act. Evidence of the payment of the full cost or costs will be sufficient if contestant deposits with the register the sum of \$5.17 in cash, or by money order, New York draft, or certified check, which sum should be repaid to the contestees.

The contest affidavit is not sufficiently specific to warrant the reopening of the case as to the entry of Howard A. Birchfield, and the grounds assigned for such request are insufficient. The request to reopen the contest is therefore denied.

In accordance with these views the action of the Commissioner in affirming the cancelation of the entry of William P. Birchfield is affirmed; his action denying contestant a preference right is reversed.

Affirmed in part.

Reversed in part.

LUCKEY v. HUSEMAN

Decided October 22, 1936

PUBLIC LANDS—BOUNDARIES—FENCE AT VARIANCE WITH GOVERNMENT SURVEYED BOUNDARY—COLOR OF TITLE.

Where an owner of patented land had an old fence which enclosed some adjoining public land, such owner has no claim or color of title to the enclosed public land entitling him to purchase the same under the act of December 22, 1928. It would not be good administrative practice to allow subdivisions of public land to be divided and disposed in metes and bounds surveys privately made except in very unusual cases where mistakes in location have been made on account of defects in the official surveys and substantial equities are involved. Fences placed at variance with the true lines cannot afford ground for departure from the rectangular system of surveys of public lands in order to conform to such irregular fence lines.

United States v. Hurliman (51 L. D. 258), cited and applied.

WALTERS, *First Assistant Secretary*:

This is an appeal by James V. Luckey from a decision by the Commissioner of the General Land Office dated October 21, 1935, holding his homestead entry for cancelation in part on the stated ground that Henry W. Huseman had a superior right under a color of title claim to the land as to which the entry was held for cancelation. The facts and circumstances are as follows:

Luckey made his homestead entry on April 14, 1932, for lots 2, 6, 7, NE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 27, NE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 28, T. 13 N., R. 113 W., 6th P. M., Wyoming. In a letter dated July 22, 1933, to the General

Land Office he stated that he had had a surveyor run his lines and had staked the same so that he could cut hay and set a fence; that a young man named William Huseman came and took the stakes away telling Luckey to keep out of the field because the Husemans had used the land a long time and were going to keep it.

In a letter dated June 14, 1935, Luckey stated that he had been advised from the district land office that William Huseman had filed an application to purchase 11.35 acres of the land embraced in the homestead entry in question, alleging that he had claimed title to said land for more than 20 years; and that he, Luckey, was ready to make final proof but had been advised by the register of the district land office to wait until later.

Huseman's application was made under the act of December 22, 1928 (45 Stat. 1069), to purchase portions of lot 7, NE $\frac{1}{4}$ SW $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 27, alleged to contain 11.35 acres and described by metes and bounds. It was alleged that the improvements consisted of a stake and rider fence on the north, east, and west of the strip, valued at \$250, which fence had been there for more than 40 years and had been kept in repair; that Huseman purchased the S $\frac{1}{2}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$, and lot 8, Sec. 27, which had been patented more than 35 years ago and thought that the adjoining strip to the north, the land in controversy, was part of the land purchased; that about seven acres of the land in question were under cultivation.

In the decision appealed from, the Commissioner said:

The evidence presented shows in fact that the land applied for by Huseman has been held under color of title, with improvements and cultivation, for more than 20 years. Land thus held and occupied is not subject to entry by another person. See the case of *Earl E. Baughn and Charles Lord* (50 L. D. 239), which applies the decision in the case of *Atherton v. Fowler* (96 U. S. 513) and other cases. It is the general rule in homestead and kindred cases that entry and sale of the public lands must be in accordance with legal subdivisions as shown by the approved plats of survey. However, where equity demands it the rule is not strictly followed. To follow the fence line in segregating the color of title claim from the homestead entry would require a survey in the field. This would not be practicable on account of the expense. The width of the strip cut off from the homestead by the fence varies from 1.81 chains at the southwest corner of lot 7, said Sec. 27, to 2.79 chains at the southeast corner of the NE $\frac{1}{4}$ SW $\frac{1}{4}$, and the width of the strip segregated by the fence in the NW $\frac{1}{4}$ SE $\frac{1}{4}$, said Sec. 27, which subdivision is not embraced in any entry, is 3.05 chains at the widest point.

It appears that an equitable solution of this problem would be to cut off a strip 3.75 chains wide from the south side of lot 7 and the NE $\frac{1}{4}$ SW $\frac{1}{4}$ and from the NW $\frac{1}{4}$ SE $\frac{1}{4}$. This would make the area of the color of title claim 21.39 acres and would cut off 13.89 acres from the homestead, leaving therein 141.15 acres.

The land which Luckey was allowed to enter was shown vacant upon the records of the district land office. His entry was properly

allowed and he did not then know the lines of survey. On the other hand, Henry W. Huseman evidently did not know the lines of survey and never had taken the trouble to find out the actual boundaries of the land he had purchased. If he had caused the lines to be run he would have found that there was a considerably larger acreage up to the old fence than that shown by the Government survey.

In the case of *United States v. Hurliman* (51 L. D. 258), the Department expressed itself as follows:

In *Lindgren v. Shuel* (49 L. D. 653, 654), the Department said:

"It is well settled that land in the actual possession and occupancy of one under color of title of claim of right is not subject to entry by another." Citing *Jones v. Arthur* (28 L. D. 235); *Burtis v. Kansas* (34 L. D. 304); *Ather-ton v. Fowler* (96 U. S. 513); *Lyle v. Patterson* (228 U. S. 211); *Krueger v. United States* (246 U. S. 69); *Denee v. Ankeny* (246 U. S. 208). An examination, however, of the facts in that case and those cited in its support will disclose that they involved questions of unlawful intrusion upon possession or were cases where the claimant in possession had such equities in the land as entitled him to acquire the title under some applicable law.

An exception to the rule is made in some cases, which has application to the case at bar. It has been held that where a prior occupant has possession of a part of a governmental subdivision of public land and the claimant enters upon the unoccupied part claiming the right to enter the whole of it, and in pursuance of such claim files his declaratory statement and obtains a certificate of entry on the whole tract he will be allowed to recover possession of the part occupied by the prior possessor. *Whitaker v. Pendola* (78 Cal. 296; 20 Pac. 680); *Havens v. Haws* (63 Cal. 514).

In distinguishing the facts in the cases last cited from that before the court where a peaceable homestead entry had been made covering lands in the actual possession of another inclosed by fencing and used for agricultural purposes, the supreme court of California in the case of *Gragg v. Cooper et al.* (89 Pac. 346) observed:

"When the reasons for the doctrine stated in *Ather-ton v. Fowler, supra*, are considered, the distinction between these cases and the others clearly appears. Where the applicant can find a part of the land unoccupied, he is at liberty to enter thereon, and can do so without danger of the strife, altercations, violence, or breaches of the peace, such as would be invited by an entry upon the actual possession of another. The reason of the rule does not exist, and the rule ceases. Having the right to take up this part of the land, and having obtained the evidence of title to the whole thereby, his title will prevail over the person in possession who can show no title whatever, but merely possession."

The reasoning of the court in the case last quoted commends itself to the Department.

The mere existence of a fence between adjoining owners is not of itself sufficient to establish the line between them. 9 C. J. 246. There was no one to acquiesce upon the part of the Government, in the location of the fence as the northern boundary of Huseman's land, and almost immediately after entry Luckey caused a survey to be made.

The act of December 22, 1928, *supra*, provides that the issuance of patents for lands held under claim or color of title shall be in the discretion of the Secretary of the Interior. In the present case Huseman could readily have ascertained the boundaries of the land to which he actually had title by having a survey made. It would not be a good administrative practice to allow subdivisions of public land to be divided and disposed of in metes and bounds surveys privately made, except in very unusual cases where mistakes in location have been made on account of defects in the official surveys and substantial equities are involved. No such conditions are found in this case. It is not at all unusual for fences to be placed somewhat at variance with the true lines, but it cannot be admitted that such careless fencing affords ground for departure from the rectangular system of surveys of public lands in order to conform to such irregular fence lines. Huseman is the owner and is in possession of the land he actually purchased.

The decision appealed from is reversed and Huseman's color of title claim is rejected, Luckey's entry being left intact.

Reversed.

CHRISTMANN v. YONKERS

Decided December 11, 1936

PRACTICE—APPLICATION FOR MINERAL PATENT—SUFFICIENCY OF ABSTRACT OF TITLE.

An abstract of title filed by an applicant for a mineral patent, showing ownership by the applicant of the claims involved is sufficient so far as title is concerned to support the entry, even though the abstract does not show the pendency of suits between applicant and adverse claimant.

PRACTICE—ADVERSE SUIT—PENDENCY OF JUDICIAL PROCEEDINGS.

The pendency of a suit for an injunction filed by the applicant for patent against an adverse claimant, and a cross complaint filed by the adverse claimant where the pleadings do not mention the patent application or the adverse claim and do not contain other allegations essential to constitute a proceeding under section 2326, Revised Statutes, is not an adverse suit within the meaning of said section.

SAME—AMENDMENT OF PLEADINGS.

The Department will not ordinarily be controlled by judicial proceedings instituted outside the provisions of section 2326, Revised Statutes, nor will a judgment rendered in an ordinary action wholly disconnected with the patent proceedings be necessarily considered as aiding the Department, but adverse claimant, if permitted by the court, may amend his pleadings so as to convert his action to one under section 2326.

PRACTICE—REJECTION OF ADVERSE CLAIM.

An adverse claim is properly rejected where no certified copy of the adverse claimant's location is filed.

PRACTICE—APPLICATION FOR PATENT STAYED TO AWAIT RESULT OF PENDING SUIT.

In conformity with the usual practice, although the adverse claim is insufficient, action on the application for patent will be stayed to await the result of a pending suit involving the right of possession to the claim as a matter of grace and not of right.

PRACTICE—REFUSAL OF DEPARTMENT TO ACCEPT RELINQUISHMENT—ASSERTION OF RELOCATOR'S RIGHTS BY ADVERSE CLAIMANT.

Where an adverse claimant pursuant to departmental decision relinquished a subdivision of his stock-raising entry embracing the claim in controversy, the refusal of the Department to accept the relinquishment does not preclude the adverse claimant from asserting rights as a relocater of the claim under the mining law.

CHAPMAN, Assistant Secretary:

November 19, 1935, Frida O. Christmann filed mineral application Phoenix 076379 for the Frida O. Placer claim embracing $W\frac{1}{2}SE\frac{1}{4}NE\frac{1}{4}$ Sec. 11, T. 24 S., R. 28 E., G. & S. R. M. December 5, 1935, and during the period of publication of the notice of application Gustave C. Yonkers filed protest and adverse claim. It was alleged in support of the adverse claim that the claim for which patent was sought by Christmann had been abandoned; that no assessment work had been performed thereon for the years 1930-1931 and 1931-1932; that no valid location of said claim had been made; that protestant had held the land in peaceable and adverse possession for two years preceding the filing of the application; that protestant was in possession of said mining claim doing location work preparatory to discovery and location when temporary injunction was served on protestant August 15, 1935, in Cause No. 9237, *Frida O. Christmann v. Gustave C. Yonkers* in the Superior Court of Cochise County, Arizona, and that a new cross action, No. 9242, pending for 30 days or more in the above-named cause, had been filed by protestant and consolidated with Cause No. 9237, and that said cause is pending and undetermined. Protestant asked that the proceeding on the application for protest be abated and that the matter be treated as an adverse proceeding in the courts.

December 11, 1935, the register dismissed the adverse claim on the ground that it did not appear that adverse claimant had made a mining location and had not filed a copy of a location notice of the claim. December 14, 1935, the adverse claimant responded by stating that, in substance, he had made no mining location, but that the making thereof was interfered with by the injunction proceedings and that under the ruling in *Fields v. Gray*, 1 Ariz. 404, one in possession will be protected in his possession until he could complete his location. He further contended that the Commissioner erred in directing publication on the ground that applicant had not furnished

a complete abstract of title as required by paragraph 42 of the Mining Regulations, in that any reference to the pending court proceedings therein was not shown in the abstract.

The register by letter of December 17, 1935, treated adverse claimant's response as an appeal and transmitted it with the abstract of title filed by the applicant for patent to the General Land Office.

By decision of January 30, 1936, the Commissioner, adverting to the abstract of title showing the location of the Frida O. placer on September 19, 1929, and to the various notices thereafter filed for record relating to the assessment work or intention to hold the claim and to a gift deed dated January 23, 1933, from Walter F. Christmann, the locator of the Frida O. claim, to his wife, Frida O. Christmann, conveying all his property to her, but reserving a right to the possession thereof during his lifetime, held the abstract sufficient as a basis for an application for patent to the claim and affirmed the register in holding the adverse claim for dismissal for the reason that inasmuch as there was no showing that a mining location was perfected, the proceedings were not one contemplated under section 2326, Revised Statutes. But in view of the allegation of Yonkers that no discovery had been made on the claim of the mineral applicant, the Commissioner directed a stay of proceedings upon the application for patent until investigation and report by the Division of Investigations, stating further that if it were deemed advisable the stay would be continued until disposition of the suits pending before the local court.

The adverse claimant appeals and assigns errors as follows:

1

The Commissioner erred in holding that the Register could entertain the application for patent, when a State court action was pending at the time of a cross-action by protestant disputing with applicant the legal possessory right to the placer mining claim.

2

The Commissioner erred in not vacating the application for patent; or at least holding it in abeyance, or remanding for hearing, pending the disposition of suit in the State court on possessory right to the mining claim.

3

The Register and Commissioner of the General Land Office erred in not requiring an investigation of the title to the placer mining claim in question, after actual notice that a State court action was pending involving the title when the application for patent was filed.

Although the abstract of title did not show the pendency of the suits between the parties involving the right of possession to the claims, if they had been so shown in the abstract, there would have

been no error in entertaining the application for patent and proceeding with publication thereof. The abstract showed full ownership of the claim for which patent was sought in the applicant. That is the purpose of the abstract and is sufficient so far as title was concerned to support the entry. *Repeater and Other Lodes*, and cases there cited (35 L. D. 54).

Examination of the bill for injunction filed by the applicant and the cross-complaint filed by adverse claimant prior to the application for patent show that while there is disclosed an issue as to right of possession and the adverse claimant asserts a better right by virtue of attempted acts of relocation, these suits are not earmarked as suits under section 2326, Revised Statutes, as no mention is made therein of the filing of the patent application and adverse claim in the local office and do not contain other essential allegations to constitute a proceeding under said statute. (See Lindley on Mines, Sec. 755.) The Department will not ordinarily be controlled by judicial proceedings instituted outside of the sanction of section 2326, nor will a judgment rendered in an ordinary action, by which we mean one wholly disconnected with the patent proceedings, be necessarily considered as aiding the Department. *420 M. Co. v. Bullion M. Co.* (2 Copp's L. O. 5); *Seymour v. Wood* (4 Copp's L. O. 2); *Nichols v. Becker* (11 L. D. 8); *Cain v. Addenda M. Co.* (24 L. D. 18, 20); *Bunker Hill & Sullivan M. Co. v. Shoshone M. Co.* (33 L. D. 142).

Adverse claimant, however, if permitted by the court, where proper adverse claim is filed in the local office subsequent to the suit between the parties, may by supplemental pleadings convert his action into one under section 2326 (Lindley on Mines, Sec. 755, and cases there cited), and may then as a matter of law be entitled to the stay of proceedings prescribed by the statute. However, section 81, of Mining Regulations (49 L. D. 79), requires that the adverse claimant shall file a certified copy of his mining location, and the statute plainly contemplates that an adverse claim should be based on such a location. The Commissioner was therefore right in rejecting the adverse claim as insufficient.

The allegations in the protest and in the pleadings in the suits mentioned raised the question whether the adverse claimant may not be entitled to the possession of the land involved in the patent application, and whether he would have been entitled to make a location had he not been restrained by the temporary injunction. This question is for the court to determine, and its solution will aid the Department in the disposition of the application. In conformity with the usual practice, although the adverse claim is insufficient, as there is pending a suit involving the right to the possession, the proceedings upon the application will be stayed as a matter of grace

and not of right to await the result of the suit. *Little Giant Lode* (22 L. D. 929); *Northwestern Lode and Mill Site Company* (8 L. D. 437); *Thomas et al. v. Elling* (25 L. D. 220); *Selma Oil Co.* (33 L. D. 187).

The fact that adverse claimant, pursuant to departmental decision (*Christmann v. Yonkers*, 53 I. D. 228), relinquished a subdivision of his stock-raising entry embracing the Frida O. claim, upon the refusal of the Department to accept a relinquishment from him of that claim alone does not preclude him, as contended by the applicant herein, from asserting rights as a relocater under the mining law. A report from the Bureau of Investigations pursuant to the Commissioner's direction has been made upon the application which charges merely that expenditure required for patent purposes has not been made, so that the question of discovery is no longer material.

As herein modified the Commissioner's decision is affirmed.

Affirmed.

STATE AND FEDERAL JURISDICTION OVER RESTRICTED INDIAN RESERVATION LANDS

Opinion, December 11, 1936

INDIAN RESERVATION—POWER OF STATE GAME WARDENS TO MAKE SEARCHES— GAME IN POSSESSION OF INDIANS.

Control over Indian conduct and Indian property on an Indian reservation is reserved to the United States, although for all other purposes a State may exercise a police jurisdiction over the Territory. The State cannot send its officers upon restricted Indian lands to search for game thought to be possessed by reservation Indians.

MARGOLD, *Solicitor*:

My opinion has been requested on the question of whether State game wardens may enter upon restricted Indian reservation lands in Minnesota to search for game they believe to be in the possession of Indians.

This question demands consideration of the extent and basis of State jurisdiction upon an Indian reservation. It has been settled law since the famous case of *Worcester v. State of Georgia*, 6 Pet. 514, that a State has no jurisdiction to arrest a non-Indian within an Indian reservation for violation of a State law inconsistent with Federal laws and treaties affecting Indians. Likewise, it is settled that a State court has no jurisdiction to punish an Indian for acts forbidden by State law when such acts are committed within an Indian reservation. *United States v. Hamilton*, 233 Fed. 685; *In*

re Blackbird, 109 Fed. 139; *In re Lincoln*, 129 Fed. 247; *United States v. Quiver*, 241 U. S. 602.

These limitations on State jurisdiction do not, however, go to the point of denying all State jurisdiction within the boundaries of an Indian reservation. It is well settled that a State has jurisdiction to tax property owned by non-Indians within an Indian reservation (*Thomas v. Gay*, 169 U. S. 264, holding that a tax on cattle pastured on Indian lands under Indian leases is not a tax on rentals and is "too remote and indirect to be deemed a tax upon the lands or privileges of the Indians" (p. 273). *Accord: Wagoner v. Evans*, 170 U. S. 588). It is also well settled that a State may punish a non-Indian for an offense committed against another non-Indian within an Indian reservation, unless the United States in establishing the State itself has reserved absolute and exclusive jurisdiction over the territory of the reservation. *Draper v. United States*, 164 U. S. 240; *United States v. McBratney*, 104 U. S. 621.

The theory underlying all the foregoing decisions appears to be that control over Indian conduct and Indian property on an Indian reservation is reserved to the United States, while for all other purposes the State may exercise a police jurisdiction over the territory of the reservation. Under this theory, the State cannot send its officers upon restricted Indian lands to search for game thought to be possessed by reservation Indians. Such action would be interfering with the person and property of Indians upon reservation lands, and could not be legally supported without specific Federal statutory authorization.

Such specific authorization, in another field, is given by the act of February 15, 1929 (45 Stat. 1185; U. S. C., Tit. 25, Sec. 231), authorizing State officers to enter upon Indian reservation lands "for the purpose of making inspection of health and educational conditions and enforcing sanitation and quarantine regulations or to enforce compulsory school attendance of Indian pupils, as provided by the law of the State, under such rules, regulations, and conditions as the Secretary of the Interior may prescribe." Permission thus given to State officers for limited purposes cannot be extended, without further legislation, over purposes wholly different. The statute is itself a recognition that without specific authority State officers have no power to enter restricted Indian lands for the enforcement of State laws against Indians and their property.

I am therefore constrained to answer your question in the negative.

Approved: December 11, 1936.

OSCAR L. CHAPMAN,

Assistant Secretary.

BLANCHE C. CRANE ET AL.

Decided December 16, 1936

MINING CLAIM—ADVERSE CLAIM—DEPARTMENTAL JURISDICTION—SECTION 2326, REVISED STATUTES.

In determining the sufficiency of an adverse claim under Section 2326, Revised Statutes, the Department only determines matters of form, and an objection that goes to the merits of the adverse claim is not within the jurisdiction of the Department to determine.

Chambers v. Pitts (2 Copp's L. O. 162), *City Rock v. Pitts* (1 Copp's L. O. 146), *Owens et al. v. Stephens et al.* (2 L. D. 699), cited and applied.

MINING CLAIM—ADVERSE PROCEEDINGS—DEPARTMENTAL JURISDICTION.

The question of the right of possession of the land between the parties in an adverse proceeding under the statute is one exclusively for the courts, and that question may involve a determination as to priority of location, as to whether the location was made in conformity with law, as to whether the land was subject to location in the manner it was attempted to be acquired. The action, therefore, of the Commissioner of the General Land Office in rejecting an adverse claim on the ground that the land was not subject to location is in effect a judgment that the adverse claimant had no right to possession of the land. It is a judgment as to the merits, invaded the jurisdiction of the court, and violated the mandate of the statute that when an adverse claim is filed within the time required by law, all proceedings upon the application, except with reference to the publication and proof of notice, are stayed until the controversy is settled by a court of competent jurisdiction, or the adverse claim waived.

Duffield v. San Francisco Chemical Co., 205 Fed. 480, *Mason v. Washington Butte Mining Co.*, 214 Fed. 32, 36, *Richmond Mining Co. v. Rose*, 114 U. S. 576, 585, *Henry C. Bolyard et al* (53 I. D. 556), cited and applied.

MINING CLAIM—ADVERSE JUDICIAL PROCEEDINGS—PROTEST.

It is a rule of the Department that a protest will not be entertained during the pendency of adverse judicial proceedings under Section 2326, Revised Statutes, in which the protestant is a party, especially when the matter of protest may be the subject of legitimate inquiry in the proceedings.

Crown Point Mining Co. v. Buck (26 L. D. 348), *Clipper Mining Co.* (22 L. D. 527), cited and applied.

MINING CLAIM—ADVERSE CLAIM—DISMISSAL.

The dismissal of an adverse claim is not justified on the ground that by proper construction of the acts authorizing withdrawal for the Indians, or by proper construction of the language of the withdrawal, or by the terms of the patent to the Indians, the land was not public land subject to location at the time the adverse claimant initiated his location, although after presentation of the judgment roll of the court showing the land was awarded the adverse claimant, the Department might have the question whether the decision was conclusive as to the locatability of the land.

MINING CLAIM—ADVERSE CLAIM—SUIT PENDING.

Although there is a question as to the sufficiency of the adverse claim, when the suit is commenced the Department is not inclined to entertain an attack on the adverse claim, relegating all questions to the courts.

McMasters Appeal (2 L. D. 706), *Reed v. Royt* (1 L. D. 603), *Brown v. Bond* (11 L. D. 150, 154), cited and applied.

WALTERS, *First Assistant Secretary*:

March 12, 1936, Blanche C. Crane made application, Los Angeles 052714, for patent to the Stewart Mine lode claim in Sec. 23, T. 9 S., R. 2 W., S. B. M., located in 1898. Publication of the notice of application for patent began May 22, 1936. On July 9, 1936, and within the period of publication Norman C. French and Fred J. Rynerson filed adverse claim 052785 against the application alleging ownership of the Feldspar Double "O" and Gem Chief, lode claims located respectively August 4 and 6, 1931, and that both claims were in conflict with the Stewart Mine lode. On August 5, 1936, the mineral applicant protested against the adverse claim in substance alleging that at the date of location of the adverse claims the land was embraced in an Indian reservation and was, therefore, not subject to location.

Upon consideration of this protest the Commissioner of the General Land Office by decision of September 11, 1936, rejected the adverse claim and as grounds therefor stated:

The records of this office show Sec. 23 was withdrawn on January 24, 1903, for the Pala Band of Mission Indians and that it continues so withdrawn, and since the date of the withdrawal it has not been subject to location under the United States mining laws.

It is unnecessary and entirely beside the point to consider at this time whether the Stewart Mine lode claim is in all respects valid or whether the application is sufficient in every particular. If the adverse claim is a proper one consideration of the mineral application is precluded by law, Section 2323 R. S., which expressly provides that upon the filing of an adverse claim the proceedings shall be stayed in the land office until a final determination upon the adverse claim is made. If the adverse claim is not one contemplated by the statute, it will suffice at this time to reject the adverse claim and the mineral application may be considered thereafter in its regular order.

It has been held that a protest or adverse claim such as is not contemplated by the statute should be rejected. *Thomas et al. v. Elling* (25 L. D. 495). In that case it is true the question decided was that an alleged co-owner of the claim for which patent was sought may not file an adverse claim but it is evident that the same principle would apply to an adverse claim filed by one who does not own either in whole or in part a mining claim in conflict with the one applied for.

A mining location may not be made on land not subject to such location and the adverse mining locations are therefore wholly void and constitute the basis for no right either as against the United States or this mineral applicant. The attempted locations can not be recognized by this office for any purpose and the adverse claim accordingly is rejected subject to adverse claimants' right of appeal to the Secretary of the Interior within 30 days from notice in default of which this action will become final and the case will be closed without further notice from this office.

The adverse claimants have appealed and filed evidence of the institution on August 6, 1936, of an adverse suit under section 2326,

Revised Statutes, to quiet their title to the Feldspar Double "O" and Gem Chief claims against the claim of the applicant for patent.

In support of the appeal adverse claimants alleged that:

The land was included in mining locations made in July 1898, based upon valid discovery of mineral, and said locations were thereafter maintained by the performance of annual assessment work and were so held at the date of the attempted withdrawal of January 24, 1903, and said claims were continued to be held until the year 1930-1931 when the mining lode claims were located by appellants, French and Rynerson. Therefore neither the withdrawal, nor the Indian patent, which issued February 4, 1920, under the provisions of the Act of March 1, 1907 (34 Stat. 1015-1023), applied to or covered the lands in the Feldspar Double "O" and Gem Chief Lode Claims.

The basic act of January 12, 1891 (26 Stat. 712) which authorized withdrawal of lands in California for the benefit of Mission Indians, directed the Commissioners appointed thereunder to "ascertain whether there are vacant public lands in the vicinity to which they (*Indians*) may be removed" [italics ours]. The act further provided that "no patent shall embrace any tract or tracts to which existing valid rights have attached in favor of any person under any of the United States laws providing for the disposition of the public domain * * *." The Act of March 1, 1907, *supra*, amended the Act of January 12, 1891, *supra*, and provided that no patent issued thereunder "shall embrace any tract or tracts to which valid existing rights have attached in favor of any person under any of the United States laws providing for the disposition of the public domain, unless such person shall acquiesce in and accept the appraisal provided for in this Act in all respects and shall thereafter, upon demand and payment of such appraised value, execute a release of all claims and title thereto." The language of both of these Acts excluded any and all existing *claims* under the United States public land laws.

On February 4, 1920, patent issued to the Indians covering the exterior boundaries of the section in which the mining claims were situated but such patent did not, of course, include existing valid mining claims.

Among the errors assigned are in holding that the land covered by the Feldspar Double "O" and Gem Chief were included in the withdrawal, it being contended that the prior location made in 1898 and maintained until relocated in the year 1930-1931, excepted the land from the withdrawal of 1903 and from the patent to the Indians of 1920; that the patent of 1920 superseded and ended the withdrawal and by force of the exceptions in the provisos in the acts authorizing the patents, the original claims were excepted therefrom and became subject to the relocation thereafter.

Error is also assigned in not suspending all action upon the adverse claims and application for patent pending the decision of a court of competent jurisdiction upon the adverse suit as required by the mandatory provisions of section 2326, Revised Statutes, is being contended that the case of *Thomas et al. v. Elling* is without application, that the Commissioner's action was premature and in disregard of the requirement that all proceedings in the land department be stayed to await the decision of the courts.

It is for the Department to determine the sufficiency of an adverse claim, for illustration, whether it is one contemplated by section 2326, Revised Statutes, whether it conforms to the requirements of that statute and regulations thereunder, or whether it is filed in time and is verified by oath. But it has long been the rule that only matters of form are to be decided by the Department, the merits are to be tried by the courts. *Chambers v. Pitts* (2 Copp's L. O. 162); *City Rock & Utah v. Pitts* (1 Copp's L. O. 146); Lindley on Mines, Sec. 737. An objection that goes to the merits of an adverse claim is not one within the jurisdiction of the Department to determine. *Owens et al. v. Stephens et al.* (2 L. D. 699). It does not appear that the land is patented; adverse claim is not, therefore, inappropriate for that reason. Neither is the adverse claim one presented by an excluded co-owner of the claim for which patent is sought, as in *Thomas et al. v. Elling, supra*, who, as there held, is not required to file adverse claim. The controversy here is between lode claimants, asserting independent and hostile sources of title and is a proper subject of an adverse proceeding under section 2326.

It is firmly settled that the question of the right of possession between the parties in such a proceeding is exclusively for the courts. Whether the land is subject to location in the manner in which it was sought to be acquired is involved in the question of the right to the possession. There is not only the question of which of the adverse claimants is prior in time in making the location, whether the location was made in compliance with law, but also whether the land occupied and covered by the location was subject to location in the manner it was attempted to be acquired. *Duffield v. San Francisco Chemical Co.*, 205 Fed. 480; *Mason v. Washington-Butte Mining Co.*, 214 Fed. 32, 36. *A fortiori*, the question is involved whether the land is subject to location at all.

The action of the Commissioner in rejecting the adverse claim on the ground that the land was not subject to location was in effect a judgment that the adverse claimant had no right to the possession of the land and went to the merits of his claim. It invaded the jurisdiction of the court and violated the mandate of the statute that when an adverse claim is filed within the time required by law, all proceedings upon the application in the land office, except with reference to the publication and proof of notice, are stayed until the controversy shall have been settled and decided by a court of competent jurisdiction or the adverse claim waived. *Richmond Mining Co. v. Rose*, 114 U. S. 576, 585; *Henry C. Bolyard et al.* (53 L. D. 556); Lindley on Mines, Sec. 741, and cases there cited.

It is a rule in the Department that a protest will not be entertained during the pendency of adverse judicial proceedings to which the

protestant is a party, especially when the matter of protest may be subject to legitimate inquiry in the pending adverse proceeding. *Crown Point Mining Co. v. Buck* (26 L. D. 348). The rule was followed where the objection to the adverse claim was that the Department had previously denied application for patent therefor as a placer on the ground that the land was nonplacer in character. See *Clipper Mining Company* (22 L. D. 527).

The action of the Commissioner could not be justified for the reason that by proper construction of the acts authorizing withdrawal for the Indians, or by proper construction of the language of the withdrawal, or by the terms of the patent to the Indians, the land was not public land subject to location at the time the adverse claimants initiated their location. That question would only arise for determination by the land department in the event the adverse claimant prevailed in the adverse suit, presented the judgment roll of the court showing he was awarded the possession of the land, and demanded a patent. Should that happen the Department might have the question whether the decision of the court was conclusive as to the locatability of the land. While the adverse proceeding is pending and undetermined a decision on that question by the Commissioner was premature and nugatory (*H. C. Bolyard et al., supra*), and would be so if now determined by the Department.

Even if it were conceded that there is a question as to the sufficiency of the adverse claim, when the suit is commenced the Department is not inclined to entertain an attack on the adverse claim, relegating all questions to the courts. *McMaster's appeal* (2 L. D. 706, 707); *Reed v. Royt* (1 L. D. 603); *Brown v. Bond* (11 L. D. 150, 154).

The protest should have been and is hereby dismissed. The action of the Commissioner in rejecting the adverse claim is reversed.

Reversed.

BUCKHOLTS v. ANDERSON

Decided December 31, 1936

OIL AND GAS LANDS—APPLICATION FOR LEASE—ACTS OF MARCH 3, 1887, JULY 17, 1914.

Section 5 of the act of March 3, 1887 (24 Stat. 556), does not confer a vested right. It does not confirm any title but simply grants a privilege. The act of July 17, 1914 (38 Stat. 509), modifies section 5 of the act of March 3, 1887, so that any person now applying under the latter act to purchase land actually or prospectively valuable for oil or gas must consent to reservation of oil or gas deposits to the United States.

The cases of *Hutton et al. v. Forbes* (31 L. D. 325), and *Clogston v. Palmer*, (32 L. D. 77), cited and distinguished.

WALTERS, *First Assistant Secretary*:

On March 2, 1936, E. E. Buckholts filed an application to lease the NW¼ Sec. 35, T. 12 S., R. 22 W., 6th P. M., Kansas, under the act of August 21, 1935 (49 Stat. 674). On July 20, 1936, Charles J. Anderson filed an application to purchase the land above described in accordance with the provisions of section 5 of the act of March 3, 1887 (24 Stat. 556). By decision of August 21, 1936, the Commissioner of the General Land Office rejected the lease application on the ground that Anderson had the right to the land and all minerals therein.

The Commissioner states that the facts are substantially as follows:

The land involved is within the 20-mile limits of the odd-section grant in place, under the acts of July 1, 1862 (12 Stat. 489), and July 2, 1864 (13 Stat. 357), to the Leavenworth, Pawnee, and Western Railroad Company, succeeded by the Union Pacific Railway Company, Eastern Division, which by change of name became the Kansas Pacific Railway Company, and the present owner Union Pacific Land Company. This grant has been adjusted and closed under the provisions of the cited act of 1887, the beneficiary having received all land to which it was entitled. The NW¼ Sec. 35 was never listed by the company under the grant, and no patent has been issued.

On May 5, 1879, the Kansas Pacific Railway Company conveyed this land by warranty deed to Albert E. Warren, who thereafter conveyed by warranty deed to Henry R. Wilcox. It appears that Wilcox executed a mortgage to Warren in connection with the sale, and this mortgage was assigned to the Union Pacific Railway Company, which company lost a suit to foreclose because the statute of limitations had run. Several transfers followed and on December 11, 1897, the land was conveyed to Anderson, who has since possessed and used the same.

After reciting the facts the Commissioner says:

Anderson has set up facts which tend to establish the right in him to purchase said NW¼ Sec. 35 under Sec. 5 of the act of March 3, 1887. Before patent can be issued it will be necessary for him to forward here the sum of \$200, being the purchase price of the land at the rate of \$1.25 per acre. Also, it will be necessary for him to publish notice of the application.

* * * * *

A right to purchase under Sec. 5 of the act of March 3, 1887, carries with it the right to minerals in the land, provided the original purchaser from the beneficiary of the grant did not know of the mineral character of the land at the time of such purchase. 32 L. D. 77; 31 L. D. 325. There is no evidence of such knowledge of mineral character on the part of Albert E. Warren, the original purchaser. As Anderson under his application would have a right to any oil and gas discovered, Buckholts can gain nothing from his lease application 06362, being for oil and gas which would, if discovered, actually be Anderson's.

Buckholts has filed an appeal, and reply thereto with brief and argument has been filed on behalf of Anderson.

The cited acts of July 1, 1862, and July 2, 1864, provide that all mineral lands other than coal and iron lands shall be excepted from the operation of the grants therein.

In the case *Barden v. Northern Pacific Railroad Company*, 154 U. S. 288, it was held that by the act of July 2, 1864 (13 Stat. 357), all mineral lands other than iron and coal were excluded from the operation of the grant of public lands, whether known or unknown. That is to say, if any lands which would otherwise pass under the grant were found at any time before the issuance of patent to be mineral in character they were excepted from the grant. The provisions of this act appear to be the same as those in the acts in this case.

Section 5 of the act of March 3, 1887, *supra*, reads in part as follows:

That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns.

In the case of *Hutton et al. v. Forbes* (31 L. D. 325) the Department held that one who purchased land from a railroad company known to be mineral at the date of the purchase was not a purchaser in good faith within the meaning of the above-quoted act, and was not entitled to patent for mineral land. The Department further stated that if such lands were not known to be mineral at the time of their purchase, no subsequent discovery or development of minerals thereon could affect the question of the good faith of the purchase. This expression of opinion was not necessary for the decision in the case.

In the case of *Clogston v. Palmer* (32 L. D. 77) the Department held that where lands coming within the provisions of section 5 of the act of March 3, 1887, and not known to be mineral in character at the time of their purchase from the railroad company were subsequently found to be mineral, they were not for that reason excepted from the right to purchase granted by the section. The Department cited court decisions to the effect that the good faith of the parties in making contracts of purchase was the controlling consideration and said:

Such being the intention of Congress, as shown by judicial decisions and executive rulings, it follows as a logical consequence that the *bona fides* of the purchase is to be determined by the conditions prevailing at the time of the purchase and in view of which it was made. The known character of the land at the date of the purchase from the company is therefore the determining factor in any controversy involving the character of the land applied for under the provisions of said section. To except lands from purchase under its provisions for the reason that they contain minerals, it must appear that the lands were of known mineral character at the date of the sale by the land-grant company, and therefore were such that they were excepted from the grant to the railroad company, and that he could obtain no title thereto from the company.

There was also a question in said case as to the effect of a withdrawal for forest purposes. The Department held that the provisions of section 24 of the act of March 3, 1891 (26 Stat. 109, 1103), were not intended by Congress to authorize the President in establishing a forest reserve to extinguish an existing right to purchase granted by section 5 of the act of March 3, 1887. But in that connection it was stated:

The right to purchase conferred by said section 5 of the act of March 3, 1887, is not a vested right. It may be modified or entirely extinguished by Congress while it is in an inchoate condition.

In the case of *Ramsey v. Tacoma Land Company*, 196 U. S. 360, the court, in construing said section 5 of the act of 1887, said: "Obviously the statute is not a curative one, confirms no title, but simply grants a privilege."

Has the right to purchase conferred by the act under consideration been modified?

Section 3 of the act of July 17, 1914 (38 Stat. 509), is as follows:

That any person who has, in good faith, located, selected, entered, or purchased, or any person who shall hereafter locate, select, enter, or purchase, under the nonmineral land laws of the United States, any lands which are subsequently withdrawn, classified, or reported as being valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals, may, upon application therefor, and making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which patent shall contain a reservation to the United States of all deposits on account of which the lands were withdrawn, classified, or reported as being valuable, together with the right to prospect for, mine, and remove the same.

See the Regulations of March 20, 1915 (44 L. D. 32, 37), under the above-quoted section.

Unpatented lands within the primary limits of railroad grants are subject to the provisions of the act of July 17, 1914, *supra*. Instructions of September 17, 1925 (51 L. D. 196). The Indian Allotment act of February 8, 1887 (24 Stat. 388), is modified by the act of July 17, 1914. *Clark, Jr. v. Benally et al.* (51 L. D. 91, 98).

In section 37 of the act of February 25, 1920 (41 Stat. 437), it is provided:

That the deposits of * * * oil * * * and gas, herein referred to, in lands valuable for such minerals, * * * shall be subject to disposition only in the form and manner provided in this Act.

It is conceded that the purpose of section 5 of the act of 1887 was to grant relief to bona fide purchasers from railroad companies. There may be justification for the *Clogston v. Palmer* decision, because then it was a question of all or nothing. Now the laws are modified.

Anderson's predecessor in interest purchased nonmineral land from the railroad company. Anderson may acquire title to nonmineral land. He has no vested right, no equitable title. He has merely the privilege of purchasing, and that must be determined according to the laws which now govern.

If the land in question is known to be valuable for oil or gas, actually or merely prospectively, Anderson must file a waiver of right to such minerals. The procedure prescribed in paragraph 12 c of the Oil and Gas Regulations (47 L. D. 437, 445) should be followed.

The decision appealed from is reversed.

Reversed.

APPLICABILITY OF THE ACT OF JUNE 20, 1936 (49 STAT. 1542), TO INDIVIDUAL MEMBERS OF THE OSAGE TRIBE OF INDIANS IN OKLAHOMA¹

Opinion, January 4, 1937

INDIANS AND INDIAN LANDS—OSAGE INDIANS—TAX EXEMPTIONS.

The relief afforded by section 1 of the act of June 20, 1936, *supra*, may be extended to those individual Osage Indians who meet the requirements of that section. Section 2 of the act of June 20, 1936, *supra*, declaring that lands purchased with restricted or trust funds of individual Indians and held subject to restrictions upon encumbrance or alienation except with the approval of the Secretary of the Interior shall be instrumentalities of the Federal Government and as such exempt from taxation, is applicable to lands acquired and held in this manner for Osage Indians as well as Indians of other tribes.

STATUTORY CONSTRUCTION—ACT OF JUNE 20, 1936—REPEAL BY IMPLICATION.

Special statutes relative to the taxation of Osage lands are superseded by the act of June 20, 1936, to the extent that the latter act is inconsistent with earlier statutes.

The maxim "Repeals by implication are not favored," reasonably construed in the light of decided cases applying the maxim means: (a)

¹ See Opinion of the Attorney General, Feb. 13, 1937, 38 Opinions of the Attorney General 577.

that any ambiguity in the later statute will be construed, if possible, so as to avoid conflict with an earlier statute; and (b) that if two statutes on the same subject are not inconsistent and both can be conveniently enforced, the later statute will not be held to repeal the earlier statute.

The maxim "*Generalia specialibus non derogant*" is likewise to be construed as (a) a rule for resolving ambiguities, and (b) a caution against implied repeals in cases where there is no logical inconsistency between the two statutes.

MARGOLD, *Solicitor*:

My opinion has been requested as to what, if any, application the act of June 20, 1936 (49 Stat. 1552), has to the individual members of the Osage Tribe of Indians in Oklahoma. The act reads:

That there is hereby authorized to be appropriated, out of any money in the Treasury of the United States not otherwise appropriated, the sum of \$25,000 to be expended under such rules and regulations as the Secretary of the Interior may prescribe, for payment of taxes, including penalties and interest, assessed against individually owned Indian land the title to which is held subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of an Indian, where the Secretary finds that such land was purchased with the understanding and belief on the part of said Indian that after purchase it would be nontaxable, and for redemption or reacquisition of any such land heretofore or hereafter sold for nonpayment of taxes.

SEC. 2. All lands the title to which is now held by an Indian subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of said Indian, are hereby declared to be instrumentalities of the Federal Government, and shall be nontaxable until otherwise directed by Congress.

In explanation of the above statute, it may be said that the right of the State and its legal subdivisions to tax lands purchased with the restricted or trust funds of individual Indians and conveyed to the Indians by deeds prohibiting alienation or encumbrance without the consent or approval of the Secretary of the Interior was the subject of controversy and litigation extending over a considerable period of years. It has now been finally decided that such lands after acquisition by the Indians remain subject to the taxing power of the State. *United States v. Gray*, 284 Fed. 103, dismd. 263 U. S. 689; *United States v. Ranson*, 284 Fed. 108, aff'd. 263 U. S. 691; *United States v. Mummert*, 15 F. (2d) 926; *McCurdy v. United States*, 246 U. S. 263; *Work v. Mummert*, 29 F. (2d) 393; *Shaw v. Oil Corporation*, 276 U. S. 575. As a result, many Indians who were financially unable to meet these tax burdens lost their lands under tax foreclosure sales, and others faced similar losses. The object of the act of June 20, 1936, *supra*, is to afford a measure of relief to these Indians.

Two forms of relief are provided and dealt with, respectively, in separate sections of the statute. Section 1 provides for an appro-

priation of \$25,000, which is to be available only in cases where the Secretary of the Interior finds that the lands were acquired by the Indians with the belief and understanding that they would be nontaxable, and where such finding is made, the appropriated funds may be used for redeeming or reacquiring lands sold for nonpayment of taxes or in making payment of delinquent taxes, interest and penalties standing as a lien against lands still in Indian ownership. Section 2 makes all lands purchased prior to the date of the enactment and then in restricted Indian ownership instrumentalities of the Federal Government and declares that such lands shall be nontaxable until otherwise provided by Congress. It is to be observed that the limitation imposed by section 1 on the expenditure of the appropriated funds, namely, that such expenditures may be made only where the Secretary of the Interior finds that the Indian for whom the lands were purchased understood and believed that the lands would be nontaxable, is not contained in section 2, which creates the tax exemption. In such a situation, the limitation must be regarded as confined to the section in which it is found and will not be extended to other sections unless plainly so intended. See Lewis' Sutherland on Statutory Construction, Vol. 2, Sec. 352. No such intention is apparent on the face of the statute. Confining the limitation to the section in which it is found does exclude from the benefits of that section certain Indians who will share in the relief granted by section 2. Bearing in mind, however, the difference in the relief afforded by the two sections, this is not an unreasonable distinction. In asking Congress to appropriate funds for the payment of taxes and for redeeming or reacquiring lands sold for nonpayment of taxes, the Indian for whom the land was purchased with the understanding and belief—often induced by representations made by employees of the Federal Government—that the lands would be nontaxable, doubtless occupies a more favored position than the Indian who had the contrary understanding and belief. But protection from future taxation by creating a tax exemption might with equal propriety be given to both. In any event, the distinction as to the beneficiaries entitled to the relief granted by the two sections of the statute is one which Congress has seen fit to make and it may not be disregarded without adding to the language of the statute, which administrative officers are without the power to do.

Turning now to the question of the application of the statute to members of the Osage Tribe of Indians in Oklahoma, it will be observed that no mention is made in the statute of any particular tribe of Indians. Section 1 refers to "*individually owned Indian land* the title to which is held subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of

the Interior, heretofore purchased out of trust or restricted funds of *an Indian* * * *." Section 2 imposes the tax exemption upon "*all lands* the title to which is now held by *an Indian* subject to restrictions against alienation," etc. [Italics supplied.] Under this all-inclusive language, the tribe to which the individual Indian belongs is immaterial. If, therefore, the Osage Indians are to be excluded, the reason for such exclusion must be found elsewhere than in the act of June 20, 1936. In so far as the relief afforded by section 1 of the act is concerned, no reason is apparent for excluding the Osages. No prior legislation, general or special, prohibits the use of Federal funds for paying taxes on lands purchased by Osage Indians or for redeeming or reacquiring lands that may have been sold for nonpayment of taxes. The appropriation authorized by section 1 cannot, of course, be used for the benefit of an Osage Indian whose restricted or trust funds were used in purchasing lands with the understanding that same would be taxable. But this is equally true of Indians of other tribes. Relief is denied in such cases, not because the act is in terms inapplicable, but because the Indians are unable to meet one of its requirements.

When we come to consider the applicability of the tax exemption created by section 2 of the act to the Osages, however, we encounter a somewhat different situation. The taxability of lands of members of the Osage Tribe of Indians has been dealt with specifically and expressly by Congress. Section 1 of the act of March 2, 1929 (45 Stat. 1478), reads:

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

The scope of the proviso prohibiting allottees, their heirs, or devisees from holding at any one time more than 160 acres of tax-exempt land, construed in the light of the general language to which it is attached, may well be regarded as confined to lands allotted to members of the Osage Tribe as homesteads. Given this construction, any conflict between that enactment and section 2 of the act of June 20, 1936, which deals with a different class of lands, is avoided and the two statutes may operate in entire harmony. There is, however, a more specific provision dealing with the taxability of lands including lands of the identical class involved in the act of June 20, 1936. Section 1 of the act of February 27, 1925 (43 Stat. 1008), authorizes, among other things, the purchase of real estate from the restricted or trust funds of individual members of the Osage Tribe. Such

lands, when purchased, are usually conveyed to the Indians by deeds prohibiting alienation or encumbrance without the approval of the Secretary of the Interior. Section 3 of the act of February 27, 1925, further declares that:

Property of Osage Indians not having certificates of competency purchased as hereinbefore set forth shall not be subject to the lien of any debt, claim, or judgment *except taxes*, or be subject to alienation, without the approval of the Secretary of the Interior. [Italics supplied.]

The words "Property of Osage Indians * * * purchased as hereinbefore set forth" obviously embrace lands purchased by Osage Indians under authority of section 1 of the act of 1925, and the declaration that such lands shall not be subject to the lien of any debt, claim, or judgment "except taxes" carries the implication that such lands shall be subject to taxation. That it was the intent of Congress that these purchased lands should be subject to taxation is clearly shown by the legislative history of the enactment. See Hearings before the Committee on Indian Affairs, House of Representatives, 68th Cong., Sess. 1, on H. R. 5726, page 124. We are thus confronted with a special statute under which lands purchased by Osage Indians are subject to taxation and a later general statute which exempts Indian lands from taxation if title is taken and held in a certain manner. In this situation, is the prior special enactment repealed?

The argument that no repeal has been effected relies, in the first place, upon the old maxim, "Repeals by implication are not favored." In determining whether the earlier statute is still in effect, it becomes necessary to ascertain what meaning and what force is given to this maxim by the decided cases.

The maxim in question, like many other maxims, is stated in many cases, but the judicial statement of it is usually followed by the words "however," "but," or "nevertheless." In fact, of the many Federal cases cited in Corpus Juris and the Federal Digest in support of this rule, there is none in which a later statute logically incompatible with an earlier statute was held not to repeal the earlier statute.

All this is not to say that the maxim is entirely meaningless. Two situations must be recognized in which the maxim is of positive importance. In the first place, the maxim is invoked, as are other rules of statutory construction, in the resolution of ambiguities that appear on the face of a statute. In accordance with this maxim, when two interpretations of a statute are possible, one of which will permit earlier legislation to stand and the other of which will nullify the earlier legislation, the former interpretation is favored. Thus, where the later statute refers to "real estate in

possession of any person" and establishes a period of limitation inconsistent with the period established by earlier statutes, the phrase "real estate in possession of any person" has been given a narrow construction to exclude railroad lands devoted to public use, as to which the earlier statute of limitations is enforced. *Summers v. Atchison, etc., R. Co.*, 2 F. (2d) 717. This narrow construction is perfectly reasonable, in view of the traditional rule that the sovereign is not comprehended in general statutes without special mention, and in view of the further fact that the word "person" is commonly used to exclude instrumentalities of government.

As invoked in such a case as the foregoing, the rule in question is a rule for the resolution of ambiguities, and is so recognized by the highest authorities.

Repeals by implication are not favored. This means that it is the duty of the court to so construe the acts, if possible, that both shall be operative. *Lewis' Sutherland Statutory Construction*, Sec. 247.

Such an interpretation (repeal by implication) is not to be adopted unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention. *Maxwell on Interpretation of Stats.* (6th ed. London) 296.

Repeal will be implied only when necessary, because the last or dominant statute admits of no other reasonable construction. *Continental Insurance Co. v. Simpson*, 8 F. (2d) 439, 442.

It is true enough that under well-known rules of statutory construction, repeals by implication are not favored. It is nevertheless just as definitely a rule that where the later statute is clearly and distinctly inconsistent with the earlier condition of the law the last enactment will control. *Ex parte Yoshinobu Magami*, 47 F. (2d) 946, 947.

* * * it is a familiar doctrine that repeals by implication are not favored. When there are two acts on the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first. *United States v. Tymen*, 11 Wall. 88, 92.

If two inconsistent acts are passed at different times, the last is to be obeyed; and if obedience can not be observed without derogating from the first it is the first which must give way * * * the intention of the framers must prevail, and the only serious problem is as to how that intention is to be ascertained. Of course, if the language of the statute is clear and unambiguous we are to go no further to ascertain its meaning. *Lewis v. United States*, 50 Ct. Cl. 226, 240, aff'd. 244 U. S. 134.

* * * it is equally well settled that a subsequent statute, which is clearly repugnant to a prior one, necessarily repeals the former, although it do not do so in terms. *Sedgwick on Statutory Construction* (2d ed.) 104.

So construed and applied, the maxim, "Repeals by implication are not favored," has no application to the act of June 20, 1936, for there is no ambiguity whatsoever in the provision that certain lands shall be nontaxable.

A second application is given, in many cases, to the maxim under consideration. In most cases of so-called repeal by implication it will

be noted that there is actually no incompatibility between the earlier and the later statute. Thus where a later statute forbids an act already prohibited by an earlier statute, attaching a new penalty thereto, it is usually held that the later statute impliedly repeals the earlier statute, although actually there is no logical difficulty in holding that both statutes are in force and that prosecutions may be brought under either. Cases of this sort, in which repeals by implication are effected without any showing of inconsistency are: *United States v. Tynen*, 11 Wall. 88; *District of Columbia v. Hutton*, 143 U. S. 18; *United States v. Yuginovich*, 256 U. S. 450; *Maresca v. United States*, 277 Fed. 727.

In such cases as the foregoing the argument for repeal is that the legislature could not have intended that two different statutes should govern the same subject. This argument from the assumed intent of the legislature is regularly answered by the maxim, "Repeals by implication are not favored." Logically, there is no implication of repeal in these cases. It is not only logically possible but often practically necessary to have a single subject governed by many different statutes. From the standpoint of logic, the question of whether two inconsistent statutory provisions shall both stand can never arise, since it is logically impossible to give effect to two inconsistent provisions. If one statute is inconsistent with another either the earlier statute is *pro tanto* repealed or the later statute is *pro tanto* void. The question of whether *both* statutes shall be enforced arises only when there is no logical inconsistency between the two statutes, but simply an issue of convenience or legislative intent. Upon that issue the maxim that implied repeals are not favored has a legitimate force.

On the basis of this maxim courts will frequently permit two statutes to stand where they are not inconsistent and reject the fiction that a legislature must have intended the later statute as a substitute for the earlier. In the case of *Chase v. United States*, 283 Fed. 887, two separate statutes authorized allotments of different amounts of land to different classes of Indians. It was held, quite properly, that a repeal of the earlier statute had not been effected. It was perfectly possible to give effect to the two statutes. Again in *Wood v. United States*, 16 Pet. 342, separate statutes prescribing separate penalties for different, but overlapping, offenses are both given effect and the argument for repeal of the earlier statute by implication is rejected. Similarly in *Bookbinder v. United States*, 287 Fed. 790, it is held that a prohibition statute does not repeal a law against smuggling, since there is no necessary incompatibility between the two laws. In *United States v. Ten Thousand Cigars*, 28 Fed. Cas. No. 16,451, it is held that a statute permitting certain witnesses to testify under certain conditions does not repeal a statute permitting these and other wit-

nesses to testify regardless of such conditions. Either statute may be invoked to justify the testimony to which it applies. In *Continental Insurance Company v. Simpson*, 8 F. (2d) 439, the argument for repeal by implication is rejected where the two statutes in question dealt with entirely different subjects, one, the manner of printing insurance policies, the other the method of proving losses. In *Ex parte Yoshinobu Magami*, 47 F. (2d) 946, it is held that two statutes, authorizing deportation under different conditions, may both be given effect, and the argument for repeal by implication is therefore rejected. In *Franke v. Murray*, 248 Fed. 865, one statute made desertion from the military service punishable by a military court, while a later statute made violation of draft laws a misdemeanor. The argument that the later statute by implication repealed the earlier statute, where the same act constituted both desertion and a violation of the draft laws, was rejected. In this case as in all the other cases above mentioned, it is logically possible to give full effect, according to their terms, to both statutes. That, quite clearly, is not the situation which the act of June 20, 1936, presents.

The scope of the maxim in question is thus summed up by the Supreme Court in two recent cases:

It is, of course, settled that repeals by implication are not favored. It is equally well settled that a later statute repeals former ones which are clearly inconsistent with the earlier enactments. *United States v. Yuginovich*, 256 U. S. 450, 463.

It is true that repeals by implication are not favored. The repugnancy between the later act upon the same subject and the former legislation must be such that the first act cannot stand and be capable of execution consistently with the terms of the later enactment. *Lewis v. United States*, 244 U. S. 134, 144.

I conclude, then, that the maxim, "Repeals by implication are not favored," is primarily a rule for the resolution of ambiguities. Certain of the ambiguities thus resolved appear in the language of the later statute itself, and in these cases the rule is invoked to justify that interpretation of the ambiguous phrase which does least damage to prior law. The interpretation in such cases must at least be a reasonable interpretation. Secondarily, the maxim in question is a limitation upon the legal fiction that a statute is intended to supersede all earlier statutes on the same subject. In no case where the rule is invoked is it held that of two statutes which are logically inconsistent the earlier statute remains in force and the later statute is *pro tanto* nullified. There is nothing in any of the decided cases inconsistent with the rule that a later statute clearly inconsistent with an earlier statute supersedes the earlier statute.

The maxim, "Repeals by implication are not favored," takes a more specialized and more persuasive form where the second statute is general and the first statute special. The rule is commonly announced

that a later general statute will not be construed to repeal an earlier special statute, but that the earlier statute will be read as an exception to the later statute.

The argument from this rule, applied to the statute under consideration, is that, being general in its scope, it must yield to the earlier legislation dealing specially with Osage lands.

It may be questioned whether the rule cited could be applied to the present case. In the first place, we must note that the prior act of February 27, 1925, did not in terms make Osage lands taxable but simply recognized that Osage lands were subject to the same rule of taxation as then applied to other Indian lands. That general rule has now been modified. In the second place, the assumption that the act of February 27, 1925, is special and the act of June 20, 1936, general is true only in a geographical sense. With respect to the type of property, the later act is more specific. It refers to:

All lands the title to which is now held by an Indian subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of said Indian, * * *

The earlier act refers generally to "property of Osage Indians" acquired on their behalf by the Secretary of the Interior, including United States bonds, Oklahoma State bonds, real estate, and livestock. Applying to the instant case the ancient maxim, "*Generalia specialibus non derogant*," we might infer that the kind of land referred to in the later statute is a special exception to the general tax rule recognized in the earlier statute. We might then give full force to both statutes by holding that the earlier provision on taxes is no longer applicable to the lands covered by the recent statute (just as it never was applicable to United States bonds) but remains applicable to other property, real or personal.

A more fundamental objection to the argument that the earlier statute, being special, remains in full force appears from an analysis of the decided cases in which this rule is applied. However frequently stated, the rule is not borne out by the actual decisions. In no case is the rule actually applied so as to hold that where the two statutes are clearly inconsistent the earlier statute will remain in force and the latter statute will be voided *pro tanto*. As with the maxim, "Repeals by implication are not favored," this rule is invoked in two situations: (1) to resolve ambiguities, and (2) to negate an argument for implied repeal where there is no logical inconsistency between the two statutes.

In its first usage the rule is invoked to justify a narrow construction of the later statute which preserves the integrity of the earlier statute. In all such cases it is important to note the narrow construction is a reasonable construction of the later statute.

A strong case cited in support of the rule that a later general statute does not repeal an earlier special statute is *Washington v. Miller*, 235 U. S. 422. In that case a general act of Congress provided that Arkansas laws theretofore applied to non-Indians within the Indian territory should be extended to cover Indians and Indian estates. An earlier statute provided that in the descent of Creek lands, Creek citizens should have a preference among heirs. The Arkansas laws, of course, provided for no such preference. The Supreme Court held that the statutory preference had not been repealed, although it recognized that if the later statute were given a literal interpretation the repeal of the earlier statute would be implied. The court held that a reasonable interpretation could be placed on the later statute under which "no irreconcilable conflict or absolute incompatibility" would arise between the two laws and both could be given effective operation. In effect, the court held that "all the laws of Arkansas heretofore put in force in the Indian territory" meant the laws of Arkansas compatible with Federal legislation. Such a construction can the more easily be defended since the laws of Arkansas were extended to Indian territory by acts of Congress which were amended by the specific statute establishing preferences in inheritance. Certainly the holding in this case does not by any means prove that where two statutes are necessarily inconsistent the earlier statute can be read as an exception to the later and the later statute *pro tanto* voided.

A similar case is *United States v. Nix*, 189 U. S. 199. Here a specific statute required the marshal in Indian territory to take prisoners before judicial officers nearest the place where the crime was committed. A later general statute imposed upon all arresting officers the duty to bring the prisoner before the "nearest" judicial officer. Literally construed, this referred to the officer nearest to the point of arrest. In view of the earlier specific statute, however, it was held that an officer who conformed to the direction in that statute had not violated the law. In effect, the court simply placed a perfectly reasonable interpretation upon the later statute which avoided inconsistency.

Again, in *United States v. Greathouse*, 166 U. S. 601, a statute of limitations was construed as not running against persons under disability until the removal of the disability, thus giving effect to an earlier statute specifically providing for such cases. In *United States v. Burnet*, 65 F. (2d) 195, a statute governing payment of interest on tax overpayments was construed as not applicable to overpayments made by a government officer in behalf of an alien enemy corporation, thus avoiding inconsistency with a statute passed a few days earlier specifically prohibiting any interest payments with respect to the refund of taxes assessed upon alien enemy properties.

In *Knapp v. Byram*, 21 F. (2d) 226, a procedural statute authorizing removal of causes of action was held inapplicable to cases arising under the Federal Employees Liability Act, which provided that plaintiffs might bring actions in State courts and that such actions might not be removed. The strongest case that has been found in support of the maxim cited is *Loisel v. Mortimer*, 277 Fed. 882. In that case special legislation authorized the payment of traveling expenses for the clerks of certain courts out of court fees, at a rate of \$10 per day. A later general appropriation bill, appropriating a certain sum for payment of clerical fees, contained a proviso that travel expenses of clerks should not exceed \$5 per day. It was held that the appropriation act did not repeal the earlier legislation. The actual decision in this case may perhaps be justified on the ground that the proviso should be construed to cover the use of appropriated funds rather than the use of court fees—and so construed there was no incompatibility between the statutes. But the language of the opinion in this case is very sweeping. The court, relying on *Washington v. Miller*, *supra*, declares:

* * * even where the words of the general act embrace the special act no repeal will be implied, but the special act will be construed to be an exception to the general act, unless it is absolutely necessary to so construe it in order to give its words any meaning at all (p. 887).

Actual decisions do not support this sweeping dictum.

Other cases commonly cited as supporting the maxim that a later general statute does not overrule an earlier special statute are cases in which there is no logical inconsistency between the two statutes. Such a case is *Petri v. Creelman Lumber Co.*, 199 U. S. 487. In that case it was held that a statute requiring civil suits to be brought in a district in which the defendant resided did not repeal an earlier statute providing that where several defendants were involved, residing in different districts of Illinois, suit might be brought in a district in which any one of the defendants resided. Likewise in the case of *Hemmer v. United States*, 204 Fed. 898, special legislation authorized certain Indians to take homesteads subject to a 5-year limitation on alienation. Later general legislation authorized Indians to take homesteads under restraints on alienation covering a 25-year period. It was held that the later statute did not repeal the earlier statute by implication. The holding is perfectly sound since there is no logical inconsistency between the two statutes. Again, in the case of *Abbate v. United States*, 270 Fed. 735, it was held that an Alaska prohibition law was not repealed by the National Prohibition Act. The latter act specifically provided that other laws not inconsistent therewith should not be repealed. There being no inconsistency between the two prohibitions, both could remain in full force. Similarly in *Witte v.*

Shelton, 240 Fed. 265, cert. den. 240 U. S. 660, the earlier statute forbade delivery of liquor to fictitious consignees while the later statute forbade any and all delivery within certain States. The court held that there was no inconsistency between the statutes and hence no repeal, declaring "specific legislation upon a particular phase of a single subject is not affected by a subsequent law related to a general subject which neither refers to the earlier law nor is repugnant to nor inconsistent with it * * *" (p. 268). To the same effect is *Washington Trust Company v. Dunaway*, 169 Fed. 37, in which it is held that a general act covering the recording of mortgages by "residents" does not supersede an earlier special act providing for the method of recording a railroad mortgage by a foreign corporation. See to the same effect *Harris v. Bell*, 250 Fed. 209, aff'd. 254 U. S. 103; *United States v. Dern*, 74 F. (2d) 485; *Wash. Ry. & El. Co. v. District of Columbia*, 10 F. (2d) 999; *Tri-State Motor Corp. v. Standard Co.*, 276 Fed. 631; *Priddy v. Thompson*, 204 Fed. 955; *Partee v. St. L. & S. F. R. Co.*, 204 Fed. 970; *Christie-Street Comm. Co. v. United States*, 136 Fed. 326; *Third Nat. Bank v. Harrison*, 8 Fed. 721. In all these cases there is no inconsistency between the earlier and the later statute and the question is simply whether the legislature is presumed to intend the repeal of an earlier act on the same subject, even though the acts are not logically inconsistent.

Finally, it may be noted that many of the cases commonly cited in support of the proposition that a general statute does not repeal a special statute are cases in which the special statute is the later of the two (*Thornton v. Road Imp. Dist.*, 291 Fed. 518, app. dism. 269 U. S. 592; *Bd. of Comrs. v. Aetna Life Ins. Co.*, 90 Fed. 222), or cases in which the two provisions which seem to conflict are part of the same statute (*Rodgers v. United States*, 185 U. S. 83).

If the foregoing analysis is correct none of the reported cases in the Federal courts actually holds that of two inconsistent statutes the earlier statute will prevail if it is "special" and if the later statute is more "general." The farthest that any cases cited in support of this rule go is to place upon the later statute a construction that may seem strained in order to avoid a logical inconsistency. On the other hand, there are a number of cases in which the courts recognize a clear inconsistency between the two statutes and in such cases it is universally held that the later statute, even though more general in its terms than the earlier statute, repeals the earlier statute. Thus in the case of *Tracy v. Tuffly*, 134 U. S. 206, where the earlier statute referred to assignments by limited partnerships, and the later statute referred to assignments generally, it was held that the later statute repealed by implication so much of the earlier statute as was inconsistent. In the case of *King v. Cornell*, 106 U. S. 395, the earlier statute laid down

a rule on removal of causes of action by alien defendants. The later statute laid down a general rule on the subject of removal of causes of action. Finding the rules inconsistent, the court held that the later statute, though general, repealed the earlier act. In *Anchor Line v. Aldridge*, 280 Fed. 870, an earlier statute authorizing the transportation of bonded liquor for certain purposes was held to have been repealed by implication by a later general statute forbidding all transportation of liquor. The court declared in that case, "Repeals by implication are not favored; but where a later statute is plainly inconsistent with a prior statute the later statute necessarily repeals the prior statute" (p. 875).

Instances of this sort could be multiplied indefinitely. The fact of the matter is that if all the general statutes now in force could be impeached by discovering earlier laws less general in scope, no one could put credence in the words of any statute. There is no logical distinction between "general" and "special" statutes, but only between the more general and less general of any pair of statutes. There is no statute which may not turn out to be more general than some earlier statute. Thus every case that falls under any statute might conceivably have been dealt with earlier by more particular legislation. To apply generally the maxim, "*Generalia specialibus non derogant*" would thus be to throw the law into boundless confusion. Exhaustive historical research would be necessary to determine whether any statute should be enforced according to its terms. For these reasons it is impossible to accept at face value certain judicial dicta on this subject which go beyond the decisions in any case and are squarely in conflict with a number of actual holdings.

It is quite possible that the act of June 20, 1936, as drafted, covers a wider territory than was intended by its sponsors. The remedy for that is legislative amendment rather than repeal by administrative or judicial construction.

Approved: January 4, 1937.

OSCAR L. CHAPMAN,
Assistant Secretary.

CHARLES B. REYNOLDS, JR., ET AL.

Decided January 13, 1937

OIL AND GAS LANDS—STATE'S TITLE TO TIDELANDS.

Title to tidelands in California passed to the State in 1850 and no mineral rights in such lands were reserved to the United States. In 1850 there was no established mineral policy of the United States.

Borax, Ltd., v. Los Angeles, 296 U. S. 10, cited and applied.

CHAPMAN, *Assistant Secretary*:

On August 17, 1936, several applications for oil and gas leases of lands described by metes and bounds as lying in the Pacific Ocean below the line of ordinary high tide off the coast of California were filed in the district land office at Los Angeles. The names of the applicants and the serial numbers of their applications are as follows:

Charles B. Reynolds, Jr., 052791, 052794, 052795; Myrtle A. McCurry, 052792, 052793, 052796; Douglas W. Churchill, 052797, 052799, 052801; Lemoyne J. Chambard, 052798, 052800, 052802.

By decisions of October 26 and 27, 1936, the Commissioner of the General Land Office rejected the applications on the ground that there was no public land of the United States as applied for, jurisdiction being in the State of California.

The applicants have appealed, but the appeals are in all respects similar, so that they may properly be disposed of in one decision.

The stated grounds of appeal are in substance as follows:

The important question of ownership of valuable mineral rights in lands beneath the Pacific Ocean, below the line of low tide off shore from Southern California, title to which has not yet been determined by any Federal Court, is involved.

The right to minerals by the laws of Spain remained in the Crown, were retained by Mexico while she was sovereign of this territory, and passed to the United States with the territory of California.

The long-established mineral policy of the United States sustaining its mineral rights as a separate property with specific requirements for their acquisition is being violated.

It was early spelled out by judicial construction that the separate title to all minerals within the public domain is retained by the United States, and this has been adhered to in a long line of decisions and is too firmly entrenched to be changed save by legislative action.

Decisions of the Supreme Court of the United States cited in rejection of the applications are based on the act admitting California into the Union on an equal footing with the thirteen original States. The title to minerals in tidelands is not discussed.

In the case of *Borax, Ltd., v. Los Angeles*, 296 U. S. 10, the Supreme Court of the United States, speaking through Chief Justice Hughes, said:

The soils under tidewaters within the original States were reserved to them respectively, and the States since admitted to the Union have the same sovereignty and jurisdiction in relation to such lands within their borders as the original States possessed. *Martin v. Waddell* (16 Pet. 367, 410); *Pollard v. Hagan* (3 How. 212, 229, 230); *Goodtitle v. Kibbe* (9 How. 471, 478); *Weber v. Harbor Commissioners* (18 Wall. 57, 65, 66); *Shively v. Bowlby* (152 U. S. 1,

15, 26). This doctrine applies to tidelands in California. *Weber v. Harbor Commissioners, supra*; *Shively v. Bowlby, supra*, pp. 29, 30; *United States v. Mission Rock Co.* (189 U. S. 391, 404, 405). Upon the acquisition of the territory from Mexico, the United States acquired the title to tidelands equally with the title to upland, but held the former only in trust for the future States that might be erected out of that territory. *Knight v. United States Land Assn.* (142 U. S. 161, 183). There is the established qualification that this principle is not applicable to lands which had previously been granted by Mexico to other parties or subjected to trusts which required a different disposition, a limitation resulting from the duty resting upon the United States under the treaty of Guadalupe Hidalgo (9 Stat. 922), and also under principles of international law, to protect all rights of property which had emanated from the Mexican Government prior to the treaty. *San Francisco v. LeRoy* (138 U. S. 656, 671); *Knight v. United States Land Assn., supra*; *Shively v. Bowlby, supra*.

It follows that if the land in question was tideland, the title passed to California at the time of her admission to the Union in 1850. That the Federal Government had no power to convey tidelands, which had thus vested in a State, was early determined. *Pollard v. Hagan, supra*; *Goodtitle v. Kibbe, supra*.

Title to the lands involved passed to the State of California in 1850. There was then no provision of law for reserving possible mineral deposits. There was no established mineral policy of the United States. In this connection see the case of *Work v. Louisiana*, 269 U. S. 250.

The decisions appealed from are affirmed.

Affirmed.

THE NATURE AND EXTENT OF THE DEPARTMENT'S AUTHORITY TO ISSUE GRAZING PRIVILEGES UNDER THE TAYLOR GRAZING ACT

Opinion, January 21, 1937

PUBLIC LANDS—GRAZING—LICENSES—PREFERENCE.

The provision of section 3 of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269), providing that preference shall be given in the issuance of grazing permits to persons in certain enumerated classes, does not require the extension of grazing privileges to all such persons, but contemplates merely that such privileges shall not be extended to persons without the enumerated classes until all persons within them have received grazing privileges. Accordingly, when the range within a grazing district is inadequate to provide for all members of the preference class, the Secretary may provide, by reasonable regulation, for the granting of grazing privileges to a limited group within that class.

PUBLIC LANDS—GRAZING—PRIORITY—CLASSIFICATION OF APPLICANTS.

In determining what persons within the preference class shall be entitled to receive grazing privileges, it is proper for the Secretary to issue regulations grading applicants on the basis of priority of use, such being a reasonable standard that will further the declared purposes of the Act. In adopting priority of use as a factor in the classification of preferred

applicants, it is proper to prefer applicants who have property which has been used in connection with the public range for a full grazing season during the 5-year period immediately preceding the passage of the Act or its amendment (under whichever the grazing district was created) over applicants whose property has not had such use.

MARGOLD, Solicitor:

At the request of the Director of the Division of Grazing, certain questions involving the nature and extent of the authority of the Department to issue grazing privileges under the Taylor Grazing Act (act of June 28, 1934, 48 Stat. 1269), as amended by the act of June 26, 1936 (49 Stat. 1976), have been submitted to me for opinion.

The following are the Director's questions:

When the public grazing lands within a grazing district are inadequate to permit the proper use of all the lands or water within or near such district which are owned, occupied, or leased by the members of the preferred class of applicants named in the act of June 28, 1934 (48 Stat. 1269), is there authority in said act for the following:

1. To select a part only of the members of said preferred class for grazing privileges?

2. Is prior use of the public lands for grazing purposes in connection with such lands or water owned, occupied, or leased by such applicants a proper test for making such a selection?

3. Will the following classification of such preferred applicants be satisfactory?

- (a) Those qualified preferred applicants who have dependent commensurate property which has been used in connection with the public range for a full grazing season during the 5-year period immediately preceding the passage of the act or its amendment (under whichever the district was created).

- (b) Those qualified preferred applicants who do not have such prior use.

The specific provisions which require examination in connection with the foregoing questions are contained in section 3 of the act:

That the Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time. * * * Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water, or water rights owned, occupied, or leased by them; except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler, whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive, * * *.

It is my opinion, for the reasons set forth in the discussion to follow, that all of the Director's questions are to be answered in the affirmative.

QUESTION 1.

Nothing in the provisions quoted above nor in any other portion of the act makes mandatory the extension of grazing privileges to any particular persons or classes of persons. Thus, the first provision quoted merely *authorizes* the Secretary of the Interior to issue permits to certain classes of persons. The next provision quoted requires that "preference shall be given in the issuance of grazing permits" to persons in the enumerated classes. I do not regard this provision, however, as requiring the extension of grazing privileges to *all* such persons. It appears rather to contemplate merely that the Secretary of the Interior shall not act favorably on the application of a person who is *without* the described classes until all persons *within* them have received grazing privileges. In other words, it means simply that all persons with certain qualifications are to be considered before persons lacking those qualifications, but it does not mean necessarily that the applications of all those in the first class must be granted.

Two reasons for this construction are immediately apparent. First, if a contrary meaning were intended, the Congress more reasonably would have said that "*permits shall be issued* to those within or near a district who are landowners," etc., rather than that "preference shall be given" to those persons. Secondly, a different construction would be inconsistent with the first portion of section 3, which authorizes the Secretary of the Interior to issue permits to "such bona fide settlers, residents, and other stock owners *as under his rules and regulations* are entitled to participate in the use of the range." [Italics supplied.]

I am of the opinion, therefore, that when the range within a grazing district is inadequate to provide for all members of the preference class created in section 3 of the act, the Secretary of the Interior may provide, by reasonable regulation, for the issuance of grazing privileges to a limited group within that class.

QUESTION 2

Section 2 of the Taylor Grazing Act directs the Secretary of the Interior to—

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; * * *

Under this provision, the Secretary of the Interior has the power to issue regulations grading applicants within the preferred class on the basis of priority of use, unless to do so is in itself unreasonable, inappropriate, or inconsistent with the provisions of the act. *United States v. Morehead*, 243 U. S. 607, 613-614; *International Ry. v. Davidson*, 257 U. S. 506, 514. *Cf. United States v. Grimaud*, 220 U. S. 506.

A careful examination of the provisions of the Taylor Act indicates that where the range is insufficient to provide for all applicants in the preference class, prior use of the public lands for grazing purposes in connection with privately held property may be regarded as a most reasonable standard for the granting of grazing privileges. I base this conclusion on two separate but none the less related provisions in section 3 and a portion of the language in which the act is entitled.

First, it is stated in the preference provision that persons in the described classes shall be given preferences "*as may be necessary to permit the proper use of lands, water, or water rights owned, occupied, or leased by them.*" [Italics supplied.] This provision thus appears to recognize that certain of the privately held properties are economically dependent on the public lands for their proper use, that is to say, that if their proper use is for the raising of livestock, the privilege of grazing on the public lands in connection with the use of the private property is essential in order to attain a degree of economic sufficiency. It follows, therefore, that a standard of selection from among the members of the preference class which is based on a prior use of the public lands for grazing purposes not only is in itself a reasonable standard but furthers one of the declared purposes of the act.

Secondly, the language immediately following the portion of the preference provision heretofore quoted is significant:

* * * except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler, whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive * * *

This provision, of course, no longer has literal application to the issuance of grazing privileges, being in operation only from June 28, 1934, the date of the approval of the act, until July 1, 1935. It is important, however, when considered in connection with what already has been said concerning the "proper use" of lands, as demonstrating the intention of the Congress that properties not theretofore used in connection with the public lands should not be made the basis of an application for grazing privileges by persons who otherwise might be in the broad preference class until, presumably, other persons also

in the preference class, but having properties which had been so used, should have had an opportunity to obtain grazing privileges.

Lastly, it is to be noted that the Taylor Grazing Act is thus entitled:

AN ACT To stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes. [Italics supplied.]

While it is true that the title is only a formal part of an act, the United States Supreme Court recently has reaffirmed the principle that resort may be had to the title as an aid to the construction of the act. *Bengzon v. The Secretary of Justice of the Philippine Islands*, 299 U. S. 410. If one of the purposes of the Taylor Act is "to stabilize the livestock industry dependent upon the public range," it is obvious that this purpose is well served by granting grazing privileges to applicants who are and have been operating going concerns in connection with the range and by denying them, if there is insufficient range for all, to other applicants who also may be in the broad preference class but who have elected to enter the livestock business on properties not heretofore used in connection with the public lands.

QUESTION 3

Before discussing the reasonableness of the particular standard of selection proposed by the Director of Grazing, the meaning of the words "dependent commensurate property," as used by the Division of Grazing, should be explained. The following is quoted from the Rules for Administration of Grazing Districts, approved by the Secretary of the Interior on March 2, 1936:

Property—shall consist of land and its products or stock water owned or controlled and used according to local custom in livestock operations. Such property is:

"(a) '*Dependent*' if public range is required to maintain its proper use.

* * * * *

"(c) '*Commensurate*' for a license for a certain number of livestock if such property provides proper protection according to local custom for said livestock during the period for which the public range is inadequate."

It is my opinion that the rule proposed is a reasonable one. Clearly, if the standard of selection is to be one of prior use of the public lands in connection with the private property held by the applicant, some definition of the nature and extent of such prior use becomes necessary. I am informed by the Director of Grazing that the 5-year period immediately preceding the enactment of the act has been selected as a period within which an applicant may qualify for grazing privileges by having used the public range for one full graz-

ing season because of its definite relation to existing economic and climatic conditions. It is a matter of common knowledge that the period from 1929 to 1934 was one of great economic distress. It also included seasons of severe drouth, particularly in the States in which grazing districts have been established. Not to provide for the flexibility afforded by the 5-year rule, as for example, to require that an applicant's property have been used in connection with the public range at the time of the enactment of the act, or during the grazing season last preceding, would necessitate the denial of grazing privileges to an applicant who conceivably had been established in the livestock business and had used the public range in connection with his private property for many years, but who, because of conditions beyond his control, was forced temporarily to suspend his operations for that particular season.

I am informed also by the Director of Grazing that the application of this rule will in fact adequately protect the interests of all applicants who were established in the livestock business at the time of the enactment of the Taylor Grazing Act. In the light of these facts and since the employment of the principle of prior use of the public lands as a standard of selection from among the members of the preference class is deemed sound for the reasons discussed under question 2, it is my belief that the particular rule proposed is open to no legal objection.

Approved: January 21, 1937.

T. A. WALTERS,

First Assistant Secretary.

SLIGER GOLD MINING COMPANY

Decided January 28, 1937

MINING CLAIM—RECONVEYANCE TO UNITED STATES OF RAILROAD GRANT FOR INCLUSION IN MINERAL PATENT.

Land patented under a grant to a railroad company is not subject to location under the mining law, and where more than six years have elapsed from the date of patent, the patent is immune from attack by the United States in the absence of fraud in its procurement, and a locator under the mining law of part of such land who also holds the title of the railroad will not be permitted to reconvey such title to the United States for the purpose of having such part included in a mineral patent to his location.

MINING CLAIM—WITHDRAWALS UNDER FEDERAL WATER POWER ACT.

Mining locations for metalliferous mineral on lands withdrawn under the act of June 25, 1910 (36 Stat. 847), made prior to withdrawals of such land under the Federal Water Power Act, and amended for the purpose of correcting description after said act, where there is nothing to show that new ground covered by the withdrawals under the Federal Water Power Act

was included in the location, does not subject the applicant for patent to the claim to the requirement that he show cause why his application should not be rejected to the extent of the lands embraced in the amended location outside the original boundaries of the claim.

PASSAGE OF TITLE TO STATE UNDER GRANT OF SCHOOL SECTIONS—MINERAL CLAIMANT MAY CONTEST.

Lands in Section 36, not known to be mineral at the date of survey thereof, January 14, 1875, presumptively passed to the State under its grant of school sections, and after State patent issues to the land without mineral reservation, the State has no more interest in the land other than to maintain the title it undertook to grant. On the other hand, if the land was known to be mineral at date of survey, the title did not pass to the State under its school land grant, and the State could not transmit by a patent a title which it did not receive. Mining location on January 1, 1916, of land which otherwise would pass to the State, known to be mineral at the date of the filing of the plat of survey thereof, is not affected by the act of January 25, 1927 (44 Stat. 1026), which extended the grants of school sections to the various States to include sections mineral in character. The presumption that land passed to the State under its original grant is not conclusive, and the question may be raised at any time by any one in privity with the Government whether the lands are within the purview of the grant, and a mineral claimant is in such privity.

ELECTION BY APPLICANT FOR MINERAL PATENT TO TAKE TITLE UNDER MINING LAWS OF UNITED STATES INSTEAD OF FROM STATE.

As the Department retains jurisdiction to determine whether or not the land was known mineral at the date of survey thereof and the question is open and unadjudicated, no legal impediment is seen in the applicant for mineral patent waiving his claim under the title from the State and electing to take title under the mining laws of the United States. If, in the case where cause exists to set aside a patent by procedure in the courts and the proceedings may be avoided by surrender of the patent attacked, *a fortiori*, where a proceeding in the Land Department may result in an adjudication rendering the asserted title of no effect, the proceeding may be avoided by surrendering the title assailed.

WALTERS, *First Assistant Secretary*.

May 31, 1933, the Sliger Gold Mining Company filed mineral application Sacramento 028399 for the Penobscoot lode mining claim. According to the mineral survey thereof (No. 6129) the claim embraces portions of Secs. 25, 26, 35, and 36, T. 13 N., R. 9 E., M. D. M. The claim was located January 1, 1916, for gold in quartz rock in place. The certificate of location was amended May 29, 1932, for the alleged purpose of correcting errors in the description therein. It is elsewhere alleged in support of the application that the amendment was made to make the certificate conform to the original position of the claim on the ground. The field notes declare that the mineral survey is identical with the amended location.

The records of the General Land Office disclose that the status of the land is as follows: The plat of survey of the township was

accepted January 14, 1875. Lot 1, Sec. 35 was patented to the Central Pacific Railroad Company on March 9, 1911. The NW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 36 into which the claim intrudes was not returned by the Surveyor General as mineral in character and, it not appearing that it was otherwise excepted, presumptively passed to the State of California under its grant of school section under the act of March 3, 1853 (10 Stat. 244). *Hyppolite Favot* (48 L. D. 114, 118). As to the lands in Secs. 25 and 26 certain withdrawals were made under the act of June 25, 1910 (36 Stat. 847), prior to the location, and certain other withdrawals were made under section 24 of the Federal Water Power Act subsequent to the location, which for reasons hereinafter set forth need no particular mention.

It appears that when the Penobscot claim was located the locators were led to believe that the claim included only public land in Secs. 25 and 26 because of the erroneous delineation on the official plat of the township of the Sliger quartz claim owned by the applicant, as in section 25. The south boundary of the former was made coincident with the north boundary of the latter. The Sliger quartz claim was designated and surveyed as lot 38 in 1870 and patent issued therefor on January 10, 1874. According to the description in the patent thereof the claim is tied by course and distance to the northeast corner of Sec. 36, a then existing monument, but in the diagram recorded with the patent it is shown that the deputy surveyor who surveyed the Sliger claim assumed that the line between Secs. 25 and 36 was an east and west line, whereas the deputy mineral surveyor who surveyed the Penobscot claim finds its course to be S. 73°40' E. from the northwest corner of Sec. 36. The district cadastral engineer does not question the position of the Sliger claim as shown by Mineral Survey No. 6129, and expresses the opinion that the discrepancy between the two mineral surveys as to its position is due to the reporting of common boundary between Secs. 25 and 36 in the official survey of lot 38 as an east and west line. Mineral Survey No. 6129 shows 1.73 acres of Penobscot claim within the boundaries of Sec. 36.

The applicant alleges that it has acquired the title of the State through a patent issued therefor to the land in Sec. 36 and tendered a deed conveying the same to the United States, supported by an abstract of title; they also allege ownership of all land adjoining the Penobscot claim and request that the deed to the fraction of the claim in Sec. 36 be accepted and that fraction be incorporated in and become a part of the patent proceedings in order to render the Sliger and Penobscot contiguous and "to preserve its extra-lateral rights on that portion of the vein which extends through the fraction."

Affidavits of miners long acquainted with the ground have been filed, wherein it is alleged, *inter alia*, that a broad vein which had been producing gold on the Sliger claim for many years extends and outcrops northward on the fraction and through the Penobscot claim and beyond; that some mining has been done on the fraction and the Penobscot claim and the ground therein has been located and relocated for many years past.

Upon consideration of the facts as above set forth, the Commissioner of the General Land Office in his instructions to the register of January 14, 1936, held in effect that the land in Sec. 35 must be eliminated from the application; that the acceptance of a deed for the land in Sec. 36 and conveyance thereof by mineral patent were not warranted under the decisions of the Department in *Junita Lode Claim* (13 L. D. 715); *Matter of Abernathy* (17 L. D. 25); *Walter Tryon* (29 L. D. 475); *James W. Bell* (52 L. D. 197), as contended by applicant. The Commissioner distinguishes these cases from the present case, in that in the former the exchange of title was permitted on the ground of mistake. He also held that the rights of the State must be considered, it being observed that if title to Sec. 36 did not pass under the original grant it nevertheless had the right to a determination whether title did not pass to the State under the provisions of the act of January 25, 1927 (44 Stat. 1022). He therefore laid the following requirements:

You will notify the mineral claimant that 30 days from notice are allowed in which (1) to file an application to contest against the State of California on a charge alleging that the land was known to be mineral in character prior to January 14, 1875; (2) to show cause why its application should not be rejected to the extent of the lands embraced in the amended location which lie outside of the original boundaries of the claim, because of conflict with withdrawals in Secs. 25 and 26; (3) to show cause why the application should not be rejected to the extent of its conflict with Sec. 35; or (4) to appeal, and that if no action be taken within the time specified the application will be finally rejected without further notice.

From this action the applicant has appealed.

With respect to requirement "(3)" the land in section being patented at the date of location of the mining claim, it was not subject to location under the mining law, *Burke v. Southern Pacific R. R. Co.*, 234 U. S. 669, 701, 702, and as more than six years have elapsed since the date of patent in the absence of evidence of fraud in its procurement, the patent is immune from attack by the United States. See *United States v. Winona & St. Peter R. R. Co.*, 165 U. S. 463; *United States v. Chandler-Dumbar Co.*, 209 U. S. 447; *Exploration Co. v. United States*, 247 U. S. 435. A reconveyance should not be allowed except where the Government would feel compelled to have the court vacate the patent for fraud, mistake, or inadvertence in

issuance. *Junita Lode, supra; E. J. de Sable et al., Trustee*, decided July 5, 1934, unreported. The tract in Sec. 35 should be excluded from the application.

With respect to the Commissioner's requirement "(2)": Inasmuch as the act of June 25, 1910, did not inhibit location for metalliferous minerals from withdrawals made thereunder, as conceded by the Commissioner, and there is nothing to show that by amending the location new adjacent ground covered by the withdrawals under the Federal Water Power Act was included in the location, and it is alleged that the amendment was merely to correct description and not change boundaries, there is no sufficient basis for this requirement.

With respect to the Commissioner's requirement "(1)," unfortunately the Commissioner prematurely returned the evidence of title of the applicant to the lands in Sec. 36. The Department, therefore, cannot determine the nature of the estate, the instruments submitted purported to convey, nor the time thereof, though it is represented in behalf of the applicant that such title was acquired shortly after the date of location of the Penobscot claim.

But if the land though mineral was not known to be such on January 14, 1875, then the land passed to the State, and if the State patent issued without mineral reservation and the applicant is vested with the title the patent purported to grant, the State has no more interest or concern in the matter except to maintain the title it undertook to grant.

On the other hand, if the land was known to be mineral in character on January 14, 1875, then title did not pass to the State under the act of March 3, 1853, *Mining Co. v. Consolidated Mining Co.*, 102 U. S. 167, 175, and the State could not transmit by a patent a title which it did not receive (Instructions of January 15, 1930, and cases there cited (53 I. D. 30, 33); Lindley on Mines, Sec. 144 A), notwithstanding decisions of the courts of California holding patents of the State to school sections issued on certificates furnished by the local register (furnished without lawful authority (31 L. D. 212)) are immune from collateral attack. See *Saunders v. La Purisima G. M. Co.*, 125 Cal. 159, 57 Pac. 656, 658; *Worcester v. Kitts*, 8 Cal. App. 181, 96 Pac. 335.

Assuming that land was known to be mineral in character at the crucial date, aforesaid, in the absence of prior valid adverse claim under the mining laws, the land was subject to the location of the applicant January 1, 1916. Such location would not be affected by the act of January 25, 1927 (44 Stat. 1026), which extended the grants of school sections to the various States to include such sections mineral in character. *Mangan and Simpson v. State of Arizona* (52 L. D. 266).

While there exists the presumption that the land passed to the State under its original grant, this presumption is not conclusive but is open to contestation in the Land Department. There is in such cases no preliminary adjudication, actual or presumed by the Land Department as to the character of the land. There is no antecedent judgment as there is in homestead and preemption cases which is final and conclusive upon collateral attack. It follows the question may be raised at any time by anyone in privity with the Government whether the lands are within the purview of the grants, and a mining locator is in such privity. See Lindley on Mines, Sec. 144; *West v. Standard Oil Co.*, 278 U. S. 200, 219.

As the Department retains jurisdiction to determine whether or not the land was mineral in character at the crucial date aforesaid, and that question is open and unadjudicated, no legal impediment is seen in the applicant waiving its claim founded on a title from the State and electing to take title under the mining law of the United States. As the patent from the State creates a color of title, a deed from the applicant would seem to be the most appropriate form of extinguishing such title.

It appears that at least the error of the General Land Office in depicting the Sliger claim as in Secs. 25 and 26 was a contributing cause to the error in placing boundaries of the Penobscot in Sec. 36 and it is not inappropriate that the Department should be called upon to rectify it if possible. So long as an unrestricted patent is outstanding from the State predicated on the assumption that title passed under the act of March 3, 1853, the State should not be heard to say that it acquired any title under the act of February 25, 1927. The doctrine in the cases cited by the Commissioner as impediments to the exchange of title are not incompatible with the views here expressed. For, if as announced in such cases, where cause exists to set aside a patent by procedure in the courts the proceedings may be avoided by a surrender of the patent attacked, a *fortiori*, where a proceeding in the Land Department may result in an adjudication rendering the asserted title of no effect, the proceeding may be avoided by surrendering the title assailed.

The facts being as represented there appears no reason to apprehend a disturbance of the rights of other mineral claimants by reason of any extralateral rights that would be granted as one of the incidents of a mineral patent. If the applicant owns the land contiguous to the side lines of the fraction in Sec. 36 there is no one to object to the following of the veins on their dip outside such lines. If they do not own such land it has been held that one holding under a mineral patent cannot follow his vein apexing on his claim across the boundaries of his own land into adjoining land held under an

older agricultural title. *Amador-Meadean Gold Mining Co. v. South Spring Hill Gold Company*, 36 Fed. 668.

Of course if the State reserved the minerals in the patent there is no other proper course than the bringing of a contest proceeding as directed by the Commissioner.

The Commissioner's instructions are accordingly modified to conform to these views and the case remanded for appropriate procedure.

Modified and Remanded.

CLARENCE CUNNINGHAM ET AL.

Decided February 2, 1937

COAL LANDS—CANCELATION OF ENTRY—FRAUD BY ENTRYMAN IN ADDITION TO MISTAKE BY LAND OFFICE—APPLICATION FOR REPAYMENT OF PURCHASE PRICE DENIED.

Section 2 of the act of June 16, 1880 (21 Stat. 287), provides that "where, from any cause, the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall caused to be repaid * * * purchase money * * * paid upon the same * * * whenever such entry shall have been duly canceled by the Commissioner of the General Land Office * * *." Coal land entries were canceled because (1) the entrymen had been guilty of fraudulent and illegal conduct, and (2) the entries should not have been allowed because of defects apparent on the face of the papers filed. The entrymen then applied for repayment of the purchase price of the lands, pursuant to the statute.

Held: (1) The applications for repayment must be denied because one of the grounds for cancelation of the entries was the fraudulent conduct of the entrymen. (2) The statute is construed to mean that where one of the grounds for cancelation of an entry is fraud, repayment must be refused, even though in addition the entry has been erroneously allowed because of mistake or error on the part of the land officers. (3) The statute is based upon equitable principles, and should be administered accordingly, hence, applicants for repayment, whose entries have been canceled partly because of their fraudulent conduct, should be denied relief; the "clean-hands" doctrine should be applied.

Henry Cannon (30 L. D. 362) and *William D. Wheeler* (30 L. D. 355) distinguished; *W. E. McCord* (23 L. D. 137) distinguished, and to the extent of any possible inconsistency, overruled.

WALTERS, *First Assistant Secretary:*

These four appeals are from a decision of the Commissioner of the General Land Office dated February 8, 1930, denying repayment applications.

The appellants or their predecessors in interest were part of a group of 33 persons each of whom sought to purchase about 160 acres of public coal lands in Alaska; a total area of 5,250 acres. In 1907 they each paid the statutory purchase price of \$10 per acre to the local land officials and received from them final certificates and receipts.

"This, in the nomenclature of the public land laws, was the allowance of an entry." *United States v. Colorado Anthracite Company*, 225 U. S. 219, 221.

In 1911 the 33 entries were canceled by the Commissioner and the Department affirmed his decision. *Andrew L. Scofield et al.* (41 L. D. 176, 240). The reasons for cancellation were (1) that the entrymen had been guilty of illegal and fraudulent conduct and (2) that the entries should not have been allowed because of defects apparent on the face of the papers filed.

The illegal and fraudulent conduct consisted of this: The relevant statute provided that no person could acquire more than 160 acres and no association of persons more than 320 acres of coal lands. Each of the 33 applicants filed sworn statements to the effect that he was making the entry for his own use and benefit and not for that of any other party, and that he had made no agreement by which the title to the land or any part of it, or interest therein, was to pass to any other persons or association.

The Commissioner and the Department, in canceling the entries, held—

First, that the several locations, filings, and entries were made pursuant to an understanding and agreement entered into by all the claimants prior to location to combine the several claims for the joint use and benefit of all the claimants; second, that each location, filing, and entry was made with the unlawful purpose and intent that the titles acquired thereunder should inure to the use and benefit of an association or a corporation formed or to be formed by the several claimants. 41 L. D. 179, 234, 240.

If the true facts had been stated in the papers filed, the entries could not have been allowed without violating the statute. The 33 applicants attempted to achieve indirectly and by misrepresentation and concealment of the facts, what the statute prohibited, to wit, acquisition of more than 160 acres by an individual and 320 acres by an association. This was palpably illegal and fraudulent. *United States v. Trinidad Coal Company*, 137 U. S. 160, 167; *United States v. Colorado Anthracite Company*, 225 U. S. 219, 225; *United States v. Portland Coal & Coke Company*, 173 Fed. 566.

One of the entrymen, John G. Cunningham, who is not among the appellants, thereafter applied for repayment of his purchase money. The Commissioner and the Department granted the application. When the case reached the Comptroller General he held:

The charges against the entry of this claimant and the entries of those associated with him included a charge of illegality and fraud. In the decision of the Commissioner of the General Land Office, as concurred in by the Secretary of the Interior, it was found that the charges had been sustained. In view thereof, the claim for refund must be and is disallowed. 9 Dec. Comp. Gen. 318, 320.

John G. Cunningham then commenced an action in the Court of Claims. The United States interposed the plea to the jurisdiction of the court that plaintiff had commenced his action more than six years after his claim had been allowed by the Secretary of the Interior. The question of law raised by that plea was the sole issue before the court. The court sustained the plea and dismissed the petition. By way of dictum, it was said:

The case is a peculiar and unfortunate one as it seems that plaintiff had a meritorious claim which had been allowed and ought to have been paid, but we can only decide the legal questions. For relief on the ground that a moral obligation exists to return the sum paid by plaintiff, application must be made to Congress. *Cunningham v. United States*, 83 Court of Claims 696.

Apparently this dictum was based on the fact that the Department had allowed the claim. The dictum is of no force as precedent. And we are convinced the claim of John G. Cunningham was improvidently allowed by the Department. The claims of the appellants for repayment of their purchase money similarly should not be allowed.

The applications for repayment were made under section 2 of the act of June 16, 1880 (21 Stat. 287, 43 U. S. C. 263). It provides that—

where, from any cause, the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid * * * purchase money * * * paid upon the same * * * whenever such entry shall have been duly canceled by the Commissioner of the General Land Office * * *.

The words "erroneously allowed" have been held to denote "some mistake or error on the part of the land officers whereby an entry is allowed when it should be disallowed, and not some fraud or false pretense practiced on them whereby an applicant appears to be entitled to the allowance of an entry when in truth he is not." *United States v. Colorado Anthracite Company*, 225 U. S. 219, 224. It is true that in the cases before us the land officers erroneously allowed the entries because there were defects apparent on the face of the papers filed. But the entire transaction was colored by the illegal and fraudulent purpose and conduct of the entrymen. This was the dominant pervading reason for the cancelation of the entries, to the consideration of which the Commissioner devoted some 50 pages of the 57 pages of his decision of cancelation (41 L. D. 176).

But even if this were not so and the two grounds for cancelation were of equal dignity, we hold that repayment may not be allowed when fraud is one of the reasons for cancelation. The reasoning which supports the rule that an allowance of an entry is not erroneous if the error was the result of the entrymen's fraud, is "that it was not the purpose of Congress to authorize the repayment of moneys paid in connection with an attempt to acquire illegally a tract of public land. To hold otherwise would place a premium

on fraud and concealment which would seriously interfere with the administration of the public-land laws." *Frackelton v. United States*, 54 Ct. Cls. 152, 157. This reasoning is just as applicable to the situation where fraud is the only ground for cancellation as to the one where there are other grounds as well. To hold otherwise would similarly place a premium on fraud and concealment. It would permit the wrongdoer to gamble on and benefit by the error of the land officers.

Moreover, it would be inequitable to allow repayment under such circumstances. A court of equity would view the applications for purchase as having been tainted with fraud, hold that the entrymen were coming into court with unclean hands, and refuse relief. *Pomerooy*, *Equity Jurisprudence*, 4th Ed., Sec. 401. "We speak of the view which equity would take of the matter, because it is manifest that the act of 1880 proceeds upon equitable principles and is intended to be administered accordingly." *United States v. Colorado Anthracite Company*, 225 U. S. 219, 223; *Quinn v. United States*, 52 Ct. Cls. 496, 502. The "clean-hands" doctrine should be applied and the appellants should be denied the relief of repayment.

The appellants cite three departmental decisions. In *Henry Cannon* (30 L. D. 362) and *William D. Wheeler* (30 L. D. 355) no fraud was involved. *W. E. McCord* (23 L. D. 137) may be distinguished in that there the entry was canceled on the sole ground that it was not subject to entry, even though it later appeared that the final proof which had been submitted was false. To the extent of any possible inconsistency with this decision, the *McCord* case is hereby overruled.

The decision of the Commissioner is affirmed.

Affirmed.

ROBERT L. GRAY, ET AL.,
ON REHEARING

Decided February 2, 1937

HOMESTEAD ENTRY—WITHDRAWAL OF PREFERENCE RIGHT WAIVER.

A waiver or withdrawal of preference right to enter is not governed by the act of May 14, 1880. The filing of a waiver of preference right before the end of the preference right period can be held to be a mere notice of intention not to take advantage of that preference right, and if nothing is done in reliance upon the same it can be withdrawn and the preference right exercised.

WALTERS, *First Assistant Secretary*:

The attorneys for the Bagdad Copper Corporation filed a timely motion for rehearing of the Department's decision of May 21, 1936, in the above-entitled case, and the same was granted on October 6, 1936. Thereafter copies of the motion and argument in support

thereof were served upon the attorneys for Robert L. Gray, who have served and filed an answer thereto. The cause is accordingly complete for consideration and determination.

For ready reference, a brief history of the case is set forth as follows:

In March 1934 Robert L. Gray commenced a contest against the stock-raising homestead entry of William Mueller, embracing 640 acres in Secs. 3, 10, and 11, T. 14 N., R. 9 W., G. & S. R. M., Arizona, charging abandonment. The entryman did not answer after due service of contest notice and on May 3, 1934, the register of the district land office transmitted all the papers in the case to the General Land Office and recommended cancelation of the entry.

On May 12, 1934, a relinquishment of Mueller's entry was filed, together with an Indian exchange selection list by the Bagdad Copper Corporation for the land which had been embraced in the entry. The selection list was suspended and Gray was notified of his preference right of entry by virtue of his contest on May 14. On May 31, Gray filed a waiver of his preference right and at the same time his son, Ingle G. Gray, filed an application to make a stock-raising homestead entry for part of the land.

On June 1, 1934, Gray filed an application for withdrawal of his waiver of preference right, stating that the waiver had been filed in order to allow his son to make entry and in ignorance of the prior filing of the selection list. Ingle G. Gray withdrew his application on June 12.

The Commissioner of the General Land Office by decision of August 17, 1934, rejected Gray's application for withdrawal of his waiver. Gray appealed and by decision of June 24, 1935, the Department affirmed the Commissioner's action, stating that inasmuch as Gray had filed no application to enter within 30 days from notice of his preference right, said right elapsed.

Subsequently the Commissioner found that Gray had filed a stock-raising homestead application for part of the land involved and some other land on June 12, 1934, within the preference right period; that this application had been suspended for lack of designation of two subdivisions; and that upon withdrawal by Gray as to these two subdivisions entry had been allowed on October 28, 1935. The Commissioner made report of the matter to the Department on May 11, 1936.

In the decision complained of the Department vacated its former decision, reversed the Commissioner's decision of August 17, 1934, allowed Gray's entry to remain intact, and directed rejection of the selection list to the extent of conflict with Gray's entry. This action was taken for the reasons that the former decisions were made under a misunderstanding of the facts; that Gray's waiver of preference

right was an excusable mistake; that he filed a proper application to enter within the preference right period; and that the Bagdad Copper Corporation was merely relegated to the position it occupied when its selection list was filed.

The attorneys for the corporation have assigned numerous specifications of error and have submitted a lengthy brief and argument. They contend that there was error in vacating the former decision without affording the corporation, through its attorneys, a right to appear and set forth its case; error in holding that the prior decisions were made under a misunderstanding of the facts; error in holding that Gray's waiver was filed through excusable ignorance; and error in holding that the corporation was simply relegated to the position it occupied when it filed its selection. They allege that the corporation has incurred an expense of about \$3,000 in purchasing and applying the scrip, in examination of the lands, and in attorneys' fees.

Numerous decisions have been cited to the effect that a preference right is personal and cannot be assigned or transferred, and that if a waiver is filed the land becomes subject to entry.

But these decisions merely establish that Gray could not assign his preference right to his son and that if Gray attempted to waive his preference right in favor of his son the Bagdad Copper Corporation would take precedence over his son. But they are not authority for holding that the mere filing by Gray of the waiver of his preference right immediately, completely, and irrevocably extinguished his preference right in the absence of loss or detriment to another directly due to and induced by the waiver.

In section 2 of the act of May 14, 1880 (21 Stat. 140), as amended by the act of July 26, 1892 (27 Stat. 270), it is provided:

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 in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands.

There is no statutory provision directly applicable to waiver or withdrawal of preference right to enter. In the first section of the cited act of May 14, 1880, it is provided—

That when a preemption, homestead, or timber-culture claimant shall file a written relinquishment of his claim in the local land office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office.

The statute has been uniformly construed as being applicable only to entries or the equivalent thereof, that is to say, appropriations under the public land laws which while of record segregate the land involved wholly from other application or filing. *Sullivan v. Seeley*

(3 L. D. 567); *Stanley v. Myers* (45 L. D. 596); *Martin Judge* (49 L. D. 171).

In the absence of any statutory provision or decision to the contrary the Department is free to hold that the filing of the waiver before the end of the preference right period was a mere notice of intention not to take advantage of that preference right, and if nothing was done in reliance upon the same it could be withdrawn and the preference right exercised.

The corporation has not made any allegation that its position was changed to its disadvantage by any act on its part between the time that Gray filed his waiver and the withdrawal thereof or the filing of his application in the exercise of his preference right. In these circumstances the Department was justified in holding that by relieving Gray from the consequences of his excusable mistake the Bagdad Copper Corporation was simply relegated to the position it occupied when it filed its selection.

The decision complained of was rendered without giving the Bagdad Corporation prior opportunity to be heard in opposition. But the corporation has been permitted to present all its questions of law and allegations of fact in its motion, brief, and argument. All has been very carefully considered but nowhere is there any showing that the corporation actually changed its position so that it can assert that Gray's waiver prior to the filing of his homestead application caused it to take some action to its loss or detriment.

For want of such showing there is no ground for any order of hearing to take testimony and there is no ground for reversing or modifying the action which the Department has taken.

Upon careful consideration of the entire record the Department has come to the conclusion that there is no reversible error in the decision of May 21, 1936, and the same is adhered to.

Motion Dismissed.

ELIGIBILITY OF INDIANS AND INDIAN PUEBLOS FOR GRAZING PRIVILEGES UNDER THE TAYLOR GRAZING ACT

Opinion, February 13, 1937

TAYLOR GRAZING ACT—QUALIFICATIONS OF APPLICANTS FOR GRAZING PRIVILEGES— ELIGIBILITY OF INDIANS—INDIAN CITIZENSHIP.

Under the Taylor Grazing Act individual applicants for grazing privileges must be stock owners and citizens or prospective citizens. Indians who are stock owners are eligible applicants as all Indians born in the United States are citizens under the act of June 2, 1924, regardless of their maintenance of tribal relations or their residence within or without Indian reservations. The Taylor Grazing Act does not authorize discrimination against applicants because of race, guardianship, or other personal condition.

TAYLOR GRAZING ACT—PREFERENCE IN ISSUANCE OF GRAZING PRIVILEGES—ELIGIBILITY OF INDIANS FOR PREFERENCE.

Indian stock owners who own any interest in land or any occupancy right in tribal land or any water rights would be entitled to preference in the issuance of grazing privileges under the Taylor Grazing Act and the regulations pursuant thereto, and the location of the land or water involved, within or without an Indian reservation, would be material only in determining the right of the Indians to first consideration within the preferred class.

INDIANS ON RESERVATIONS—RIGHT TO USE ADJACENT PUBLIC DOMAIN—EFFECT OF CONTINUED USE.

Indians on reservations are not prohibited from using the adjacent public domain for livestock grazing, and where such use has continued the requisite time, the Indian users, otherwise qualified, may be entitled to first consideration in the issuance of grazing privileges.

INDIANS—CAPACITY TO CONTRACT—ISSUANCE OF GRAZING PRIVILEGES—AGENCY SUPERVISION.

Indians are capable of contracting without governmental supervision except where Indian property is involved in which the United States has an interest. Therefore grazing privileges may be issued directly to Indian applicants unless practical administration requires negotiation of grazing contracts through the Indian agency.

INDIAN PUEBLOS—ELIGIBILITY FOR GRAZING PRIVILEGES—PUEBLO AS CORPORATION.

Indian pueblos in New Mexico are qualified applicants for grazing privileges if they are stock owners, as pueblos are corporations authorized to do business under the laws of New Mexico and are therefore within the designation of qualified applicants in the Taylor Grazing Act.

MARGOLD, *Solicitor*:

My opinion has been requested on certain questions dealing with the eligibility of Indians and particularly the Pueblo Indians and the Pueblos themselves to receive grazing privileges within the grazing districts established under the so-called Taylor Grazing Act (Act of June 28, 1934, 48 Stat. 1269), as amended by the Act of June 26, 1936 (49 Stat. 1976). These questions are posed in the letter to you of December 2, 1936, of the Acting Director of the Division of Grazing and are set forth as follows:

1. Is an Indian who has severed all tribal relations entitled to the same consideration for grazing privileges as other citizens of the United States possessing the qualifications prescribed by the Taylor Grazing Act?
2. Is an Indian who maintains tribal connections but who may reside upon an allotment outside of a reservation entitled to receive equal consideration?
3. Is an Indian maintaining tribal relations and residing within a reservation entitled to grazing privileges within an established grazing district?

4. If entitled to such privileges in any case, should the matter be taken up with him individually or with the proper official of the Indian Service having jurisdiction?

The Acting Director also requests an opinion on the following two questions raised by the Superintendent of the United Pueblos Indian Agency:

1. Is an Indian Pueblo otherwise qualified under the Taylor Grazing Act entitled to the benefits of the act?
2. Are individual Indians of a particular Pueblo who can meet the requirements of the Taylor Act entitled to its benefits?

The answer to these questions depends upon the provisions of the Taylor Grazing Act defining the persons to whom the Secretary of the Interior is authorized to grant the privilege of grazing livestock on the grazing districts. These provisions are found in section 3 and, insofar as they are applicable to these questions, read as follows:

That the Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time: *Provided*, That grazing permits shall be issued only to citizens of the United States or to those who have filed the necessary declarations of intention to become such, as required by the naturalization laws and to groups, associations, or corporations authorized to conduct business under the laws of the State in which the grazing district is located. Preference shall be given in the issuance of grazing permits to those within or near a district who are land-owners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them, * * *.

Under these provisions, in order to be qualified to apply for grazing privileges, the applicant must be a stock owner entitled to participate in the use of the range under the Rules and Regulations of the Secretary of the Interior and must be either a citizen or prospective citizen of the United States or a "group, association, or corporation authorized to conduct business under the laws of the State." The Rules and Regulations of the Secretary of the Interior, approved March 2, 1936, and amended January 28, 1937, for the issuance of privileges under this act, provide that an applicant for a grazing license is qualified if he owns livestock and is either (1) a citizen or prospective citizen of the United States; or (2) a "group, association, or corporation authorized to conduct business under the laws of the State in which the grazing district is located."

However, both the act and the regulations make a distinction between persons who are qualified applicants and persons who are

entitled to preference in the issuance of grazing privileges. This distinction is based upon the fact that the grazing districts are inadequate to provide forage for the stock of all applicants. The act provides that preference shall be given to those "within or near a district" who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights. The amended Regulations recite these preferred classifications and provide definitions to assist in their application. The most relevant to the question at hand is the definition of bona fide occupancy as actual and exclusive occupancy during the grazing period under a possessory right. When the range is insufficient for all in the preferred class, those who have dependent commensurate property which had been used for a specified period in connection with the public range will receive first consideration in the granting of privileges. "Dependent commensurate property" is defined in the Regulations to be such property as is dependent on the public range to maintain its proper use and sufficient to provide proper protection, according to local custom, for the number of livestock during the period for which the public range is inadequate.

As the first three questions presented by the Division of Grazing and the second question raised by the United Pueblos Indian Agency all deal with the right of individual Indians to participate in grazing privileges, I am answering these four questions together. In my opinion all four questions should be answered in the affirmative. Under section 3 of the act and the Regulations of the Secretary all Indians who are livestock owners and who are citizens of the United States are qualified applicants for grazing privileges. Since the passage of the act of June 2, 1924 (43 Stat. 253), all Indians born within the United States are citizens of the United States. Such Indians are citizens whether or not they have severed their tribal relations and whether or not they are residing within or without an Indian reservation. It has been repeatedly determined in the courts that citizenship is not incompatible with Federal wardship or the maintenance of tribal relations. *Williams v. Johnson*, 239 U. S. 414; *United States v. Ramsey*, 271 U. S. 461. From the way in which the questions submitted by the Division of Grazing are framed it appears that the hesitancy of the local officers of the grazing districts to grant privileges to Indians may have been based upon an assumption that Indians maintaining tribal relations or having allotments within a reservation were not citizens of the United States.

The possession of an allotment by an Indian would be significant only in showing him a landowner or occupant and entitled to preference. However, it is not necessary that an Indian own an allotment in order to be entitled to preference. An Indian who owns any

interest in land, such as an inherited interest or an occupancy right in tribal land, giving him the right of possession, or has ownership of water rights under proper authority would undoubtedly, under the regulations, come within the definition of a qualified applicant entitled to preference. The location of the allotment or other land interest of an Indian within or without an Indian reservation is material only in connection with his opportunity to obtain first consideration under the Regulations in the issuance of grazing licenses to preferred applicants. For example, if an Indian is a stock owner and has an allotment within or near a grazing district and such allotment is dependent commensurate property which had been used in connection with the public domain for grazing purposes for the required time, such Indian would be entitled to first consideration.

From the information submitted in the letter, dated October 20, 1936, of the Superintendent of the United Pueblos Indian Agency to the Commissioner of Indian Affairs, it appears that the Indians of the Santa Ana Pueblo have used for grazing purposes from time immemorial the public domain between the Old Santa Ana Pueblo Grant and the Ranchitos Grant now part of a grazing district. It would appear therefore from these facts that these Santa Ana Indians are not only qualified preferred applicants for grazing privileges but would probably be entitled to first consideration in the obtaining of licenses under the Regulations as they are evidently stock owners, citizens, and occupants of land which is dependent on the public domain and has been used in that connection for the requisite time. The same possibility of obtaining licenses would apply to Indians of other pueblos or reservations who have been accustomed over a long number of years to use the public domain adjacent to their reservation for grazing purposes. Besides the Indians of the Santa Ana Pueblo, I am informed by the Indian Office that this custom is common with the Indians of the Navajo, Consolidated Ute, and Uncompahgre Reservations. The use by the Indians residing on reservations of the adjacent public domain for grazing purposes is entirely legitimate. There are no statutes or regulations prohibiting it and the practice is as permissible as the usage of adjacent public domain for grazing purposes by other landholders.

My answer to these four questions is based upon a reading of the plain language of section 3 of the act and of the departmental Regulations. Since the act and the Regulations make all individuals who are stock owners and citizens qualified applicants, it is obvious that there is intended no discrimination because of race or status of guardianship or other purely personal conditions. There is no indication whatsoever in the legislative history of the act or in the hearings before the Senate and House Committees on Public Lands that any discrimination on such grounds was intended.

In reply to the fourth question of the Division of Grazing as to whether the matter of grazing privileges should be taken up with the Indian individually or with the proper official of the Indian Service, it should be pointed out that an Indian, although a tribal member and a ward of the Government, is capable of making contracts and that these contracts require supervision only insofar as they may deal with the disposition of property held in trust by the United States. *In re Stringer's Estate*, 61 Mont. 173, 201 Pac. 693. An Indian would, therefore, be capable of applying for such privileges and entering into the necessary contractual obligations without the intervention of the agency officials. However, as a matter of practical administration it may be found advisable to consult the agency officials, especially if a large number of Indians desire grazing privileges, and to negotiate their grant through the agency.

The final question relates to the eligibility of a Pueblo as such to receive grazing privileges. Under the above-quoted section 3 of the act and the Regulations of the Department, a Pueblo would be a qualified applicant for a permit if it itself was a stock owner, since a Pueblo falls within the second requisite for being a qualified applicant, namely, "a group, association, or corporation authorized to conduct business under the laws of the State." A Pueblo is a corporation under the laws of New Mexico and as a corporation of New Mexico is authorized to carry on its business and affairs in accordance with State law. The fact that a Pueblo is a corporation under the laws of New Mexico has received most decisive statement in the Supreme Court in the cases of *Lane v. The Pueblo of Santa Rosa*, 249 U. S. 110; *United States v. Candelaria*, 271 U. S. 432; and *Pueblo of Santa Rosa v. Lane*, 49 App. D. C. 411. The law of New Mexico on this subject appears in section 2784 of the 1915 compilation of Statutes of New Mexico, and reads as follows:

The inhabitants within the State of New Mexico, known by the name of the Pueblo Indians, and living in towns or villages built on lands granted to such Indians by the laws of Spain and Mexico, and conceding to such inhabitants certain lands and privileges, to be used for the common benefit, are severally hereby created and constituted bodies politic and corporate, and shall be known in the law by the name of the Pueblo de _____ (naming it), and by that name they and their successors shall have perpetual succession, sue and be sued, plead and be impleaded, bring and defend in any court of law or equity all such actions, pleas, and matters whatsoever, proper to recover, protect, reclaim, demand or assert the right of such inhabitants, or any individual thereof, to any lands, tenements, or hereditaments, possessed, occupied, or claimed contrary to law, by any person whatsoever, and to bring and defend all such actions, and to resist any encroachment, claim or trespass made upon such lands, tenements, or hereditaments, belonging to said inhabitants, or to any individual.

While the chief functions of the Pueblo are the carrying on of its own government and internal affairs, it pursues many business activ-

ities with nonmembers of the Pueblo. It may purchase, sell, rent, and otherwise dispose of real and personal property and privileges, except that the land of the Pueblo and property held in trust by the United States could not be sold without the consent of the United States. *Cf. Pueblo of Santa Rosa v. Fall*, 273 U. S. 315; *United States v. Candelaria*, 271 U. S. 432. The fact that some of the transactions between the Pueblo and nonmembers of the Pueblo are under the laws and supervision of the Federal Government does not negate the fact that other transactions not covered by such laws or supervision, would be carried on in accordance with State law. Therefore, I am of the opinion that the first question submitted by the Superintendent of the United Pueblos Indian Agency should be answered in the affirmative.

In summary, it is my opinion that Indians who are stock owners and citizens are qualified applicants to receive grazing privileges and that an Indian Pueblo which is itself a stock owner in its community or corporate capacity is likewise a qualified applicant for grazing privileges. The actual obtaining of such privileges is, however, dependent upon whether the Indian applicants fulfill the requirements in the Regulations for obtaining the necessary preference. But the determination of such preference depends on the finding of certain prescribed facts and should not be affected by the status of the applicants as Indians or residents of a reservation or Indian corporations.

Approved: February 13, 1937.

OSCAR L. CHAPMAN,
Assistant Secretary.

AUSTIN v. MANN

Decided February 17, 1937

MINING CLAIM—SUFFICIENCY OF EVIDENCE.

Evidence of the existence of mineralized vein held insufficient to warrant cancelation of a homestead entry made under 2289 Revised Statutes. Mere proximity of valuable mines, without a showing that the veins worked intersect the claim, is insufficient to stamp the land as valuable for mineral.

WALTERS, *First Assistant Secretary:*

George Austin et al. have appealed from so much of the decision of the Commissioner of the General Land Office rendered November 18, 1935, as held their contest against the homestead entry of Ralph D. Mann, Coeur d'Alene 013442, made under Section 2289, Revised Statutes, for dismissal.

Mann filed his application February 21, 1933, for lot 2, SW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 32, T. 48 N., R 5 E., B. M., which was allowed February 25, 1933. The contest affidavit alleged in substance that the entry was in conflict with the Silver Rock, Humdinger, and Cracker Jack lode mining claims located October 18, 1932, on which were exposed veins in mineral rock in place containing quartz and iron, and that the land was more valuable for mineral than for other purposes.

Upon evidence adduced at a hearing between the parties, the Commissioner disagreed with the finding of the register that adequate discoveries had been made and that the land was valuable for mineral, and held the evidence insufficient to establish either allegation.

The evidence shows that the claims are situated in a mining district and in a mineral belt containing mines some of which are less than one-half mile from these claims, which have produced or are now producing large quantities of commercial ore. It is not shown, however, that any of the productive veins penetrate or would likely penetrate the lands in question. With respect to the Humdinger and Cracker Jack claims, the evidence of mineralization is very meager. All the work that appears to have been done on these two claims, excepting perfunctory assessment work in years when such was required, was the digging of two discovery pits, one on each claim, 10 feet deep. Mining engineer Hall merely states that there was mineral rock in place in the discovery pit on the Humdinger. Dancer, one of the locators, asserts that he found mineralized rock in place in each, but he did not know what to call it, that it was a kind of quartzite, not oxidized iron, and that he took no assays to ascertain if it was valuable. Burch, a co-locator, testifying for contestee, who as Dancer admits saw these holes, states they were in loose gravel and disclosed no bedrock.

By a preponderance of evidence it is shown that there is on the Silver Rock claim, traversing it from end to end, a quartz vein containing oxidized iron exposed in certain excavation along its course in the nomenclature of some of the witnesses termed an iron gossan or capping. The miners and mining engineers testifying for contestants state, in effect, that this vein is of no value in itself but is valuable as an indication of valuable ores at depth and that similar disclosures on other lands in the Coeur d'Alene district have led to valuable deposits of mineral; that these iron-oxidized outcroppings are the usual but not invariable indicia of the presence of valuable ores at depth and for that reason the vein in question warrants development. It, however, is shown that the vein in question has been considerably explored in times past, it being stated that about 175 feet in all of tunnel has been run, caved and abandoned tunnels being evidence of such development. Speaking of the vein in question,

mining engineer Trask, testifying for the contestant, said that with the purpose of finding a showing of "galena" he ran tunnels and crosscuts 50 feet, and followed the vein for 30 feet, when he abandoned the work for lack of funds. He does not state that he found any galena or any other indications of a commercial ore. The present claimants do not appear to have done anything on the claim but blind prospecting and perfunctory assessment work. One of them, Dancer, uses a part of the Silver Rock as a place of residence. It is shown that the contestee has his home on the land within the Silver Rock claim, has erected substantial improvements, and raised a garden and cleared additional areas for seeding on the limited area adapted for such use in a rough and mountainous terrain.

The Commissioner holds that a mere oxidized quartz vein, containing no valuable mineral, is not a lode or vein subject to location under the mining law. While such a construction of the statute seems somewhat incompatible with certain decisions of the courts where the question was as to the sufficiency of a discovery to sustain a prior as against a subsequent location (see *Shoshone Mining Company v. Rutter et al.*, 87 Fed. 801), the Department is of the opinion that the showing of such a vein under the circumstances disclosed in this case is insufficient to warrant the cancelation of a homestead entry.

To except lands from settlement and agricultural entry, the lands must be "mineral lands" and "lands valuable for minerals." Revised Statutes, Sections 2302, 2318; *Diamond Coal Co. v. United States*, 233 U. S. 249. Where the controversy is between two mineral claimants the rule respecting the sufficiency of discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that where the land is sought to be taken out of the category of agricultural lands the evidence of its mineral character should be reasonably clear, while in respect to mineral lands, in a controversy between claimants, the question is simply who is entitled to priority. In the latter case there must be such a discovery of mineral as gives reasonable evidence of the fact either that there is a vein or lode carrying the precious mineral, or if it be claimed as placer ground, that it is valuable for such mining. *Chrisman v. Miller*, 197 U. S. 323; *Steele v. Tanana Mines R. Co.*, 148 Fed. 678.

In a number of recent unreported cases, where indications of mineral, valueless in themselves, were not shown to be connected with valuable deposits presumed to lie at depth, the Department has followed and applied the rule announced in *East Tintic Consolidated Mining Company* (40 L. D. 271) that "To constitute a valid discovery upon a lode mining claim for which patent is sought there

must be actually and physically exposed within the limits thereof a vein or lode of mineral-bearing rock in place, possessing in and of itself a present or prospective value for mining purposes." See *United States v. Chief Consolidated Mining Company*, unreported, decided August 13, 1935, and cases there cited. The burden of proof was on the mineral claimants, and it is the view of the Department that they have not clearly shown that the land contains valuable deposits of mineral, or that the iron-oxidized vein exposed on the Silver Rock claim, in view of the abandonment long since of considerable exploration thereon with no efforts to renew it except to fulfill the requirements of annual labor, would invite the expenditure by a reasonably prudent man of time and money with the hope that it would yield him a remunerative return. As stated by the Commissioner, the mere proximity of valuable mines, without a showing that the veins there worked intersect the claim, is insufficient to stamp the land as valuable for mineral.

For the reasons stated the decision of the Commissioner is affirmed.

Affirmed.

A. W. GLASSFORD, ET AL.

Decided March 10, 1937

PUBLIC LANDS—TITLE TO LANDS UNDER BODY OF WATER—NAVIGABILITY.

The question whether a body of water within a State is navigable or non-navigable is a Federal and not a local one. When an application for a prospecting permit or lease, under the Mineral Leasing Act, of land underlying a body of water in a State is filed, the first question to be decided is whether or not such body of water is non-navigable. Title to the bed of a navigable body of water is vested in the State.

Cases of *Clayton Phebus* (48 L. D. 128), *William Erickson* (50 L. D. 281), and *Henry C. Trigg* (A. 17559, Salt Lake City 050949, decided October 31, 1933, unreported), cited and applied.

WALTERS, *First Assistant Secretary*:

On July 10, 1935, and thereafter, applications for sodium prospecting permits were filed for lands in the Lakeview, Oregon, land district as follows:

A. W. Glassford, serial No. 014994; Richard D. Parker, 014996; Earl Johnson, 014997; Miles Belden, 014998; Hugh D. Kester, 015000; J. B. Pfouts, 015001, Fred M. Stevenson, 015002; C. W. Koppe, 015518; D. Elwood Caples, 015519; H. W. Gard, 015543.

The lands applied for are mostly in the bed of Summer Lake, an oblong body of water about 13 miles long and 6 miles wide. The descriptions were by metes and bounds as for unsurveyed lands.

By decision of June 22, 1936, the Commissioner of the General Land Office rejected these applications in part, stating:

If Summer Lake was a navigable body of water in 1859, when Oregon was admitted into the Union, title to its bed vested in the State and there is no authority to grant a sodium permit or lease under the act of February 25, 1920, as amended, for any part of the lake bed. If the lake was nonnavigable, as appears probable, permits may be issued for the lake bed where title has not vested in others by reason of the disposal of the public lands bordering thereon without reservation or restriction, in which case title to the lake bed, riparian to the abutting patented upland, is controlled by the laws of the State. (*William Erickson*, 50 L. D. 281.)

The records show that practically all of the abutting lands to the west and south of the lake have been patented and that fractional Sec. 16, T. 31, S., and fractional Sec. 36, T. 32 S., R. 17 E., are school sections, title to which apparently vested in the State when the township surveys were approved. The remaining abutting uplands in T. 32 are embraced in outstanding prospecting permits. While these permits do not specifically authorize the permittees to prospect the adjacent lake bed, the policy of the Department has been to recognize in the permittees riparian rights in the bed of the adjoining water.

Accordingly, application 015543 is held for rejection to the extent of the area within the lake bed, approximately Secs. 17 and 18, T. 31 S., R. 17 E., because this area lies appurtenant to fractional Sec. 16; application 014998 as to all the area applied for except fractional Sec. 22; application 014996 as to all the area applied for except fractional Sec. 27; application 015518 as to all the area applied for except fractional Sec. 34, T. 31 S., R. 17 E.; application 015000 in its entirety because riparian to school section 36, T. 32 S., R. 17 E., and patented lands on the south of the lake; applications 014994, 014997, and 015519, 015001, 015002 in their entirety because the areas applied for are riparian to outstanding sodium permits.

The applicants, through their attorney, appealed. The attorney stated that he was of the opinion that a sodium prospecting permittee had no riparian rights, being limited to the area of his permit. He further stated that the officer in charge of the State Land Board had advised that the State of Oregon had nothing to do with the bed of this lake.

Section 60-703 of the Oregon Code, 1930, reads as follows:

Any and all lakes wholly or partly within the state of Oregon which have been meandered by the United States surveys, are hereby declared to be navigable and public waters, and the waters thereof are hereby declared to be of public character, and the title to the bed and land thereunder, including the shore or space between ordinary high and low water marks and between high and low water lines; which are not included in the valid terms of a grant or conveyance from the state of Oregon, is hereby declared to be in the state of Oregon, and the state of Oregon hereby asserts and declares its sovereignty over the same and its ownership thereof; provided, however, that the provisions of this act shall not apply to any nonnavigable lakes lying within the boundaries of any duly organized and incorporated drainage district which was in existence on January 1, 1921.

Section 60-711 of the said Code is as follows:

That certain indenture of lease and agreement entered into and executed on the sixteenth day of December 1914 by and between the state land board of the state of Oregon, for, and on behalf of said state, party thereto, and Jason C. Moore, the other party thereto, leasing to the said Jason C. Moore, his heirs, associates and assigns, for a term of forty (40) years from and after the date thereof, all the right, title and interest of the state of Oregon in and to the waters and beds of Summer and Albert Lakes in Lake county, Oregon, and all appurtenances thereunto belonging or in any wise appertaining, together with all salts of whatsoever nature or character, in solution or otherwise contained therein or in anywise belonging thereto, granting to said Jason C. Moore, his associates, successors, administrators and assigns, the right to extract, mine, separate, remove, sell and market any and all salts of whatsoever nature, character or form, contained therein, whether in solution, deposit or otherwise, or in any way belonging thereto, be and the said lease is hereby in all things ratified and confirmed and approved, and the parties thereto are hereby fully authorized and empowered to prosecute the enterprise therein mentioned.

In the case of the *United States v. Oregon*, 295 U. S. 1, the Supreme Court of the United States held that upon the admission of a State to the Union, the title of the United States to lands underlying navigable waters within the State passed to it, as incident to the transfer to the State of local sovereignty, and was subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce, but that if the waters were not navigable in fact, the title of the United States to land underlying remained unaffected by the creation of the new State. It was further stated:

Since the effect upon the title to such lands is the result of federal action in admitting a state to the Union, the question, whether the waters within the State under which the lands lie are navigable or nonnavigable, is a federal, not a local one. It is, therefore, to be determined according to the law and usages recognized and applied in the federal courts, even though, as in the present case, the waters are not capable of use for navigation in interstate or foreign commerce.

It was held in the decree in the same case, 295 U. S. 701, that the State of Oregon as owner of certain uplands was the owner of ratable portions of the beds of the nonnavigable lakes involved.

The record does not show and it has not been found that there has been any determination that Summer Lake is in fact nonnavigable. Such a determination is necessary in view of the cited State statute.

In the case of *Clayton Phebus* (48 L. D. 128), the Department held that ownership by the Government of lands abutting upon a meandered nonnavigable lake carried with it the same rights with respect to the adjacent submerged land that private ownership did, and that where the title to such land was vested in the United States, an oil

and gas prospecting permit embracing the Government-owned shore lands included the right to prospect the submerged lands.

But in the case of *Henry C. Trigg*, decided October 31, 1933 (A. 17559, Salt Lake City 050949), the Department said:

The mere fact that prospecting has been permitted on the land abutting upon the stream bed does not of necessity lead to the conclusion that the right to prospect has also been granted as to lands lying within the stream bed.

From the general tenor of the leasing act it is evident that Congress intended that all operations under oil and gas prospecting permits or leases should be conducted upon a per-acre basis. Rentals are to be paid by the acre; individual applications are limited to a certain number of acres on a known geologic structure and to a certain number of acres within the bounds of a particular State. It is evident that it was not within the intention of Congress that any person whose application called for a specific tract of land, including a certain number of acres, should receive rights on any larger tract containing a greater number of acres. Congress, then, has, in effect, set up a scheme for the exploitation of public lands containing oil and gas, which of necessity excludes the applicability of the common-law concept granting to riparian owners rights in a stream bed to the center thereof.

In the case of *William Erickson*, cited by the Commissioner, the Department said:

In view of the narrowness of these lakes it seems that the common law rule with respect to streams should be followed, namely, that the boundaries extend to a center line drawn through said lakes, at right angles from the meander line, with the use of converging lines only at the ends of said lakes, as was suggested in *Hardin v. Jordan*, *supra*, rather than the application of the rule followed where lakes are of a width comparable to their length. In such cases a center point is adopted and all boundaries determined by converging lines which meet at said point. *Olson v. Huntamer*, 6 S. Dak. 364, 61 N. W. 479; *Shell et al. v. Matteson*, 81 Minn. 38, 83 N. W. 491; *Scheifert et al. v. Briegel et al.*, 90 Minn. 125, 96 N. W. 44.

These boundaries may be arrived at by agreement with the riparian owners of the lands adjoining the vacant lots of public land, and the applicant for prospecting permit must furnish such agreement for the approval of the Department before a permit will be issued.

If Summer Lake is in fact nonnavigable, a decision to that effect must first be rendered. Assuming that the lake is nonnavigable the United States owns a portion of the bed thereof inasmuch as it owns some of the land on the eastern shore. The portion of the lake bed so owned is either subject to sodium prospecting permit application or embraced in the outstanding sodium permits by virtue of riparian rights. It is not necessary at this time to make any determination on that point. But the State of Oregon owns a part of the lake bed and owners of lands to the west and south of the lake own an undetermined quantity of its bed. Apparently several of these permit applications include land extending farther west than to a line drawn through the middle of the lake. There must first be a showing that there are no conflicting owners.

The rejection appealed from is affirmed, but this action is without prejudice to the right of the applicants to submit satisfactory proof that the lake is nonnavigable and to show to the satisfaction of the Department what specific portions of the lake bed applied for belong to the Federal Government and not to private owners or the State of Oregon.

Affirmed.

JOSEPH F. LIVINGSTON ET AL.

Decided March 29, 1937¹

TAYLOR GRAZING ACT—CONSTRUCTION OF RULES OF MARCH 2, 1936, PROMULGATED THEREUNDER—POWER OF BOARDS OF DISTRICT ADVISORS—PRIORITY OF USE—LOCAL CUSTOM.

Rules for Administration of Grazing Districts were promulgated by the Department on March 2, 1936, pursuant to the Taylor Grazing Act (act of June 28, 1934, 48 Stat. 1269). They provide for the order of preferences in which grazing licenses are to be issued. Class 1 consists of those qualified applicants with dependent commensurate property with priority of use; Class 2, of qualified applicants with such property but without priority of use. Priority of use is defined as such use of the public range before June 28, 1934, as local custom recognized and acknowledged as a proper use of both the public range and the lands or water used in connection therewith. The rules further provide for boards of district advisors for each of the grazing districts and empower them to make recommendations with regard to enumerated matters, among them, the date before which the range must have been used by an applicant in order to constitute priority of use.

A board of district advisors adopted a priority "rule" for its district which provided that in order to establish a prior right to graze, the applicant for a license must have used the range for two consecutive years between January 1, 1928, and June 28, 1934. An application for a license was then denied. The applicants in this case were denied a Class 1 rating because of insufficient priority as defined by this "rule"; the capacity of the range was held to be exhausted by Class 1, and a license was denied them. *Held*: 1. No evidence of any local custom which conceivably might support the so-called "rule" of the board of district advisors is found in the record. 2. A board of district advisors is powerless to make rules. Its function is entirely advisory. The "rule" promulgated by the board in this case is merely a recommendation to the Division of Grazing. No local custom to support the recommendation having been proven, it presents no obstacle to the grant of a Class 1 rating. 3. The rules which must be followed are the rules promulgated by the Department. 4. The use of the public range which comes within the definition of priority of use contained in those rules must have been before June 28, 1934, in connection with some private property, and proper according to local custom. Before it may be said that a use in compliance with the first two requirements is not proper according to some local custom it must be determined that a local custom existed

¹ See *Joseph F. Livingston et al.* (56 I. D. 305), decided April 23, 1938.

which recognized and acknowledged a particular kind or length of use to be proper, and that the use made by the applicant was not of that particular kind or length. 5. The evidence in this case supports a finding that four of the applicant's properties had some use in connection with the public range prior to June 28, 1934. Such use cannot be considered improper according to local custom when the record fails to prove any local custom by which that use might have been judged proper or improper. These properties are therefore entitled to a Class 1 rating and a license to the extent of their commensurability should be issued. 6. The preference class ratings for properties defined by the rules promulgated by the Department are not mutually exclusive. As the facts warrant, a qualified applicant should receive one or more ratings, each for a fixed number of livestock. Ratings should be allowed qualified applicants as follows: Class 1, for no more than the number of livestock for which the applicant's dependent property, which has been used in connection with the public range within the meaning of the priority of use definition, is commensurate. Class 2, for no more than the number of livestock for which his dependent property, which has not been so used, is commensurate. Class 3, for no more than the number of livestock, with which the applicant grazed the public range within the definition of priority of use, exceeds the commensurability of all his dependent commensurate properties, on the basis of which he has received a Class 1 and/or Class 2 rating. Class 4, for the number of livestock for which an applicant does not bring himself within the requirements of any of the first three classes.

ICKES, Secretary:

The appellants applied for the privilege of grazing 9,000 sheep and 20 horses in Colorado Grazing District No. 6 for the 1935-1936 winter grazing season, pursuant to the Taylor Grazing Act (act of June 28, 1934, 48 Stat. 1269). The application was denied. An appeal to the Department followed and on April 9, 1936, the decision was modified and the case remanded for a hearing. On March 18, 1936, the appellants filed a similar application for a license to graze 9,000 sheep and 14 horses for the 1936-1937 season. A hearing on both applications was held in June. The Director of Grazing, by decisions dated, respectively, September 14 and September 11, 1936, held the applications to have been properly denied by the regional grazier. The applicants appeal from both decisions.

Inasmuch as the 1935-1936 grazing season is over, and the new Division of Grazing Rules are now in force, the appeal from the September 14, 1936, decision is moot. It should therefore be dismissed. This opinion is confined to a consideration of the appeal from the decision of September 11, 1936.

The appellants are partners engaged in the sheep business. Because the appellant Joseph F. Livingston occupies a dominant role in the partnership we shall refer to the appellants or Livingston, interchangeably.

The sheep business has been Livingston's occupation for 35 years. He was never interested in any other business. Before coming to

Colorado, Livingston conducted his business in Utah, where he grazed from 8,000 to 13,000 sheep on 21,000 acres of his own land, and on public domain. In 1932, because of "big head" disease, he lost a substantial number of his sheep; in the fall he sold his land and with his remaining 6,250 sheep moved into Colorado for a new start.

After grazing for a while in an area whose location is not here material, in the spring of 1933, he moved into northwestern Colorado, where the range which is now District No. 6 is located. In April he bought the Kime tract of 1,600 acres. That same month he leased for eight months some 5,000 acres known as the Dines property. He acquired the 5,658 acres of the Green Estate in March of 1934; though it was agreed that the vendors were to retain possession until December 1, 1934. In April he bought the Carpenter-Pleasant property, and in May the Shroder property, consisting of 1,620 and 737 acres, respectively. The total area of the lands purchased between April 1933 and May 1934 is 9,615 acres. On these there are 15 sets of buildings. By June of 1934 he had also become lessee of more than 10,000 acres. Livingston owned over 11,000 acres and was lessee of more than 12,000 when he filed his application for the 1936-1937 season.

Before the enactment of the Taylor Grazing Act on June 28, 1934, Livingston grazed his sheep for the 1933-34 season on a part of the public domain thereafter included within district No. 6. This was repeated the following season of 1934-35, before the district was established on July 11, 1935. For aught that appears in the voluminous record before me such grazing was peaceable. At that time Livingston had the same right of access to the public domain in Colorado that he had enjoyed in Utah. Before the Taylor Grazing Act became effective the Federal Government permitted the vast public domain of the West to be used as a grazing common open to all alike. In the exercise of the police power of the State, as sanctioned in *Omaechevarria v. Idaho*, 246 U. S. 343, a Colorado statute provides for segregation of sheep and cattle on the Federal public domain (ch. 125, p. 443, Session Laws, 1929; 1935 Colo. Stat. Ann., Vol. IV, secs. 160-166). "All that was purposed by the act, and only in that may it be sustained, was to provide for judicial determination of what particular portions of government lands should be grazed by herds and what by flocks" (*Blanc v. People*, Sup. Ct. of Colorado, 28 Pac. (2d) 801). The statute expressly states that nothing in it "shall be construed to prohibit free transit over the public domain as provided by the acts of Congress or to confer upon any individual as such an exclusive right to the use or occupancy of any part of the public domain."

On March 2, 1936, Division of Grazing Rules for Administration of Grazing Districts were promulgated. They provide for the issuance of grazing licenses as follows:

After residents within or immediately adjacent to a grazing district having dependent commensurate property are provided with range for not to exceed ten (10) head of work or milch stock kept for domestic purposes, the following named classes, in the order named, will be considered for licenses: 1. Qualified applicants with dependent commensurate property with priority for use. 2. Qualified applicants with dependent commensurate property but without priority of use. 3. Qualified applicants who have priority of use but not commensurate property. 4. Other qualified applicants.

* * * *priority* is: (a) *Dependent* if public range is required to maintain its proper use. * * * (c) *Commensurate* for a license for a certain number of livestock if such property provides proper protection according to local custom for said livestock during the period for which the public range is inadequate. *Priority of use*—is such use of the public range before June 28, 1934, as local custom recognized and acknowledged as a proper use of both the public range and the lands or water used in connection therewith.

The Rules also provide for boards of district advisors for each of the districts. They "shall make recommendations," among other things, as to "the date before which the range must have been used by an applicant in order to constitute priority of use."

On March 23, 1936, in discharge of its duty to "make recommendations," the advisory board for Colorado Grazing District No. 6 formulated what is referred to as a "rule," as follows:

Prior right to graze any allotment on the Public Domain will have been established in case the applicant used that particular range during any two full grazing seasons in two consecutive years between January 1, 1928, and the date of the passage of the Taylor Act, June 28, 1934. Without such prior use, it will be considered that the range applied for was not a part of the applicants set-up.

A few days before this "rule" was made, the appellants filed their 1936-1937 application. On April 23 the advisory board determined to recommend denial of the application "because of insufficient priority on range applied for." The reason assigned did not relate to the quality or propriety of the use. The regional grazier adopted the recommendation and on May 7 denied the application. The Director of Grazing affirmed his decision.

The carrying capacity of the range for the current season was determined to be sufficient to provide for only Class 1 applicants. No Class 2 licenses were issued. Both classes consist of "qualified applicants with dependent commensurate property." In Class 1 "property" is followed by "with priority of use," while in Class 2 it is followed by "but without priority of use." The Division of Grazing Rules are silent with regard to how long the range must have been used to constitute priority of use. Nevertheless the appellants

received a Class 2 rating because their use of the range for one season before June 28, 1934, when the Taylor Grazing Act was passed, was not considered sufficient. It was held that in this district Class 1 applicants must have used the range for two consecutive seasons between January 1, 1928, and June 28, 1934.

The basis for requiring such use for at least two consecutive seasons is the "rule" of the advisory board. It is said to find support in local custom. At most, the "rule" is but a recommendation to the Division of Grazing; it may, but need not necessarily be followed. And no evidence of a local custom which conceivably might support the "rule" may be found in the record. The advisory board "rule" is therefore no obstacle to the granting of a Class 1 rating.

The rules which must be followed are the Division of Grazing Rules of March 2, 1936. In order properly to apply these Rules to the facts in this case the meaning of relevant portions should be made clear. They provide that "priority of use is such use of the public range before June 28, 1934, as local custom recognized and acknowledged as a proper use of both the public range and the lands or water used in connection therewith." It is clear that the use of the public range to which the definition refers, is required to have been "such use" in connection with some private property. The use of the public range which comes within the definition must therefore have been (1) before June 28, 1934, (2) in connection with some private property, and (3) proper according to local custom. Before it may be said that a use in compliance with the first two requirements was not proper according to some local custom, it must be determined that a local custom existed which recognized and acknowledged a particular kind or length of use to be proper, and that the use made by the applicant was not of that particular kind or length.

The Rules further provide that "the following named classes, in the order named, will be considered for licenses: (1) Qualified applicants with dependent commensurate property with priority of use. (2) Qualified applicants with dependent commensurate property but without priority of use. (3) Qualified applicants who have priority of use but not commensurate property. (4) Other qualified applicants."

These ratings are not mutually exclusive. As the facts warrant, a qualified applicant should receive one or more ratings, each for a fixed number of livestock. Ratings should be allowed qualified applicants as follows: Class 1, for no more than the number of livestock for which the applicant's dependent property, which has been used in connection with the public range within the meaning of the priority of use definition, is commensurate. Class 2, for no more than the number of livestock for which his dependent property, which has not

been so used, is commensurate. Class 3, for no more than the number of livestock, with which the applicant grazed the public range within the definition of priority of use, exceeds the commensurability of all his dependent commensurate properties, on the basis of which he has received a Class 1 and/or Class 2 rating. Class 4, for the number of livestock for which an applicant does not bring himself within the requirements of any of the first three classes.

The Division of Grazing has conceded, for the purpose of the present proceeding, that Livingston is a qualified applicant and that all his properties are dependent and commensurate. Thus, the requirements which are common to Classes 1 and 2, that is, that he be a qualified applicant with dependent commensurate property, are fulfilled as to all his properties. Whether a Class 1 or a Class 2 rating should have been allowed as to any or all these properties will depend on whether the requirements of priority of use of the respective properties were satisfied. As to those which satisfied the requirement, a Class 1 rating was appropriate and a license should have been issued. As to those which did not, a Class 2 rating was proper, and because the carrying capacity of the range was exhausted by Class 1, a license was properly refused.

The evidence supports a finding that at least four of Livingston's properties had some use in connection with the public range prior to June 28, 1934. These are the Kime, Green Estate, Carpenter-Pleasant, and Shroder properties. If a Class 1 rating is to be denied Livingston as to these properties, then the use so made must be held improper according to some local custom. The Rules of March 2, 1936, made local custom the only basis for determining whether a use otherwise satisfying the requirements of the definition was improper. For evidence of the existence of a local custom we must look at the record. That record fails to prove the existence of any local custom by which such use might have been judged improper.

It has been suggested that a local custom defining what is a proper use is not required; that all that need be shown is that the use was "not long enough" or "not recent enough" or that it was "insufficient," and "thereby violated local custom." But the impropriety of the use of the public range may only be judged according to some objective standard. Otherwise, judgment would be wholly subjective and arbitrary. A guiding line must be drawn somewhere, on the one side of which will be the proper and on the other the improper. The rules provided that the line was to be drawn by local custom. And to permit a determination that there was some local custom, based on no clear-cut or convincing evidence, would in effect permit preference ratings and grazing privileges to be arbitrarily granted or withheld.

In the absence of sufficient evidence of the existence of a local custom providing a standard of propriety, according to which the use of the public range in connection with the Kime, Green Estate, Carpenter-Pleasant and Shroder properties could be adjudged improper, that use cannot be considered improper. Such evidence is lacking. As to these properties therefore, a Class 1 rating should have been allowed to the extent of their commensurability, and a license issued accordingly. To that extent, the decision of the Director should be reversed.

On the record now before us we are unable to determine just what use, if any, was made of Livingston's other owned and leased properties prior to June 28, 1934. At this point in the current grazing season, it would be futile to direct further hearings. And so as to these properties, the decision of the Director should be affirmed.

The decision of September 11, 1936, is modified to the extent that, in accordance with the foregoing conclusions and upon payment of fees, an appropriate license for the 1936-1937 season effective as of the commencement thereof is to be issued to the appellants; except as so modified, the decision is affirmed; this decision, however, is without prejudice to appropriate disposition of future applications for grazing privileges consistent with facts then proven and applicable statutes and rules then in force.

The appeal from the decision of September 14, 1936, is dismissed.

Decision of September 11, 1936, modified.

Appeal from Decision of September 14, 1936, dismissed.

VERDE RIVER IRRIGATION AND POWER DISTRICT ON REHEARING

Decided March 29, 1937.

RIGHTS-OF-WAY—CONDITIONAL GRANT—TERMINATION.

Section 2 of the act of February 21, 1911 (36 Stat. 925), authorizes the Secretary of the Interior, "upon such terms as may be agreed upon, to cooperate with irrigation districts, for the construction or use of such reservoirs, canals, or ditches as may be advantageously used by the Government and irrigation districts, water users associations, corporations, entrymen, or water users for impounding, delivering, and carrying water for irrigation purposes." Ordinarily, the legal effect of approval of a map of location of rights-of-way by the Secretary pursuant to the act of March 3, 1891 (26 Stat. 1095), is that title to the rights-of-way vests, subject only to forfeiture by judicial decree or Act of Congress. *Held*, rights-of-way granted under the act of March 3, 1891, may be forfeited and canceled without judicial decree or Act of Congress if (1) they are granted as an incident to an agreement under section 2 of the act of February 21, 1911, (2) the approval or reapproval of the maps of rights-of-way is made subject to the terms of the agreement, and (3) the agreement provides for such forfeiture or cancellation.

RIGHTS-OF-WAY—TERMINATION BY TERMS OF CONTRACT—PERFORMANCE OF CONTRACT WITHIN REASONABLE TIME.

Maps of rights-of-way under the 1891 statute were reapproved, subject to the terms of an agreement under the 1911 statute between the United States and an irrigation district. The agreement provided that the failure of the district to comply with its terms would *ipso facto* render the rights-of-way null and void. The agreement also provided that the district was to supply certain Indians with fixed quantities of water each year; it failed to specify when delivery was to begin. More than six years have passed, the district has failed to supply the water, has failed to construct waterworks, and there is no reasonable prospect that they will be constructed. *Held*: (1) A reasonable time for performance has passed and the district must be considered as having failed to perform its agreement to deliver water. (2) The rights-of-way are null and void and the Commissioner of the General Land Office and the Department may officially note and announce their termination. (3) No judicial decree or act of Congress is required to render them null and void.

RIGHTS-OF-WAY—EFFECT OF PETITION FOR REAPPROVAL.

The petition of the district requested that the Secretary of the Interior "reapprove" the maps and that the rights-of-way be "regranted." *Held*, such request is a concession that the rights-of-way had become null and void.

WALTERS, *First Assistant Secretary*:

On March 23, 1936, the Department affirmed a decision of the Commissioner of the General Land Office which denied the application of the Verde River Irrigation and Power District of Phoenix, Arizona, for reapproval of its maps of rights of way for reservoirs and canals, and declared the rights of way null and void. The District now moves for rehearing.

The petition for rehearing contains nothing which was not presented by the District or considered by the Department upon the appeal. We are convinced that the decision of March 23, 1936, should not be disturbed. There is one phase of the case, however, which needs further discussion. This concerns the right and power of the Department to cancel the rights of way; the appellant challenges that right and insists that cancellation may only be achieved by judicial decree.

Ordinarily, the legal effect of approval of a map of location of a right of way by the Secretary of the Interior pursuant to the act of March 3, 1891 (26 Stat. 1095, 43 U. S. C. 946, 947), is that title to the right of way vests in the applicant, subject only to forfeiture by judicial decree or act of Congress. *Kern River Co. v. United States*, 257 U. S. 147, *Allen v. Denver Power & Irrigation Co.* (38 L. D. 207), *Windsor Reservoir and Canal Company v. Miller* (51 L. D. 27, 305).

Section 2 of the act of February 21, 1911, provides that—

in carrying out the provisions of the reclamation law, the Secretary of the Interior is authorized, *upon such terms as may be agreed upon*, to cooperate with irrigation districts, water users associations, corporations, entrymen, or water users for the construction or use of such reservoirs, canals, or ditches as may be advantageously used by the Government and irrigation districts, water users associations, corporations, entrymen or water users for impounding, delivering, and carrying water for irrigation purposes.

(36 Stat. 926, 43 U. S. C. 524.) [Italics supplied.]

In *Verde River Irrigation and Power District v. Work*, 24 F. (2d) 886, certiorari denied, 279 U. S. 854, the applicant questioned the right of the Secretary of the Interior to cancel the same rights of way here involved. In 1920, the United States and the predecessor of the District had entered into a contract pursuant to the act of February 21, 1911. As an incident of that contract, right of way applications had been approved and expressly made subject to its terms and conditions. For failure to comply with those terms and conditions, the Department had canceled the rights of way in 1926. The court affirmed a decree dismissing a bill to enjoin cancelation.

In thus refusing relief to the District, the courts among other things held that rights of way granted as an incident to a contract authorized by the 1911 statute, may be made conditional on performance of its provisions, that the rights of way and the contract thus become interdependent, and that the Secretary of the Interior may cancel the right of way for failure to perform the terms or conditions of the contract.

After that decision, on June 30, 1930, the United States by the Secretary of the Interior, and the District, entered into another agreement similarly authorized by the 1911 statute; and on the same day the Department reapproved the maps of the same rights of way, "subject * * * to the terms of an agreement made this day." Article VI of the agreement provided that "failure on the part of the District for any reason whatsoever to comply with the terms hereof, shall, *ipso facto*, render the rights of way granted to the District *in order* for the District to carry out and construct its works and thereafter maintain and operate its project, *null and void*." [Italics supplied.] Undoubtedly, the right of way was granted conditionally, and subordinate to and as an incident of the agreement.

The use of the words "*ipso facto*" in the termination clause has a peculiar significance in the light of previous decisions of the courts. The courts had held that title to a right of way granted under the 1891 statute remained in the grantee until canceled by judicial de-

cree or act of Congress. In describing the effect of breach of a statutory condition the courts had repeatedly held that cancelation did not "*ipso facto*" follow. Thus it had been said that such breach "does not operate *ipso facto* to divest the grantee of title"; and that it "does not *ipso facto* effect a forfeiture." *United States v. Whitney*, 176 Fed. 593, 594; *Carns v. Idaho-Iowa Lateral*, 202 Pac. 1071, 1072. It may therefore be assumed that the *ipso facto* provision in the contract was intended to avoid the necessity for judicial decree or congressional act of forfeiture, and to effect automatic cancelation.

The 1930 contract provided that the District was to supply the Indians of the Salt River Indian Reservation with fixed quantities of water each year; this was its all-pervading purpose. Though more than six years have passed since the execution of the contract, the District has failed to supply the Indians with any water. It has even failed to construct the water works which would enable it to supply the water, and there is no reasonable prospect that they will be constructed. It is true, the contract did not specify when the District was to begin to deliver water to the Indians. But a provision for performance within a reasonable time is implied. *Williston on Contracts*, 1920 Ed., Sec. 38. Clearly, under the circumstances, a reasonable time has passed. The District has failed to perform its contract. The contract provided that the result of a breach of the contract by the District was to "*ipso facto*, render the rights of way granted * * * null and void." It follows that the Commissioner and the Department may formally announce the termination of the rights of way. *Verde River Irrigation & Power District v. Work*, 24 Fed. (2d) 886.

In fact the assumption that the rights of way had become null and void as a result of breach of the contract, is implicit in the petition of the District. It requests the Secretary of the Interior to "reapprove" the maps, and that the "required rights of way be regranted." If the District had considered the rights of way to be still in existence, a mere request for indulgence, for additional time within which to perform, would have been appropriate. But a request to "reapprove" and to "regrant" is a concession that the life of the grant had expired. The Commissioner and the Department have officially noted and announced the expiration.

The motion for rehearing is denied.

Motion Denied.

THE CONSTITUTIONAL POWER OF CONGRESS TO ENACT LEGISLATION CONCERNING THE ALLOTMENT OF LANDS TO THE MISSION INDIANS OF CALIFORNIA

Opinion, April 8, 1937

INDIANS AND INDIAN LANDS—VESTED INDIVIDUAL RIGHTS IN TRIBAL LANDS AND UNAPPROVED ALLOTMENT SELECTIONS—ACTS OF CONGRESS.

The patents issued to the Mission Indian bands or villages under the act of January 12, 1891 (26 Stat. 712), conveying to the bands rights of use and occupancy of reservation lands while legal title remained in the United States, did not create any vested right in any individual Indian. Whatever title the Indians have in such reservation lands is in the band subject to the undisputed power of Congress to repeal or modify prior legislation regarding them.

The allotments in severalty of reservation lands which have been perfected and completed by the issuance of trust patents have vested in the allottees equitable title which cannot be impaired by subsequent legislation. But since an unapproved allotment selection confers no absolute property right in the selector, Congress is not precluded from forbidding the completion of unapproved allotments.

Gritts v. Fisher, 224 U. S. 640; *Sizemore v. Brady*, 235 U. S. 441; *Chase, Jr. v. United States*, 261 Fed. 833, aff. 256 U. S. 1; *Clay v. United States*, 282 Fed. 268, cited and applied.

KIRGIS, Acting Solicitor:

At the suggestion of the Commissioner of Indian Affairs, my opinion has been requested as to the constitutional power of Congress to enact legislation such as proposed by S. 1424, introduced February 8, 1937, which reads:

That the proviso in the Act of March 2, 1917, appearing on page 976 of volume 39 of the United States Statutes at Large, authorizing and directing the Secretary of the Interior to cause allotments in severalty to be made to the Indians belonging to and having tribal rights on the Mission Indian reservations in the State of California be, and the same is hereby, repealed and, until otherwise provided by Congress, the Secretary of the Interior is hereby directed not to perfect or complete any allotments heretofore listed or scheduled to any of said Indians which have not been approved by the Secretary of the Interior prior to the passage of this Act.

The particular questions presented are (1) did the individual members of the bands or villages of Mission Indians acquire vested rights by enactment of the legislation sought to be repealed so that Congress could not thereafter recall or impair such rights without violating the due process clause of the Fifth Amendment to the Federal Constitution, and (2) if not, has the legislation sought to be repealed been carried into effect to the extent of creating individual property rights beyond the power of Congress to divest or impair?

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The various Mission Indian reservations in California were created pursuant to the provisions of the act of January 12, 1891 (26 Stat. 712). Under section 3 of that act the respective bands or villages received patents declaring that the United States would hold the legal title to the reservation lands in trust for 25 years, and that at the end of that period the fee to the remaining land not "previously patented in severalty" would be conveyed to the bands or villages, discharged from the trust and free from charges or encumbrances. Sections 4 and 5 of the act deal with the allotting and patenting of allotments in severalty and provide:

SEC. 4. That whenever any of the Indians residing upon any reservation patented under the provisions of this act shall, in the opinion of the Secretary of the Interior, be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary of the Interior may cause allotments to be made to such Indians, out of the land of such reservation, in quantity as follows: To each head of a family not more than six hundred and forty acres nor less than one hundred and sixty acres of pasture or grazing land, and in addition thereto not exceeding twenty acres, as he shall deem for the best interest of the allottee, of arable land in some suitable locality; to each single person over twenty-one years of age not less than eighty nor more than six hundred and forty acres of pasture or grazing land and not exceeding ten acres of such arable land.

SEC. 5. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which 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 of California, and that at the expiration of said period the United States will convey the same by patent to the said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That these patents, when issued, shall override the patent authorized to be issued to the band or village as aforesaid, and shall separate the individual allotment from the lands held in common, which proviso shall be incorporated in each of the village patents.

By the act of March 2, 1917 (39 Stat. 969, 976), Congress amended section 3 of the act of 1891 so as to authorize the President to extend the trust period on the lands held in trust for the use and benefit of the Mission bands or villages of Indians with the following proviso:

That the Secretary of the Interior be, and he is hereby, authorized and directed to cause allotments to be made to the Indians belonging to and having tribal rights on the Mission Indian reservations in the State of California, in areas as

provided in section seventeen of the Act of June twenty-fifth, nineteen hundred and ten (Thirty-sixth Statutes at Large, page eight hundred and fifty-nine), instead of as provided in section four of the Act of January twelfth, eighteen hundred and ninety-one (Twenty-sixth Statutes at Large, page seven hundred and thirteen): *Provided*, That this act shall not affect any allotments heretofore patented to these Indians.

The foregoing statutory provisions fall far short of creating any present right of any kind in individual members of the Mission bands. Section 4 of the act of 1891 entrusts the problem of allotments in severalty of the reservation lands to the discretion and judgment of the Secretary of the Interior. To him is committed the function of determining when and to what Indians allotments are to be made. This discretion and this function are not taken away by the amendment of 1917. By that amendment, the Secretary of the Interior is authorized and directed to cause allotments to be made in areas as specified in section 17 of the act of June 25, 1910, instead of the areas specified in section 4 of the act of 1891. In other words, the amendment changes the quantities of land to be allotted, and the mandatory direction, if it may be properly called that, extends to the area to be allotted leaving undisturbed the discretionary authority vested in the Secretary by section 4 of the act of 1891 to make allotments. This interpretation is in accord with established rules of statutory construction in that it avoids a repeal by implication and harmonizes the two enactments and gives full effect to both.

That legislation of this character is subject to change, modification, or repeal at the will of Congress is no longer open to question. In *Gritts v. Fisher*, 224 U. S. 640, an agreement with the Cherokee Tribe made in 1902 limited the distribution of the lands and properties of that tribe to members living on September 1, 1902. In 1906, Congress passed an act permitting children born after September 1, 1902, and living on March 4, 1906, to participate in the allotment and distribution. The validity of the later act was challenged because it enlarged the number of participants and thereby reduced the distributive share of the members entitled under the 1902 agreement and it was contended that those members had become invested under the 1902 agreement with an absolute right to receive all the lands and funds. It was further contended that this right could not be impaired by subsequent legislation. Rejecting these contentions, the Supreme Court said (page 648):

* * * No doubt such was the purport of the act. But that, in our opinion, did not confer upon them any vested right such as would disable Congress from thereafter making provision for admitting newly born members of the tribe to the allotment and distribution. The difficulty with the appellants' contention is that it treats the act of 1902 as a contract, when "it is only an act of Congress and can have no greater effect." *Cherokee Intermarriage Cases*, 203 U. S. 76, 93. It was but an exertion of the administrative control of the Government over the

tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect and while the tribal relations continued. * * *

In *Sizemore v. Brady*, 235 U. S. 441, the original Creek allotment agreement of 1901 provided that the lands and moneys to which deceased members of the tribe would be entitled, if living, should descend to their heirs according to the laws of descent and distribution of the Creek Nation and that such lands and moneys should be allotted and distributed to them accordingly. This provision was repealed and the laws of Arkansas substituted by later legislation. Holding that the later legislation was a valid exercise by Congress of its powers over the tribal property of tribal Indians, the Court said:

On the part of the maternal cousins it is contended that the provisions in the original agreement relating to the allotment and distribution of the tribal lands and funds were in the nature of a grant *in praesenti* and invested every living member of the tribe and the heirs, designated in the tribal laws, of every member who had died after April 1, 1899, with an absolute right to an allotment of lands and a distributive share of the funds, and that Congress could not recall or impair this right without violating the due process of law clause of the Fifth Amendment to the Constitution. To this we cannot assent. There was nothing in the agreement indicative of a purpose to make a grant *in praesenti*. On the contrary, it contemplated that various preliminary acts were to precede any investiture of individual rights. The lands and funds to which it related were tribal property and only as it was carried into effect were individual claims to be fastened upon them. Unless and until that was done Congress possessed plenary power to deal with them as tribal property. It could revoke the agreement and abandon the purpose to distribute them in severalty, or adopt another mode of distribution, or pursue any other course which to it seemed better for the Indians. And without doubt it could confine the allotment and distribution to living members of the tribe or make any provision deemed more reasonable than the first for passing to the relatives of deceased members the lands and money to which the latter would be entitled, if living. In short, the power of Congress was not exhausted or restrained by the adoption of the original agreement, but remained the same thereafter as before, save that rights created by carrying the agreement into effect could not be divested or impaired. *Choate v. Trapp*, 224 U. S. 665, 671.

To the same effect is *Chase, Jr. v. United States*, 261 Fed. 833, affirmed 256 U. S. 1. In that case, it was held that an act passed by Congress in 1912, authorizing the survey, appraisal and sale by the Secretary of the Interior of all of the unallotted lands of the Omaha Reservation, was inconsistent with and therefore repealed prior allotment laws enacted in execution of treaty stipulations. It was further held that such repeal operated to cut off the right to allotment of an individual Indian, otherwise entitled thereto, whose allotment selection the Secretary of the Interior had declined to approve. It was contended by the Indian claimant that he had a vested right to allotment under the treaties and allotment acts, but the Circuit Court of Appeals, Eighth Circuit, held that he "never

obtained a vested interest in the unallotted lands of the Omaha Tribe under any law, and Congress had plenary power to at any time change the mode of disposition of these unallotted lands." Affirming this holding, the Supreme Court said:

The contention is one that has often been made in this court and rejected as often as made. *Gritts v. Fisher*, 224 U. S. 640; *Choate v. Trapp*, 224 U. S. 665; *Cherokee Nation v. Hitchcock*, 187 U. S. 294. In those cases the relation of the individual Indian to the tribal property is explained and also the power of Congress over that property and the tribes. In the recent case of *United States v. Chase*, 245 U. S. 89, we had occasion to consider the Reservation here involved and the effect of Article IV of the treaty of 1865 relied on by the appellant, and decided that its purpose was to do no "more than to individualize the existing tribal right of occupancy" and that it left "the fee in the United States" and left "the United States and the tribe free to take such measures for the ultimate and permanent disposal of the lands, including the fee, as might become essential or appropriate in view of changing conditions, the welfare of the Indians and the public interests."

I have hereinbefore expressed the view that the authorization for allotments contained in the act of 1891, as amended by the act of 1917, is permissive or discretionary rather than mandatory. Inasmuch, however, as the provisions of the statute considered in *Sizemore v. Brady*, *supra*, and portions of those involved in *Chase, Jr. v. United States*, *supra*, were framed in mandatory language, it appears to be immaterial from the viewpoint of Congressional power of modification or repeal whether the act of 1891 as amended be regarded as permissive or mandatory.

The patents issued to the Mission Indian bands or villages under the act of 1891 conveyed to the bands or villages rights of use and occupancy to the reservation lands, the legal title remaining in the United States. Whatever title the Indians have in virtue of these patents is in the village or band, and not in the individual members. *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 307. The foregoing decisions clearly establish that acts of Congress looking to the allotment in severalty of such lands do not, of their own force, create any vested right in any individual Indian. Until such acts of Congress have been carried into effect to the extent of creating vested property rights in the individual Indians, the reservation lands remain in tribal ownership subject to the undisputed power of Congress to deal with them as such. The first question is accordingly answered in the negative.

The Commissioner of Indian Affairs states that subsequent to the approval of the act of 1917, amending the act of 1891, an allotting agent was placed in the field and allotments in severalty were made

on several of the Mission Indian reservations, which allotments were duly approved and patents issued to the allottees as provided in section 5 of the act of 1891. In no other cases have allotments proceeded to the point of receiving approval by the Secretary of the Interior. On one of the reservations, according to the Commissioner, considerable time and effort was spent in an endeavor to complete allotment of the reservation lands. Selections were made by many but not all of the Indians and at least two allotment schedules were prepared. Neither schedule was approved and the allotment plans were finally abandoned for various reasons not the least of which was opposition among the Indians themselves to the allotment of the reservation lands.

As to those allotments which have been perfected and completed by the issuance of trust patents, it is clear that the allottees have become invested with the equitable title and the beneficial use of all that would pass under a final or fee simple patent. *Oklahoma v. Texas*, 258 U. S. 574, 597. It is clear also that the equitable title so acquired by these patentees cannot be impaired by subsequent legislation (*Choate v. Trapp*, 224 U. S. 665, 677). S. 1424 does not propose so to do.

The bill does propose to prohibit the Secretary of the Interior from perfecting or completing allotments "heretofore listed or scheduled to any of said Indians which have not been approved by the Secretary of the Interior prior to the passage of this Act." If the lands so selected and listed or scheduled thereupon become the individual property of the selectors and the tribal title thereupon became extinguished, the proposed legislation, if enacted, doubtless would be invalid as an unwarranted invasion of private property rights. But I am aware of no decision, departmental or court, which accords such weight to an unapproved allotment selection. In my opinion of July 17, 1935 (M. 2806), it was held that certain approved and unapproved allotment selections on the Fort Belknap Reservation in Montana might proceed to patent notwithstanding the declaration in section 1 of the act of June 18, 1934 (48 Stat. 984), that thereafter no land of any Indian reservation should be allotted in severalty to any Indian. That opinion, however, rested primarily on the premise that the inhibition against further allotments was not intended to prevent the completion of allotments, mandatorily provided for in the Fort Belknap allotment act, for the benefit of the remaining few unallotted Indians whose right to allotment under the allotment act became fixed long prior to the passage of the prohibitory legislation. Neither that opinion nor any of the numerous decisions cited therein is authority for the proposition that an unapproved allotment selec-

tion confers an absolute property right in the selector to the extent of precluding Congress from forbidding that mode of disposition of tribal property. That an unapproved allotment selection does not have such a far-reaching effect is established by the case of *Chase, Jr. v. United States, supra*. Chase, Jr., who was a member of the Omaha Tribe of Indians, selected and claimed an allotment of 80 acres of land on the Omaha Reservation. The Secretary of the Interior having declined to approve his selection, suit was brought to obtain a decree for allotment under the act of February 6, 1901 (31 Stat. 760). The United States moved to dismiss the bill and the trial court sustained the motion. On appeal, the Circuit Court of Appeals, Eighth Circuit, reversed the trial court and held, among other things, that the plaintiff was entitled under the then existing law to an allotment of 40 acres. The case was accordingly remanded to the trial court with instructions to permit the defendant to answer, 238 Fed. 889. The case was then retried on its merits and a decree of dismissal entered for the reason that Congress in the meantime had repealed the laws under which the plaintiff was entitled to an allotment. The decree was affirmed on appeal by the Circuit Court of Appeals and by the United States Supreme Court, both courts holding that Chase, Jr., had not obtained a vested right in the selected lands and that Congress had plenary power at any time to change the mode of disposition of the unallotted lands. In the course of its decision, the Circuit Court of Appeals stated:

If we should concede that Chase, Jr., had a floating right in the unallotted lands, that right did not attach to a particular tract of land until such tract of land had been definitely located, selected, and set apart to the allottee.

To the same effect is *Clay v. United States*, 282 Fed. 268. That was a suit for allotment brought by the heir of two Omaha Indians whose selections in allotment had not been approved and the application of the heir in their right had been denied because of the death of the claimants before the allotments were completed. Rejecting the claim of the heir, the court said:

* * * The United States denied the right of appellant to an allotment, for the reason that the persons entitled thereto, the mother and daughter, had died before any allotments were made. *Woodbury v. U. S.*, 170 Fed. 302, 95 C. C. A. 498; *La Roque v. U. S.*, 239 U. S. 62, 36 Sup. Ct. 22, 60 L. Ed. 147. These cases support the proposition that, until the allotments were made, the right thereto was a mere float, and from its nature would not descend to heirs. Whether those cases are conclusive as to the rights of appellant in this case need not be determined, as we are clearly of the opinion that the Act of May 11, 1912 (37 Stat. 111), as construed by the Supreme Court in the case of *Hiram Chase, Jr., v. U. S.*, 256 U. S. 1, 41 Sup. Ct. 417, 65 L. Ed. 801 (April 11, 1921), cut off all right of appellant to an allotment under the act of 1893.

Mere selection thus is not enough to establish a vested property right in the individual Indian. The land in addition must be set apart to the allottee, and this is usually accomplished by the issuance of a trust patent for the land after the allotment selection has been approved by the Secretary of the Interior. Whether any step in the allotment process short of actual issuance of the trust patent is sufficient to divest the tribal title and vest the same in the allottee is open to serious question in view of the decision of the United States Supreme Court in *United States v. Reynolds*, 250 U. S. 104, in which it is indicated that even approval by the Secretary of the Interior is not absolute or final. The question in any event, insofar as the Mission Indians are concerned, is removed from controversy by the express provisions of the act of 1891. Section 3 of that act, in providing for the issuance of a final fee patent to the band or village, excludes only lands "previously patented in severalty," thereby recognizing that the tribal title is not extinguished until a trust patent has issued to an individual allottee. In section 5, dealing with the issuance of trust patents to individual Indians, it is provided that such patents "when issued, shall override the patent authorized to be issued to the band or village as aforesaid, and shall separate the individual allotment from the lands held in common," again recognizing tribal ownership until the individual trust patent issues. Finally, in section 8, dealing with grants of rights of way for various purposes, it is provided that contracts therefor may be made, subject to the approval of the Secretary of the Interior, with the band or village prior to issuance of individual trust patents, but with the individual allottee after a trust patent has issued to him as provided in section 5. This is a clear and definite recognition that no property rights vest in the individual allottee until the trust patent actually issues. From these repeated declarations, I conclude that the lands of these Mission Indian bands or villages remain in communal ownership until trust patents have issued to individual allottees and that until that time, it is competent for Congress to abandon the purpose to distribute such lands in severalty, or adopt another mode of distribution, or pursue such other course as to it seems better for the Indians. *Sizemore v. Brady, supra*. The second question is answered accordingly.

Approved: April 8, 1937.

OSCAR L. CHAPMAN,
Assistant Secretary.

AUTHORITY OF THE SECRETARY OF THE INTERIOR TO RESERVE WATERS IN CONNECTION WITH, AND INDEPENDENTLY OF, LAND RESERVATIONS FOR ALASKAN NATIVES UNDER THE ACT OF MAY 1, 1936

Opinion, April 19, 1937

INDIAN RESERVATIONS—NECESSITY FOR STATUTORY AUTHORITY FOR WITHDRAWALS IN ALASKA.

In view of the acts of Congress prohibiting withdrawal of public lands in the United States for Indian reservations except by act of Congress, the Secretary of the Interior should rely upon statutory authority for withdrawals in Alaska for reservations for Alaskan natives.

RESERVATIONS FOR ALASKAN NATIVES—ACT OF MAY 1, 1936—INTERPRETATION OF STATUTES.

The principle that a statute should be interpreted in the light of the situation and needs of the Indians may be applied to the act of May 1, 1936, to determine the intent of Congress as to reservation of waters as well as land for the use of Alaskan natives.

RESERVATION OF WATERS—INTENT OF ACT OF MAY 1, 1936—REQUIREMENTS OF NATIVES.

The purpose of the act of May 1, 1936, to conserve and develop native resources and to foster economic organizations of Alaskan natives indicates an intent of Congress to authorize reservation of waters in connection with land reservations where necessary for Alaskan natives whose occupations require use of waters.

WATERS AS PART OF PUBLIC DOMAIN—TERRITORIAL TIDEWATERS AND SUBMERGED LANDS HELD AS PUBLIC TRUST—DISPOSITION FOR USE OF ALASKAN NATIVES.

The statutory term "public lands" is equivalent to the term "public domain" which includes tidewaters and submerged lands. The withdrawal of territorial tidewaters and submerged lands for the use of Alaskan natives is held not to be inconsistent with the obligation of the United States to hold them in trust for the benefit of the whole people.

RESERVATIONS FOR ALASKAN NATIVES—AREAS AUTHORIZED TO BE RESERVED—ACT OF MAY 1, 1936.

Section 2 of the act of May 1, 1936, authorizes the Secretary of the Interior to designate as Indian reservations for Alaskan natives either (1) existing reserves specified in the act, (2) such reserves together with additional adjacent public lands, and (3) other public lands actually occupied by Indians or Eskimos within Alaska.

NECESSITY OF OCCUPANCY BY ALASKAN NATIVES—RESERVATION SOLELY OF WATERS.

Since no reservation can become effective under the act of May 1, 1936, until approved by the native residents thereof, part of every reservation created under that act must be land upon which natives are actually residing, and therefore no reservation consisting solely of waters can be created.

RESERVATION OF WATERS IN CONNECTION WITH LAND RESERVATIONS—POSSIBLE EXTENT.

The waters which may be reserved as part of a reservation of lands for Alaskan natives may not extend further than essential for effective use of the reservation and further than can be considered an integral part of

the reservation. The extent of the waters included in the Annette Islands Reservation should be used as a guide.

KIRGIS, *Acting Solicitor*:

You [the Secretary of the Interior] have requested my opinion on the questions raised by the Indian Office as to whether section 2 of the act of May 1, 1936 (49 Stat. 1250), extending the provisions of the Indian Reorganization Act to Alaska, authorizes the Secretary of the Interior to reserve for the natives of Alaska, in order to protect their fishing rights, (a) waters in connection with reservations of land made under that section, and (b) waters where there are no lands being reserved in connection therewith; and if so, whether waters may be withdrawn extending as far from the shore as the territorial limits of Alaska. Section 2 of the act follows:

SEC. 2. That the Secretary of the Interior is hereby authorized to designate as an Indian reservation any area of land which has been reserved for the use and occupancy of Indians or Eskimos by section 8 of the Act of May 17, 1884 (23 Stat. 26), or by section 14 or section 15 of the Act of March 3, 1891 (26 Stat. 1101), or which has been heretofore reserved under any executive order and placed under the jurisdiction of the Department of the Interior or any bureau thereof, together with additional public lands adjacent thereto, within the Territory of Alaska, or any other public lands which are actually occupied by Indians or Eskimos within said Territory: *Provided*, That the designation by the Secretary of the Interior of any such area of land as a reservation shall be effective only upon its approval by the vote, by secret ballot, of a majority of the Indian or Eskimo residents thereof who vote at a special election duly called by the Secretary of the Interior upon thirty days' notice: *Provided, however*, That in each instance the total vote cast shall not be less than 30 per centum of those entitled to vote: *Provided further*, That nothing herein contained shall affect any valid existing claim, location, or entry under the laws of the United States, whether for homestead, mineral, right-of-way, or other purpose whatsoever, or shall affect the rights of any such owner, claimant, locator, or entryman to the full use and enjoyment of the land so occupied.

In answering the questions raised I am assisted by the attitude and opinions of the Circuit Court of Appeals of the Ninth Circuit and of the Supreme Court in the *Alaska Pacific Fisheries* case, 270 Fed. 274 and 248 U. S. 78, which involved the analogous question of whether the waters adjacent to the Annette Islands Indian Reservation in Alaska were or could be included in that reservation. The reservation had been created by section 15 of the act of March 3, 1891 (26 Stat. 1101), providing for the reservation of "a body of lands known as Annette Islands" for the use of the Metlakahtla Indians. In 1916 the President by proclamation stated that it was necessary to withdraw the waters adjacent to the islands for the purpose of developing an Indian fishing industry, and reserved the waters within 3,000 feet of the shore at mean low tide. There was no express statutory authority for an extension of the reservation by Executive action.

In the *Alaska Pacific Fisheries* case the United States sought to enjoin an outsider from placing nets in the waters within the 3,000-foot limit. The Circuit Court of Appeals affirmed the granting of an injunction on the ground that the President, under his general authority, could reserve parts of the public domain, including territorial waters in Alaska, for Indian use, and that his reservation of the waters adjacent to the Annette Islands for fishing purposes was a reasonable and practical effectuation of the purposes of the act creating the reservation since the Indians depended on fishing in these waters for their sustenance. However, since this decision was rendered the acts of June 30, 1919 (41 Stat. 34), and March 3, 1927 (44 Stat. 1347), have been passed prohibiting the withdrawal of public lands of the United States for Indian reservations or the enlargement of existing reservations except by act of Congress. These acts would appear to apply to Alaska. But without expressly deciding their application, since the question has not been previously determined and is not in issue here, it is doubtful, in view of these statutes, whether reliance can be placed upon the rationale of the Circuit Court decision, that the Executive Department may supplement an act of Congress by withdrawing necessary land or water to add to an existing reservation. Accordingly, unless the authority for the withdrawal by the Secretary of the Interior of adjacent waters can be found in section 2 of the Alaska Reorganization Act, it is believed that the Secretary cannot make such withdrawals. The question is then purely one of statutory construction.

The Supreme Court in upholding the granting of an injunction in the *Alaska Pacific Fisheries* case, looked at the problem as one of interpretation of the statute creating the reservation. It set forth as follows the method of approach which should be used in determining such a question of statutory interpretation:

As an appreciation of the circumstances in which words are used usually is conducive and at times is essential to a right understanding of them, it is important, in approaching a solution of the question stated, to have in mind the circumstances in which the reservation was created—the power of Congress in the premises, the location and character of the islands, the situation and needs of the Indians and the object to be attained.

The court held that the power of Congress to reserve the adjacent waters was undoubted, since such waters were the property of the United States and subject to its dominion and sovereignty. It found that the purpose of creating the reservation was to assist the Indians in their effort to become self-sustaining and advance in civilized life, and that the facts showed that the Indians were primarily fishermen and could not sustain themselves from the use of the upland alone but that the use of the adjacent fishing grounds was equally essential. The court believed that Congress intended to conform its action to the situation and needs of the Indians and therefore held that the legislation

reserving the "body of lands known as Annette Islands" included in the reservation the adjacent waters. The court also restated the principle that statutes passed for the benefit of Indian tribes should be liberally construed in their favor.

If this method and ruling is applied to the instant question it would follow that section 2 of the 1936 Alaska Act may likewise be construed as intending to allow the reservation of fishing rights essential to the reservations created under that act. It is the same power of Congress that is being exercised. The purposes of this act are identical with those which surrounded the act reserving the Annette Islands Reservation and are here plainly expressed in the statute. The act recites the title of the Indian Reorganization Act (48 Stat. 984), June 18, 1934, which states as its purposes "to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians * * *." It is well known, as is recited in the opinions of the Supreme Court and the Circuit Court of Appeals concerning the Metlakahtla Indians, that the natives of Alaska are not naturally agricultural and depend chiefly on fishing and hunting for their livelihood. The fish of the Alaska coast region is one of their major resources and therefore appropriate to be conserved under the Reorganization Act in connection with their reservations. Moreover, a large number of the organizations developed under the Reorganization Act, particularly in southeast Alaska, will be fisheries and fish canneries. It will be these fish enterprises, similar to the successful enterprise developed by the Indians of the Annette Islands, which will be major users of the credit system established under the Reorganization Act. The Alaska Reorganization Act provides that the Indians may be organized, not as bands or tribes, but as groups having "a common bond of occupation." One of the most usual bonds of occupation is that of fishing and it is certain that many of the communities organized under the Reorganization Act will be fishing communities. The economic purpose of this legislation extending the Reorganization Act to Alaska was made clear in the report by the Interior Department to Congress on this act when it was introduced. The report stated that since the original Indian Reorganization Act did not extend the right of incorporation and enjoyment of credit privileges to Alaska, the Alaska Act was designed to remedy this omission. From these facts it is evident that the purpose of the Alaska Act would be seriously frustrated if the reservations designated under it could not embrace the major resource of many of the Indian organizations.

The express language of section 2 of the Alaska Act is not materially more confining in its application than that which was used

in the act reserving the Annette Islands Reservation. Instead of the words "body of lands" the words are used, "any area of land" and "additional public lands adjacent thereto * * * or any other public lands which are actually occupied by Indians or Eskimos." The term "public lands" is synonymous with the term "public domain," and the tidewaters of the territories of the United States and the lands under them have been classified as part of the public domain since they belong exclusively to the United States Government and are subject to its disposition. *Shively v. Bowlby*, 152 U. S. 1; *Alaska Pacific Fisheries v. United States*, 248 U. S. at 87; 240 Fed. at 281, 282. It has been said that the United States holds these tidewaters and submerged lands in trust for the benefit of the whole people and that these waters and lands have never been disposed of under general laws. It is believed that neither of these propositions is violated by the proposed interpretation of section 2 of the Alaska Reorganization Act. The Circuit Court of Appeals in the *Alaska Pacific Fisheries* case stated that the reservation of the adjacent waters for the use of the Indians of the Annette Islands Reservation was not in conflict with the trust obligation of the United States since such action protected the food supply of a whole tribe of Indians who might otherwise become a public charge. And section 2 of the Alaska Reorganization Act is not a general law providing for the disposition of tidewaters but a limited law providing only for the designation of the particular kind of reservations which come within the classifications listed in section 2.

The reservations to be designated under section 2 must fall within one of the following three classes: first, areas which have already been reserved under the legislation specified or by Executive order. The specification in this class of the legislation which created the Annette Islands Reservation is further evidence of the fact that Congress intended adjacent waters to be included in the reservations designated, since if the Secretary is to exercise his authority under section 2 to declare the Annette Islands an Indian reservation, it would be obligatory upon him to include the adjacent waters already recognized as part of the reservation. The second category consists of existing reservations, "together with additional public lands adjacent thereto, within the Territory of Alaska." In view of the rulings of the Supreme Court previously discussed, this language may be said to permit the Secretary to declare territorial waters adjacent to existing reservations to be part of the reservations. The third category consists of other public lands not connected with existing reservations but occupied by Indians or Eskimos. This permits entirely new reservations. If the language in this category were not modified elsewhere in the act, it might be reasonable to hold,

in reply to question (b) of the Indian Office, that fishing waters used by the natives but not connected with any reservation might be reserved under this section. However, I believe that the act read as a whole indicates that the principal part of every reservation designated under section 2 must be land upon which the natives are actually residing. The first proviso in section 2 requires that the designation be approved by a majority vote of the native residents of the proposed reservation. This proviso could not be fulfilled if a reservation were declared which consisted only of fishing waters. Moreover, the phrase "actually occupied" implies residence rather than mere use.

It is therefore my opinion that the waters not connected with any reservation of the uplands cannot be independently reserved under section 2 of the Alaska Act but that waters adjacent to any lands already reserved or being reserved can be reserved for the natives occupying the rest of the reservation. My answer to part (a) of the first question is therefore in the affirmative and to part (b) in the negative.

My answer to the second question, namely, whether waters may be withdrawn extending as far from the shore as the territorial limits of Alaska, must likewise be answered in the negative on the facts now available. The test applied by the Supreme Court in recognizing the waters adjacent to the Annette Islands as part of the Annette Islands Reservation was that these waters were an essential part of the reservation intended for Indian use and that these waters were generally considered part of the islands. I am of the opinion that section 2 of the Alaska Act does not authorize any further withdrawal than that which can be justified under the test formulated by the Supreme Court, that is, so much of the waters adjacent to any reservation as are essential for effective use of the reservation and extending only so far as can be reasonably considered an integral part of the reservation. It appears that for all practical purposes the extent of water designated by the President in connection with the Annette Islands Reservation, namely, 3,000 feet from the shore at mean low tide, should be used as the standard and even as the maximum unless it is shown that the natives have been using and actually need a further area. An extension of the area of Indian reservations to great lengths in the territorial waters of Alaska would seriously conflict with the authority of the Secretary of Commerce, given in various acts of Congress, to regulate fishing in the territorial waters, and with the policy of Congress expressed in those acts of providing equal fishing opportunities to all citizens.

Approved: April 19, 1937.

OSCAR L. CHAPMAN,

Assistant Secretary.

THE REPAYMENT TO THE UNITED STATES OF THE CONSTRUCTION COST OF THE ALL-AMERICAN CANAL

Opinion, April 27, 1937

IRRIGATION DISTRICTS—BOULDER CANYON PROJECT ACT—POWER DEVELOPMENT— P. W. A. AND R. E. A. LOAN AGREEMENTS—INDEBTEDNESS TO THE UNITED STATES.

Section 7 of the Boulder Canyon Project Act (act of December 21, 1908, 45 Stat. 1057), provides that the net proceeds from any power development on the All-American Canal shall be paid into the canal fund until the equivalent of operation, maintenance, and construction costs shall have been paid. The P. W. A. and R. E. A. proposed making loans for the construction of power systems, on condition that the gross revenue of such systems be applied to the operation and maintenance costs and payment of bonds securing the loans. *Held*, That the United States is entitled to the net proceeds from the power system after deductions have been made for operation and maintenance costs; for payment of principal and interest of the bonds, and for the one-year reserves for such payments as authorized in the above-mentioned loan agreements.

IRRIGATION DISTRICTS—BOULDER CANYON PROJECT ACT—CLAIMS OF THE UNITED STATES—PRIORITY.

The provision in section 14 of the act of December 21, 1908, that "claims of the United States arising out of any contract authorized by this act shall have priority over all others" entitles the United States thereto only so long as the net proceeds from power development are in the hands of the irrigation district.

KIRGIS, Acting Solicitor:

Certain questions concerning the nature and extent of the security of the United States for repayment of the construction cost of the All-American Canal under its contract of December 1, 1932, as amended April 10, 1935, with the Imperial Irrigation District have been submitted to me for opinion.

The questions arise by reason of a proposed offer of a loan and grant by the Federal Emergency Administration of Public Works, and a proposed offer of a loan by the Rural Electrification Administration to the Imperial Irrigation District, the amounts totalling \$3,460,000, for the purpose of financing the construction of an electric power production, transmission and distribution system in the Imperial Valley, California. Before proceeding to a discussion of the specific questions raised, it is important that the pertinent provisions of the contract between the United States and the District and the proposed offers be reviewed.

The contract of December 1, 1932, between the United States and the Imperial Irrigation District was made pursuant to the Reclamation Act (act of June 17, 1902, 32 Stat. 388) and the Boulder Canyon Project Act (act of December 21, 1908, 45 Stat. 1057). It

provides for the construction of the Imperial Dam and the All-American Canal and appurtenant structures, at an ultimate cost to the District of not to exceed \$38,500,000, payable to the United States in 40 annual installments. Section 7 of the Boulder Canyon Project Act provides in part:

* * * The said districts or other agencies shall have the privilege at any time of utilizing by contract or otherwise such power possibilities as may exist upon said canal, in proportion to their respective contributions or obligations toward the capital cost of said canal and appurtenant structures from and including the diversion works to the point where each respective power plant may be located. The net proceeds from any power development on said canal shall be paid into the fund and credited to said districts or other agencies on their said contracts, in proportion to their rights to develop power, until the districts or other agencies using said canal shall have paid thereby and under any contract or otherwise an amount of money equivalent to the operation and maintenance expense and cost of construction thereof.

Pursuant to the foregoing, Article 14 of the contract provides in part:

* * * Subject to the foregoing provisions of this Article and the participation by other agencies as provided for in Article twenty-one (21) hereof, the District shall have the privilege at any time of utilizing by contract or otherwise such power possibilities as may exist upon said canal. The net proceeds as hereinafter defined in Article thirty-two (32) hereof and as determined by the Secretary for each calendar year from any such power development shall be paid into the Colorado River Dam Fund on March first of the next succeeding calendar year and be credited to the District on this contract until the District shall have paid thereby and/or otherwise an amount of money equivalent to that herein agreed to be paid to the United States. Thereafter such net power proceeds shall belong to the District. It is agreed that in the event the net power proceeds in any calendar year, creditable to the District, shall exceed the annual installment of charges payable under this contract during the then current calendar year, the excess of such net power proceeds shall be credited on the next succeeding unpaid installment to become due from the District under this contract.

Article 32 of the contract provides—

In determining the net proceeds for each calendar year from any power development on the All-American Canal, to be paid into the Colorado River Dam Fund as provided in Article fourteen (14) hereof, there shall be taken into consideration all items of cost of production of power, including but not necessarily limited to amortization of and interest on capital investment in power development, replacements, improvements, and operation and maintenance, if any. Any other proper factor of cost not here expressly enumerated may be taken into account in determining the net proceeds.

The following is section 17 of the Boulder Canyon Project Act and is embodied in substance in Article 35 of the contract:

Claims of the United States arising out of any contract authorized by this act shall have priority over all others, secured or unsecured.

The foregoing are the significant provisions in a determination of the extent of the right of the United States to the proceeds from power development on the canal.

Under the terms of the proposed offer by the Federal Emergency Administration of Public Works (Docket No. Calif. 1088-P-D); the United States would aid in financing the construction of a hydro-electric generating plant, a diesel electric generating plant, and an electric transmission and distribution system, including necessary equipment and the acquisition of necessary land and rights of way, by a grant of 45 percent of the cost of the project, but not exceeding \$1,242,000, and by purchasing revenue bonds of the District in the aggregate principal amount of \$1,518,000, maturing over a period of 30 years. Paragraph 1 (i) of the offer provides—

Security: The Bonds, together with such additional bonds as may be issued for extensions of and additions, betterments, and improvements to the System in accordance with Paragraph 2 hereof, shall be payable as to both principal and interest exclusively from, and secured by a first pledge of, an amount of the gross revenues of the System, after deducting therefrom only the amounts necessary to pay the reasonable cost of maintenance and operation of the System, sufficient to pay said principal and interest as the same become due and payable, and to maintain reasonable reserves for the payment of principal and interest on the Bonds.

Paragraph 2 (c) of the offer provides—

That the reserves for the Bonds and for any additional bonds hereafter issued for extensions, additions, betterments, or improvements to the System, mentioned in subparagraph (i) of Paragraph 1 hereof, shall not exceed an amount sufficient to meet the principal and interest payments on such bonds for an average year, such amount to be computed by determining the arithmetical mean of annual principal and interest payments.

Under the terms of the proposed offer by the Rural Electrification Administration (designated as R. E. A. Project California 1—Imperial), the United States would aid in financing the construction of an electric transmission and distribution system within rural areas in the District by loaning not to exceed \$700,000, the debt to be evidenced by revenue bonds of the District maturing over a period of 20 years. Paragraph 10 of the proposed form of bond resolution by the board of directors of the District, which would be made a part of its contract with the Rural Electrification Administration, provides for the allocation of all revenues of the Project (i. e., the R. E. A. project) to the payment of the principal of and the interest on the bonds, with certain exceptions not here material, and paragraph 11 provides in part—

that the District shall establish and maintain a special fund designated as the "Fifth Special Issue United States Contract Fund" (hereinafter referred to as the "Contract Fund"), and on or before the 15th day of each calendar month from and after the date when Project Revenues shall begin to be derived, the

District shall pay into the Contract Fund all of the Project Revenues for the preceding calendar month until there shall have been accumulated in the Contract Fund an amount of money (hereinafter called the "Current Requirements") sufficient for the payment of (1) the interest on the Bonds which shall have become due but which shall be unpaid, if any, (2) the principal of Bonds which shall have become due but which shall be unpaid, if any, and (3) the principal of Bonds and the interest on the Bonds which shall become due on the next succeeding interest payment date; * * * and that on or before the 26th day of December in each year after the date of the completion of the Project, the District shall pay into the Contract Fund all of the remaining Project Revenues for the twelve-month period ending on the 30th day of November next preceding until there shall have been accumulated in the Contract Fund an amount of money (hereinafter called the "Reserve Requirements") which shall be sufficient for the payment of the principal of Bonds, if any, and the interest on the bonds which shall become due on the two interest-payment dates next succeeding the following interest-payment date;

Paragraph 12 provides—

that the Treasurer of the District shall apply the money in the Contract Fund for the following purposes and in the following order of priority only: *first*—to the payment of the interest on the Bonds which shall have become due but which shall be unpaid, if any; *second*—to the payment of the principal of Bonds which shall have become due but which shall be unpaid, if any; *third*—to the payment of the principal of Bonds and the interest on the Bonds which shall become due on the next succeeding interest payment date, and any money remaining in the Contract Fund in excess of the Current Requirements shall be held in the Contract Fund and may be invested as provided in paragraph (13) hereof, provided, however, that whenever there shall be held in the Contract Fund an amount of money in excess of the Current Requirements which shall be equal to the aggregate principal of the Bonds outstanding such excess money may be used by the Treasurer of the District for the redemption and payment of the Bonds outstanding;

Paragraph 16 of the form of bond resolution provides—

that, in addition to the Project Revenues so allocated, the District hereby irrevocably allocates to the payment of the principal of and the interest on the Bonds such part of the net revenues derived by the District from all electric generating plants and all electric transmission and distribution lines and facilities now or hereafter owned or operated by the District but not included within the Project (such plants, lines, and facilities, being hereinafter called the "District System" and such net revenues being called the "System Revenues") as shall be sufficient, together with the money in the Contract Fund, to meet the Current Requirements and the Reserve Requirements; that the District shall pay into the Contract Fund on or before the 26th day of December in each year all of the System Revenues derived during the twelve month period ending on the 30th day of November next preceding such date, or such part thereof as shall be necessary for such purposes; that the System Revenues shall mean the gross revenues of the District derived from the operation of the District System after deducting therefrom all amounts necessary to pay the reasonable costs of the operation and maintenance of the District System and the principal of and interest on bonds hereafter issued by the District, the entire proceeds of which shall be employed for the purpose of constructing the District System or any part thereof or consisting or acquir-

ing extensions, additions, betterments, and improvements to the District System, together with such amounts as shall be sufficient for the creation and maintenance of reasonable reserves for the payment of such costs of operation and maintenance and the principal of and interest on such bonds; * * *

It has been necessary to quote the foregoing at some length in order to present a complete basis for a consideration of the questions which have been referred to me following their submission to the Department by counsel for the Imperial Irrigation District. Three questions originally were submitted, but in a letter dated April 13, 1937, counsel has withdrawn the second question, having to do with the right of the United States to the net proceeds from the transmission and distribution of energy, as distinguished from the net proceeds from generation alone. The letter of withdrawal bears the approval of the Commissioner of the Bureau of Reclamation and the Director of the Power Division of the Federal Emergency Rural Electrification Public Works, and the General Counsel of the Rural Electrification Administration has informally stated that there is no objection to the withdrawal. The discussion in this opinion accordingly will be principally confined to the first and third questions. For convenience, I shall quote and discuss each question separately:

I

What is the meaning of "net proceeds from any power development on said Canal" as used in Section 7 of the Boulder Canyon Project Act, and "net proceeds for each calendar year from any power development on the All-American Canal" as used in Articles 14 and 32 of the All-American Canal Contracts, when considered in connection with the proposals of Public Works Administration and Rural Electrification Administration, which require the gross revenues of the entire electric power system of the District (including both Public Works Administration and Rural Electrification Administration projects and all future extensions, additions and improvements thereto) to be applied, first, to the operation and maintenance of the production, transmission and distribution facilities, and, second, to the payment of the principal of and interest on bonds (the proceeds of which have been used to construct the two projects constituting the District's electric power system), to be amortized within 30 and 20 years, respectively, together with the creation and maintenance of a one year reserve fund for all of said bond issues to assure the payments of principal and interest thereof? Do the "net proceeds" to which the United States is entitled under said act and contract come after the deductions and payments authorized and required by the proposed loan agreements?

It is my opinion that this question as last stated may be answered in the affirmative with one possible qualification, which will be mentioned and discussed later. Section 7 of the Boulder Canyon Project Act merely provides that the net proceeds "from any power development on said canal" shall be paid into the Colorado River Dam Fund and does not define "net proceeds." Article 32 of the All-

American Canal contract, however, provides that in determining net proceeds there shall be taken into consideration all items of cost of production of power, "including but not necessarily limited to *amortization of and interest on capital investment* in power development, replacements, improvements, and operation and maintenance, if any." [Italics supplied.] It is my opinion that this provision is consistent with section 7 of the act when it is borne in mind that the act is silent on a definition of net proceeds, and that in any event it would be necessary to finance any power development by means which ordinarily would contemplate securing investors to the extent of their participation.

The same justification may be regarded as existing for the creation and maintenance of the one-year reserves for the payment of the principal of and interest on the bonds. The bonds are to be secured only by the revenues from the system and the reserves seem clearly to be a reasonable "factor of cost" which may be deducted in determining net proceeds.

The one qualification of the affirmative answer to question I is linked with the answer to question II, which has been withdrawn. If the United States is entitled to have the net proceeds from transmission and distribution of energy, as well as those from generation, paid into the fund, no difficulty concerning the deduction of principal, interest, and reserves for both bond issues is apparent. If, on the other hand, the United States is entitled to the net proceeds from generation alone, it is my opinion that the R. E. A. bondholders cannot look beyond the revenues from the R. E. A. project, notwithstanding the language of paragraph 16 of the proposed bond resolution. This point will be discussed in greater detail under question III, in connection with section 17 of the Boulder Canyon Project Act and Article 35 of the All-American Canal contract.

III

What is the meaning and scope of Section 36 [35] of the Imperial-All American Canal Contract providing that claims of the United States arising out of that Contract shall have priority over all others, secured and unsecured, when applied to the District's obligations to Public Works Administration and Rural Electrification Administration set out in their respective proposals attached hereto?

To the extent that Article 35 of the contract is to be considered in connection with question I, i. e., with the propriety of deducting debt charges before computing the "net proceeds" to be paid into the Colorado River Dam Fund, I do not regard it as affecting the general affirmative answer to question I. That is to say, the only claim of the United States "arising out of this contract," so far as revenues from power development are concerned, is a claim to the net pro-

ceeds, which, as already shown in the discussion of question I, may be regarded as not accruing until the current and reserve requirements of the bond issues have been satisfied.

Article 35 of the contract and section 17 of the Boulder Canyon Project Act, pursuant to which Article 35 is included, are of importance in a further connection, however, when two particular provisions, which already have been set forth in greater detail herein, of the proposed form of resolution for the R. E. A. bond issue are considered. By paragraph 10 the District "irrevocably allocates to the payment of the principal of and interest on the Bonds all revenues of the Project * * * and the Project Revenues shall be applied solely and exclusively to the payment of the principal of and interest on the Bonds * * *." By paragraph 16 the same allocation is made of such part of the net revenues from the entire "District System" (i. e., including the generating plant) "as shall be sufficient, together with the money in the Contract Fund, to meet the Current Requirements and the Reserve Requirements * * *." Net or "System" revenues are defined to be the gross revenues from the entire system, less operation and maintenance costs and amounts necessary for payments of and the creation of reserves for principal and interest on bonds "hereafter issued by the District the entire proceeds of which shall be employed for the purpose of constructing the District System or any part thereof * * *" (i. e., including the P. W. A. bond issue).

The effect of the foregoing provisions, so far as the United States is concerned, is dependent on the answer to question II, which is not now to be determined. For the purposes of this portion of the discussion, however, it will be assumed for the moment that the United States is entitled to have the net proceeds only from the generation of energy, as distinguished from those from transmission and distribution, paid into the Colorado River Dam Fund. In this event, paragraph 10 of the proposed bond resolution is unobjectionable, since it allocates only the revenues from the R. E. A. project, which will not include the generation of energy. Paragraph 16 *may* be objectionable under the same assumption, however, since it purports to give the R. E. A. bondholders a second lien or charge on revenues arising, *not* from the R. E. A. project alone, but from the operation of the generating plant as well, whereas the net proceeds from the operation of the latter are payable into the Colorado River Dam Fund under section 7 of the Boulder Canyon Project Act and Article 14 of the All-American Canal contract. If the words "net proceeds from any power development on said canal" should be construed to require the breaking up of costs and revenues from the entire system and their allocation between generation, transmission, and distribution

for the purpose of paying to the United States the net proceeds from generation only, then obviously debt charges allocable to distribution should not be deducted from the gross revenues from generation in determining the net proceeds from generation.

If it be assumed, on the other hand, that the United States is entitled to the net proceeds from transmission and distribution as well as from generation, the possibly objectionable effect of paragraphs 10 and 16 of the proposed R. E. A. bond resolution is exactly reversed. Paragraph 16 now is unobjectionable because the net proceeds will have been determined only after the deduction of the amounts necessary for payments of principal and interest and the creation of a one-year reserve for both bond issues, and paragraph 16 allocates only so much of the revenues as may be necessary to meet current and reserve requirements. Paragraph 10 on its face, however, is not free from objection, because of its very broad language "irrevocably" *allocating all* revenues of the R. E. A. project to the payment of principal of and interest on the bonds and providing that "the Project Revenues shall be applied solely and exclusively" to such payments. The literal import of this language alone is inconsistent with the payment of any "net proceeds" from distribution into the Colorado River Dam Fund in any year, even though the current and reserve requirements of the R. E. A. bond issue might have been satisfied.

Since, therefore, under either assumption with reference to the extent of the right of the United States to the net proceeds from power development an apparent conflict between one of two paragraphs of the proposed R. E. A. bond resolution, on the one hand, and section 7 of the Boulder Canyon Project Act and Article 14 of the All-American Canal Contract, on the other hand, exists, it becomes desirable to determine, if possible, the exact nature rather than the extent of the right of the United States.

It is here that section 17 of the act becomes important. It provides that "claims of the United States arising out of any contract authorized by this act shall have priority over all others, secured or unsecured." Unquestionably neither paragraph 10 nor paragraph 16 of the proposed bond resolution can operate in contravention of this statutory provision. So long, therefore, as the net proceeds from power development are in the hands of the District, the United States would be entitled to have them paid into the fund and neither paragraph 16, if the United States is entitled to the net proceeds from generation only, nor paragraph 10 if it is entitled to the net proceeds from transmission and distribution also, could operate to defeat this right.

Even without the statutory provision, it seems reasonable that Article 14 of the contract would operate to create an equitable lien in favor of the United States on the net proceeds, within the meaning of the following statement in Pomeroy's Equity Jurisprudence (3d ed.), section 1235:

The doctrine may be stated in its most general form, that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or encumbrancers with notice. * * *

The foregoing was quoted with approval in *Walker v. Brown*, 165 U. S. 654, 664-665, in which Mr. Justice White further said (p. 666):

* * * To dedicate property to a particular purpose, to provide that a specified creditor and that creditor alone shall be authorized to seek payment of his debt from the property or its value, is unmistakably to create an equitable lien.

To the same effect are *Ketchum v. St. Louis*, 101 U. S. 306; *Burdon Sugar Refining Co. v. Payne*, 167 U. S. 127; *Ingersoll v. Coram*, 211 U. S. 335; *United States v. Butterworth-Judson Corp.*, 267 U. S. 387.

The question remains, however, whether the foregoing would be true if the "net proceeds," under either assumption, already had been diverted by virtue of one or the other of the two paragraphs. An affirmative answer seems doubtful since, while a bondholder, for example, would have notice at least of the statutory provisions he might be held not bound to know of the source of his payment. That is, the computation of the amount of net proceeds is essentially a bookkeeping transaction and the amount is "determined by the Secretary for each calendar year" (Article 14 of the contract), taking into consideration "all items of cost of production of power" and "any other proper factor of cost" (Article 32 of the contract). If, under the assumption that the United States is entitled to the net proceeds only from the generation of energy, there should be insufficient revenues from the R. E. A. project to satisfy the current and reserve requirements of the R. E. A. bond issue, but sufficient of the revenues from generation should be taken under paragraph 16 to meet those requirements and actually so expended, it seems doubtful that that money could be followed into the hands of bondholders so benefited and impressed with an equitable lien in favor of the United States.

There are three administrative considerations, however, one addressed to paragraph 10, one to paragraph 16, and one to both,

which may render these two paragraphs substantially unobjectionable. While paragraph 10 "irrevocably allocates to the payment of the principal of and interest on the Bonds all revenues of the Project * * * and the Project Revenues shall be applied solely and exclusively to the payment of the principal of and interest on the Bonds," paragraph 11, which already has been quoted herein in greater detail, provides merely for the payment into the "Contract Fund" of sufficient of the project revenues to satisfy current and reserve requirements. Paragraphs 10 and 11 accordingly are literally inconsistent to the extent that one provides that revenues shall be used only for certain purposes while the other requires the actual use of only so much of the revenues. Whether the two paragraphs can be construed so that paragraph 11 may be regarded as qualifying paragraph 10 seems doubtful. In informal discussion, a representative of the Rural Electrification Administration has explained that it was felt necessary to include the language of paragraph 10 in order to meet the formal requirements of California law relating to the bond issue, but that it is not the intention to attempt to exercise any dominion whatever over any part of the project revenues in excess of what may be necessary to satisfy current and reserve requirements. This consideration is of course of importance only in the event that such an excess should arise.

The second consideration concerns the possibly objectionable effect of paragraph 16 in the event that the United States should be held to be entitled to the net proceeds from the generation of energy only. Counsel for the District has submitted a tabulation prepared by Mr. M. J. Dowd, Chief Engineer and General Superintendent of the District, showing the requirements under the P. W. A. and R. E. A. projects for the 10-year period beginning with 1938. The following figures are taken from the tabulation for the first five years:

Year.....		1938	1939	1940	1941	1942
1	Gross revenue.....	\$464,340	\$540,154	\$592,145	\$642,712	\$688,682
2	Operation and maintenance.....	190,570	213,340	168,620	176,720	183,260
3	New revenue for debt.....	273,770	326,814	423,525	465,992	505,422
<i>Required for P. W. A. loan</i>						
4	Interest.....	60,720	60,720	60,720	59,120	57,520
5	Maturities.....			40,000	40,000	40,000
6	Reserve fund.....	6,072	6,072	10,076	9,912	9,752
<i>Required for R. E. A. loan</i>						
7	Interest.....	19,390	19,390	19,390	18,685	17,700
8	Maturities.....			17,000	35,000	36,000
9	Reserve fund.....	19,390	36,390			
<i>Diesel engine contract</i>						
10	Interest and maturities.....	50,400	50,400	30,000		
11	Total fixed charges (items 4 to 10, inclusive).....	155,972	172,972	177,182	162,717	160,972
12	Surplus (item 3 less 11).....	117,798	153,842	246,343	303,275	344,459

The estimated yearly surplus "flattens out" after the first five years, varying by only \$4,380 during the second five-year period. The tabulation is accompanied by a letter from the Chief Engineer and General Superintendent, from which the following is quoted:

* * * We have had some discussion of the effect of the R. E. A. contract providing for a second lien on what we term P. W. A. revenue. The estimated revenue from the R. E. A. lines is approximately \$100,000 per annum, while, as shown on the tabulation, the surplus after the first two years varies from two and one-half to three times that amount. This means that even though there should be no revenue at all from the R. E. A. lines, which, of course, is impossible—yet, nevertheless, there would still be a substantial surplus from the power project.

In my opinion, the estimate of gross revenue is conservative, in that the power sales will be limited by the capacity to generate power rather than the load available. In explanation, let me point out that the sales resulting in the gross revenue, shown on the tabulation, will amount to less than 50 percent of the available load in Imperial Valley, exclusive of sales in the new rural territory not now served and exclusive of the ice plants which are owned by the power company, and, therefore, noncompetitive. In view of this fact, there can be little doubt as to the ability of the District to obtain the power load and the gross revenue as shown.

There is another point which should be emphasized. The tabulation assumes that there will be no further development than that contemplated by the present P. W. A. and R. E. A. loans. As a matter of fact it is the intention of our District to continue with the expansion of the power project as rapidly as funds can be secured, and this will include the extension of service to the Coachella Valley. In other words, without question, there will be a further expansion of the power project even before 1942, when, as shown on the tabulation, the capacity of the first development will have been reached. * * *

The last consideration concerning the effect of paragraphs 10 and 16 is the improbability that an actual diversion of funds under either paragraph, contrary to the prior right of the United States to the net proceeds (i. e., to the money remaining after the deduction of all proper factors of cost, but including debt charges *only* to the extent of current and reserve requirements as hereinbefore discussed under either one of the two assumptions) ever would be consummated without prior knowledge on the part of the United States, in which event I am of the opinion that section 17 of the Boulder Canyon Project Act clearly could be invoked to protect the prior right of the United States and to prevent such a diversion.

In summary, it is my opinion that the payments of principal of and interest on the P. W. A. and R. E. A. bonds and the one-year reserves for such payments may be deducted in determining the amount of "net proceeds" payable into the Colorado River Dam Fund, except that the so-called second lien of the R. E. A. bonds on the P. W. A. revenues would be ineffective as against the prior right of the United States under section 17 of the Boulder Canyon Project Act and Article 35 of the All-American Canal contract in the event

that the right of the United States to net proceeds should be held to be limited to those from the generation of energy alone. Whether this right is so limited is a question on which, in view of its withdrawal, I offer no opinion.

Approved: April 27, 1937.

CHARLES WEST,

Acting Secretary of the Interior.

GRANTS OF HOT-WATER PRIVILEGES AT HOT SPRINGS NATIONAL PARK

Opinion, April 29, 1937

STATUTORY CONSTRUCTION—NATIONAL PARKS—HOT-WATER PRIVILEGES AT HOT SPRINGS NATIONAL PARK.

The act of March 3, 1891 (26 Stat. 842), authorizes the Secretary in his discretion to refuse or forfeit hot water privileges because of common ownership of an interest in more than one grant thereof; it does not command him to do so.

STATUTORY CONSTRUCTION—NATIONAL PARKS—HOT SPRINGS NATIONAL PARK— GRANTS OF HOT-WATER PRIVILEGES—INTEREST IN MORE THAN ONE GRANT.

The statute authorizes the Secretary to deny an application for hot-water privileges and to forfeit existing hot-water privileges if the application is made by or such privileges are owned by a corporation, part of whose stock is owned by persons who are also stockholders of another corporation, which owns more than a majority of the stock of a subsidiary corporation, which has been granted hot-water privileges. Whether under these circumstances the Secretary should deny or forfeit such privileges are matters of administrative discretion.

NATIONAL PARKS—HOT SPRINGS NATIONAL PARK—GRANTS OF HOT-WATER PRIVI- LEGES—INQUIRY BY STOCKHOLDERS OF CORPORATION IN REORGANIZATION.

There is no legal objection to answering an inquiry of majority stockholders of a corporation which has been granted hot-water privileges and which is the subject of reorganization in an insolvency proceeding, whether, if a proposed plan of reorganization is approved and as a result a new corporation owns and operates the assets and business of the insolvent corporation, an assignment of the privileges of the insolvent corporation to the new corporation will be approved or disapproved, or new privileges granted or withheld from the latter corporation. However, the inquiry should be answered only upon full disclosure of relevant facts, that is, the details of the plan of reorganization, how and to whom the stock of the new corporation is to be issued, and such information as would be required of any applicant for a grant of privileges or an assignment thereof.

KIRGIS, *Acting Solicitor:*

You [the Secretary of the Interior] have submitted to me for my opinion certain questions concerning grants of hot-water privileges

at Hot Springs National Park, which have been posed by the Director of the National Park Service.

The New York Hotel Company, a corporation, has for some time owned and still owns a hotel, formerly called the Kingsway Hotel, now called the Eastman Hotel, and a bathhouse operated in connection therewith. Ever since the summer of 1936, H. Grady Manning and other persons associated with him have controlled a majority of the stock of the New York Hotel Company. At the time they acquired such interest in the New York Hotel Company the same group of persons, through similar stock ownership, controlled The Southwest Hotels, Incorporated; that corporation owned more than a majority of the stock of another corporation, the Majestic Hotel Company; the latter corporation owned and operated the Majestic Hotel and its bathhouse; and this ownership, operation, and control have continued to the present.

On June 17, 1932, the Department and the New York Hotel Company entered into an agreement by which the corporation was granted hot-water privileges for 20 years for its hotel and bathhouse. On February 21, 1933, the Department and the Majestic Hotel Company likewise entered into an agreement by which that corporation was also granted hot-water privileges for 20 years for its bathhouse. Both agreements were expressly made subject to the provisions of the act of March 3, 1891, which was said to "enter into and become a part of this agreement in the same manner as if specifically mentioned or set forth herein."

The relevant portions of the act of March 3, 1891 (26 Stat. 842), are these:

The Secretary of the Interior is authorized and empowered to execute leases to the bathhouses and bathhouse sites in the Hot Springs National Park, * * * the Secretary of the Interior may, in his discretion and under such regulations as he may prescribe, cause hot water to be furnished to bathhouses, hotels, and families outside the said park (sec. 1, 16 U. S. C. 362).

Full power is vested in the Secretary of the Interior to provide, in all leases to be executed against any combination among lessees or their assigns, as to ownership, prices, or accommodations at any bathhouse; * * * shall be expressly provided in all leases and grants of privileges for hot water that the bathhouse for which provision is made shall not be owned or controlled by any person, company, or corporation which may be the owner of or interested (as stockholder or otherwise) in any other bathhouse on or near the Hot Springs National Park; that neither the hot-water privilege granted nor any interest therein, nor the right to operate or control said bathhouse shall be assigned or transferred by the party of the second part without the approval of the Secretary of the Interior first obtained, in writing; and if the ownership or control of said bathhouse be transferred to any person, company, or corporation owning or interested in any other bathhouse on or near said reservation, the Secretary of the Interior may, for that cause, deprive the bathhouse provided for of the hot water and cancel the lease or agreement (sec. 3, 16 U. S. C. 363).

The Secretary of the Interior, before executing any lease to bathhouses or bathhouse sites in the park or contracts for the use of hot water for bathhouses outside said park, may make due investigation to ascertain whether the person, persons, or corporation applying for such lease or contract are not, directly or indirectly, interested in any manner whatever in any other bathhouse, lease, interest, or privilege at or near Hot Springs, Arkansas, or whether he or they belong to any pool, combination, or association so interested, or whether he or they are members or stockholders in any corporation so interested, or, if a corporation, whether its members or any of them are members or stockholders of any other corporation or association interested in any other bathhouse, lease, interest, or privilege as aforesaid, * * * and whenever, either at the time of leasing or other time it appears to the satisfaction of the said Secretary that such interest in other bathhouse, lease, interest, or privilege exists, or at any time any pool or combination exists between any two or more bathhouses or he deems it for the best interests of the management of the Hot Springs National Park and waters, or for the public interest he may refuse such lease, license, permit, or other privilege, or forfeit any lease or privilege wherein the parties interested have become otherwise interested as aforesaid (sec. 4, 16 U. S. C. 364).

The New York Hotel Company, owner of the Eastman Hotel and its bathhouse, is now the subject of a so-called 77 (b) proceeding in the United States District Court at Little Rock, Arkansas. 11 U. S. C. 207. A plan of reorganization is about to be submitted to the court for its approval. The Director of the National Park Service states that "Mr. Manning and his associates are very anxious that they be advised, in the event of the setup of a new corporation under the plan of reorganization as outlined by Mr. Manning, which will absorb both the New York Hotel Company and the Eastman Hotel * * * whether this Department under section 4 of the act of March 3, 1891 (26 Stat. 842), upon application of the new corporation, would be authorized to approve the assignment of the present lease between the Eastman Hotel Company (obviously meaning New York Hotel Company) and this Department dated June 17, 1932 * * *." The Director also states:

This Service has been advised by those interested in the reorganization that they must be advised as to the position of this Department before they can proceed further with the reorganization in Federal Court, and that unless immediate steps are taken the present bondholders in the Eastman Hotel Company will force that company into liquidation and take control of the assets of the corporation, and the present stockholders will suffer a total loss.

It is respectfully requested, therefore, that you submit this matter to the Solicitor for an opinion in view of the situation as outlined in this memorandum and attachments, and in the light of the Assistant Attorney General's opinion of November 3, 1911, copy of which is also attached.

I

Is there any legal objection to answering the inquiry of Manning and his associates?

Control of a majority of the stock of the New York Hotel Company is in Manning and his associates. They have a substantial interest in the corporation and in its reorganization. The privilege of the use of hot water at Hot Springs is for all practical purposes essential to the operation of a hotel. It would obviously be unwise to submit a plan of reorganization to the court involving a newly organized corporation, obtain the required approval of creditors and stockholders, secure the court's approval and then be faced with the possibility of a denial to the new corporation of the essential hot-water privilege.

Under these circumstances I know of no sound legal objection to answering an inquiry whether the Department will or will not grant privileges to the proposed corporation or approve an assignment of the New York Hotel Company privileges.

However, the only facts with regard to the reorganization and the new corporation now before us is that both are about to be proposed. Among other things we are not informed just how and to whom the stock of the new corporation is to be issued. Unless these facts, all the other details of the proposed reorganization, and such information as would be required of any applicant for a grant of privileges or approval of an assignment thereof, are first submitted, this inquiry cannot be intelligently answered. I therefore suggest that the inquiry be not answered until that information is submitted in appropriate form.

The opinion of the Assistant Attorney General, dated November 3, 1911, concerning an inquiry of Williams and Williams, as attorneys, has no application to the situation here receiving consideration, except in a limited sense. In the 1911 matter the inquiry was made on behalf of one who was not yet a stockholder. He was planning to buy a minority interest in the corporation. His inquiry was whether the law permitted the purchase. And the circumstances of an insolvency proceeding and a reorganization therein were not present. The only phase of the 1911 opinion which has application here is the failure there as here to reveal enough facts to permit an intelligent answer. In part it was held that the facts there disclosed were insufficient to permit such answer. To that extent the holding is here in point and is followed.

II

Does the act of March 3, 1891, authorize the Secretary of the Interior to cancel the grant of privileges to the New York Hotel Company, to refuse the approval of the assignment thereof, and to refuse the grant of privileges to the proposed corporate successor thereof?

At the present time Manning and his associates are stockholders of the New York Hotel Company, which has hot-water privileges. They

are also stockholders of another corporation, Southwest Hotels, Incorporated, which is interested in hot-water privileges granted the Majestic Hotel Company, a majority of whose stock it owns. Undoubtedly, some of the "members" of the New York Hotel Company are, to paraphrase the language of the statute, stockholders of another corporation interested in another bathhouse and privilege at Hot Springs, to wit, the Majestic Hotel bathhouse and the privileges granted the Majestic Hotel Company.

It is clear that Congress intended to authorize the Secretary to prevent common interest in hot-water privileges. If the power granted the Secretary is to have any significance, the statute must be read, as it plainly reads, to cover the exercise of that power in cases where the interest is direct as where it is indirect. It follows that the statute authorizes cancelation of the hot-water privileges of the New York Hotel Company because of the common interest of Manning and his associates in the bathhouses and privileges of that corporation and those of the Majestic Hotel Company.

If we assume, as we must, that Manning and his associates will become stockholders in the corporation proposed to be organized, that corporation will be in no better position as an applicant than the New York Hotel Company as the owner of privileges. When the proposed corporation applies for approval of an assignment or for the grant of new privileges the facts will apparently warrant the conclusion that the application is being made on behalf of a corporation among whose members will be some interested in the Majestic Hotel bathhouse and privilege.

In my opinion, the Secretary has the power, pursuant to section 4 of the act of March 3, 1891, (a) to forfeit now the privileges of the New York Hotel Company, and (b) to refuse to approve an assignment of those privileges or the direct grant of any privileges to a corporation, among whose stockholders will be Manning or his associates, if they still own any interest, directly or indirectly, in the bathhouse or hot-water privileges of the Majestic Hotel Company.

III

Must the Secretary exercise the power so to cancel and refuse such hot-water privileges or may he in his discretion determine whether the power should be so exercised?

The statute provides that "whenever, either at the time of leasing or other time it appears to the satisfaction of the said Secretary that such interest in other bathhouse, lease, interest or privilege exists or at any time any pool or combination exists between any two or more bathhouses * * * he may refuse such lease, license, permit or other privilege or forfeit any lease or privilege wherein

the parties interested have become otherwise interested as aforesaid." Section 4, 26 Stat. 843, 16 U. S. C. 364.

Do the words "may refuse * * * or forfeit" create a permissive discretionary authority in the Secretary or do they constitute a command? I think "may" is here to be construed to have its ordinary meaning and the words "may refuse * * * or forfeit" construed to grant a permissive discretionary authority. The following are my reasons:

(a) When the word "may" is used in the statutory grant of a power it is assumed the power was intended to be permissive and discretionary rather than mandatory. *Farmers Bank v. Federal Reserve Bank*, 262 U. S. 649.

(b) The authority to grant hot water privileges is expressly made discretionary: the "Secretary of the Interior may in his discretion and under such regulations as he may prescribe, cause hot water to be furnished." Similarly he is "authorized and empowered to execute leases to the bathhouses and bathhouse sites." Among the provisions in grants of privileges and leases may be this: "And if the ownership or control of said bathhouse be transferred to any person, company, or corporation owning or interested in any other bathhouse on or near said reservation the Secretary of the Interior *may*, for that cause, deprive the bathhouse provided for of the hot water and cancel the lease or agreement." [Italics supplied.] Section 3, 26 Stat. 843, 16 U. S. C. 363; this in contrast to the use of "shall" instead of the underscored "may" in a similar provision of an earlier statute. Act of March 26, 1888 (25 Stat. 619). Thus words of permission and discretion are consistently used in the grant of power to allow and cancel privileges and leases.

(c) An inflexible direction to cancel or refuse privileges is not essential to the achievement of the apparent purposes sought to be gained by the statute. Not the combination of ownership *per se* but the evils which might result therefrom were apparently sought to be avoided. Thus the Secretary may by contract safeguard against the evils of combination by insisting on provisions fixing prices and standards of service and accommodations. Section 3, 26 Stat. 843, 16 U. S. C. 363. There may be cases of common ownership of interests in privileges so slight in extent or existing under such circumstances as would not warrant forfeiture or refusal of privileges; where to do so would result in an unjustifiable denial of a desirable public service, contrary to the public interest. And it may not be said that once such common interest has been determined to be no obstacle to the grant or continued existence of privileges, there is danger of public exploitation. For section 4 of the statute authorizes forfeiture of privileges for reasons in addition to that of common ownership, that

is, when the Secretary "deems it for the best interest of the management of the Hot Springs National Park and waters, or for the public interest."

The only portion of the statute which, if literally read, would be inconsistent with my conclusion that discretion was intended, is the provision in section 3 that "it *shall* be expressly provided in all leases and grants of privilege for hot water that the bathhouse for which provision is made shall not be owned or controlled by any person, company, or corporation which may be the owner of or interested (as stockholder or otherwise) in any other bathhouse on or near the Hot Springs National Park; that neither the hot water privilege granted nor any interest therein, nor the right to operate or control said bathhouse, shall be assigned or transferred by the party of the second part without the approval of the Secretary first obtained in writing; and if the ownership or control of said bathhouse be transferred to any person, company, or corporation owning or interested in any other bathhouse on or near said reservation the Secretary of the Interior may, for that cause, deprive the bathhouse provided for of the hot water and cancel the lease or agreement." Section 3, 16 U. S. C. 363. [Italics supplied.]

The possible inconsistency concerns only refusal of a grant of privileges, not forfeiture of existing privileges. With regard to such refusal, if the Secretary may grant privileges though this results in a common interest in more than one grant, it is obviously absurd to require the grantee to covenant against a condition which is known to exist. The statute should not be read so literally as to compel inclusion of the covenants exactly as stated in the statute, regardless of the circumstances. It should be read to mean that the covenants are to be included in leases and grants as written in the statute, when ownership or control of an interest in other bathhouses or privileges does not exist or is not known to the Department at the time such lease or grant is made; that when such ownership or control does then exist, is revealed to the Department, and it determines none the less to grant the lease or privilege, the covenants described in the statute are to be included in the lease or grant in a modified form so as to exclude expressly from their application specifically described interests in or control of other bathhouses or privileges.

Harmony between the provisions of the statute is thus achieved and an absurd result avoided. "All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose." *United States v. Katz*, 271 U. S. 354, 357.

In my opinion the statute merely authorizes the Secretary of the Interior in his discretion to refuse or forfeit hot-water privileges because of common interest in more than one grant thereof; it does not command him to do so. Whether upon the facts disclosed, the grant of privileges to the New York Hotel Company should be forfeited, whether an assignment thereof or a new grant of privileges should be approved or granted to its proposed corporate successor, are matters of administrative discretion.

Approved: April 29, 1937.

OSCAR L. CHAPMAN,
Assistant Secretary.

BERNARD L. BARRY
ON REHEARING

Decided April 30, 1937

APPLICATION FOR STOCK-RAISING HOMESTEAD—ACT OF AUGUST 27, 1935—WHEN APPLICABLE.

Where a person filed his homestead application prior to January 1, 1935, for land which was included in a petition for stock-driveway withdrawal and the homestead application was not allowed until after January 1, 1935, when the petition for withdrawal was finally denied, the entryman is not entitled to invoke the benefits of the act of August 27, 1935 (45 Stat. 909). If a person filed a homestead application prior to January 1, 1935, which was not allowed until after that date but could have been allowed when filed, he is entitled to make final proof under the act of August 27, 1935, having the other necessary qualifications.

Cases cited and distinguished.

WALTERS, First Assistant Secretary:

Bernard L. Barry has filed a motion for rehearing of the departmental decision of June 8, 1936, rejecting his application to make final proof on his homestead entry. Inasmuch as the situation is quite complicated a detailed statement of the history of the case is advisable.

On October 21, 1933, Barry filed application to make a stock-raising homestead entry for the SE $\frac{1}{4}$ Sec. 19, S $\frac{1}{2}$ Sec. 20, and NE $\frac{1}{4}$ Sec. 30, T. 35 N., R. 86 W., 6th P. M., Wyoming. It appears that the application was suspended on account of conflict with a prior application for a stock-driveway withdrawal, and that the conflict having been eliminated, entry was allowed upon this homestead application on March 5, 1935.

On October 18, 1935, Barry filed an application to make final proof under the act of August 27, 1935 (49 Stat. 909). The register of the

district land office rejected the application on the ground that the entry involved was made after January 1, 1935, citing Circular No. 1371. Barry appealed, alleging that he went upon the land in May 1934, established residence and made improvements thereon, and remained on the land as much time as was possible in his condition.

By decision of January 14, 1936, the Commissioner of the General Land Office affirmed the rejection of the application to make final proof, stating that the homestead application did not become allowable until the application for stock driveway withdrawal was closed. Barry appealed to the Department and referred to two cases in which he alleged more liberal action was taken.

In the decision complained of the Department held that Barry's homestead application was not allowable at any time prior to January 1, 1935, and that inasmuch as said application was not equivalent to an entry Barry was not entitled to invoke the benefits of the cited act. The two cases referred to by Barry were distinguished and held not inconsistent with the view taken in this case.

In his motion for rehearing Barry calls attention to seven cases of homestead entries for lands in the Cheyenne land district which entries were allowed after January 1, 1935, and in which cases the entrymen were allowed to make final proof under the act of August 27, 1935. These cases will be considered in the order referred to by Barry.

1. On April 18, 1934, Charles S. Clevidence filed application 056036 to make a second stock-raising homestead entry. He was found to be qualified and entry was allowed on September 9, 1935. He made final proof on January 9, 1937, pursuant to the provisions of the cited act of August 27, 1935, alleging that he established residence on the land on January 1, 1936. Final certificate has not been issued, so that it is not known whether the entry will be perfected.

As to the question of allowing Clevidence to make final proof under the relief act of 1935, it may be stated that the case can be distinguished. He applied for land which was subject to entry and showed that he was qualified. The delay in allowing entry cannot be charged to him. In the case of *Rippy v. Snowden* (47 L. D. 321) the Department held that a homestead application for land subject to entry, accompanied by the required showing and payment, had the segregative effect of an entry, and that when it was allowed all rights thereunder dated back to the time when the application was filed. That ruling has since been cited and followed on numerous occasions.

2. On December 2, 1933, Cornelius Dailey filed application 056505 to make a second stock-raising homestead entry. The land applied for was subject to entry and he made a showing that he was qualified to enter. He was allowed entry on February 4, 1935, and made final proof on November 2, 1936, under the cited relief act. No final cer-

tificate has been issued, but in principle the case is the same as that of Clevidence.

3. On September 1, 1934, Edwin F. Woodruff filed application 056409 to make a stock-raising homestead entry for 640 acres in Secs. 8, 9, and 17, T. 39 N., R. 77 W. It does not appear that there was any objection to allowance, the land being subject to entry and the applicant showing himself qualified. Entry was not allowed until June 23, 1935, however. The claimant was allowed to make final proof under the cited relief act and patent was issued to him on October 12, 1936.

It is clear that in the Woodruff case the entry dated back to the time of the filing of the homestead application, so that it is distinguishable from the present case.

4. On June 22, 1934, Walter E. Wesco filed application 057583 to make a stock-raising homestead entry for 640 acres in Secs. 10, 14, and 15, T. 39 N., R. 78 W., but it was suspended on account of a prior oil and gas prospecting permit. The Commissioner authorized allowance on January 2, 1936, and entry was allowed four days later. The claimant was allowed to make final proof under the cited relief act on March 4, 1936, but final certificate has not been issued, so that the case cannot be regarded as a precedent. Further than that, the application can be looked upon as allowable when filed because the oil and gas prospecting permit was found to be no hindrance to allowance of a surface entry.

5. On September 12, 1933, Hall W. Massey filed application 055904 to make a stock-raising homestead entry for 640 acres and it was suspended because 40 acres of the land applied for had not been designated under the stock-raising act. He withdrew his application as to the undesignated subdivision and entry was allowed for the remainder on May 6, 1935. He was allowed to submit final proof under the cited relief act but showed that he had resided on the land more than two years and had nearly two years of military service. Patent was issued on November 24, 1936. The act of August 27, 1935, was not needed in Massey's case.

6. On May 19, 1934, Melvin E. Morris, Sr., filed application 057044 to make a stock-raising homestead entry for 640 acres in Secs. 26, 27, 33, 34, and 35, T. 32 N., R. 84 W. It was suspended because some of the land had not been designated. Thereafter the Commissioner rejected the application as to 160 acres which had not been designated. Entry was allowed on November 8, 1935, for the 480 acres which were designated at the time the application was filed. The claimant was allowed to make final proof under the cited relief act for the entry of 480 acres and patent was issued on March 26, 1937.

Morris had a right to the entry of 480 acres from the time he filed his application so that his entry in effect antedated January 1, 1935.

7. On May 2, 1933, Edwin G. Bicknell filed application 055666 to make a stock-raising homestead entry for the S $\frac{1}{2}$ Sec. 17 and N $\frac{1}{2}$ Sec. 19, T. 36 N., R. 87 W. It is shown that the application was suspended because of conflict with the prior petition for stock driveway withdrawal, Cheyenne 054969. The petition for stock driveway withdrawal was denied by the Department on February 21, 1935, and entry was allowed on Bicknell's application on March 5, 1935. Bicknell was allowed to make final proof under the cited relief act but final certificate has not been issued.

It is shown that the cases of Barry and Bicknell are similar in all respects. Both applications were suspended on account of the same prior petition for stock driveway withdrawal. The register of the district land office should not have allowed Bicknell's application to make final proof.

The entire record has been carefully reviewed and the Department finds no ground for reversing or modifying the decision complained of.

It is directed that appropriate action be taken on Bicknell's case in accordance with the foregoing views.

Motion denied.

THE PROTECTION OF INDIANS AND OTHER NATIVES OF ALASKA FROM THE LIQUOR TRAFFIC

Opinion, May 6, 1937

ALASKA NATIVES—LIQUOR TRAFFIC—POWER OF CONGRESS TO REGULATE.

Congress, by virtue of its plenary authority over the Territory of Alaska, may prohibit the sale of liquor to both Indian and white inhabitants of the Territory, and independent of any legislation that Congress may enact for inhabitants of the Territory other than Indians, it has the power to regulate the sale of liquor to Indians or other natives of Alaska.

United States v. Sandoval, 231 U. S. 28; *United States v. Nice*, 241 U. S. 591; *United States v. Holliday*, 3 Wall. 407, cited and applied.

SAME—SECTION 241, TITLE 25, UNITED STATES CODE.

Congress has power to extend to Indians and other natives of Alaska the provisions of Section 241, Title 25, United States Code, prohibiting the sale of liquor to Indians who are wards of the United States.

ALASKAN NATIVES—STATUS AS WARDS OF UNITED STATES—POWER OF CONGRESS TO DECLARE.

Congress, for the purpose of enforcing legislation designed to protect them from the dangers of the liquor traffic, may declare all Indians and Eskimos of Alaska to be wards of the United States. Such a declaration would be consistent with the existing status of these peoples and binding on the courts.

ALASKAN NATIVES—CITIZENSHIP—WARDSHIP.

Neither the decision in the case of *Nagle v. United States*, 191 Fed. 141, nor Section 6 of the act of February 8, 1887 (24 Stat. 388) would render ineffective an act extending the provisions of Section 241, Title 25, United States Code to the Indians and natives of Alaska. Section 241, if extended, would apply to all Indians and natives who were wards of the Government regardless of whether or not they were citizens of the United States.

METLAKAHTLA INDIANS—STATUS AS WARDS OF UNITED STATES.

If Section 241 were extended to apply to Indians and natives of Alaska, it would apply to the Metlakahtla Indians, although they were born in Canada, inasmuch as they have emigrated from Canada and are now settled in Alaska under authority of the act of March 3, 1891 (26 Stat. 1101), and are recognized as wards of the United States.

Territory of Alaska v. Annette Island Packing Co., 289 Fed. 671, cited and applied.

EFFECT OF INDIAN REORGANIZATION ACT ON EXISTING LEGISLATION REGARDING LIQUOR CONTROL AMONG ALASKAN NATIVES.

The acceptance of the provisions of the act of June 18, 1934 (48 Stat. 984) (Indian Reorganization Act), by a particular tribe or group of Alaskan Indians or natives would not serve to bring them under the protection of section 241, Title 25, United States Code, without further legislation on the subject.

KIRGIS, *Acting Solicitor.*

At the suggestion of the Commissioner of Indian Affairs, my opinion has been requested on certain questions arising in connection with the formulation of legislation for the protection of the Indians and other natives of Alaska from the liquor traffic. The questions are stated and separately answered below.

1. Does Congress have the authority to enact legislation providing against the sale of liquor to the natives of Alaska?

The authority of Congress to enact legislation prohibiting the sale of liquor to the natives of Alaska is not in my opinion open to question. The source of the authority is twofold. In the first place, Alaska, although an organized territory (*Steamer Coquiltam v. United States*, 163 U. S. 346, 352; *Nagle v. United States*, 191 Fed. 141), is subject to the paramount and plenary authority resting in Congress to enact laws for the government of the territory and its inhabitants (*United States v. Kagama*, 118 U. S. 375, 379, 380; *Talbot v. Silver Bow County*, 139 U. S. 438). The territorial legislature, by an act approved May 4, 1933, established the Board of Liquor Control, consisting of the Governor, the Attorney General, the Treasurer, the Auditor, and the Territorial Highway Engineer. To this Board was given the authority to prescribe rules and regulations governing the "manufacture, barter, sale, and possession of intoxicating liquors in the Territory of Alaska." See also the act

of the territorial legislature approved March 14, 1935, by which the duties of the Board of Liquor Control were enlarged with directions to provide a system for local option elections. By the Act of Congress approved April 13, 1934 (48 Stat. 583), the practical effect of which was to place the Territory of Alaska on like footing with the several States in the matter of the regulation and control of the liquor traffic after repeal of the Prohibition Amendment, the creation of the territorial Board of Liquor Control was ratified and approved in the following language:

That the act of the Territorial Legislature of Alaska entitled "An act to create the board of liquor control and prescribe its powers and duties," approved May 4, 1933, contained in the Session Laws of Alaska, 1933, being chapter 109 thereof, at pages 193-194, be, and the same hereby is, ratified and approved, and the board thereby created shall have the powers and the authority conferred upon it by the said act. And any person, firm, or corporation, who shall violate any of the rules or regulations prescribed by the said board governing the manufacture, sale, barter, and possession of intoxicating liquors in the Territory of Alaska, or the qualifications of those engaging in the manufacture, sale, barter, and possession of such liquors in the said Territory, or the payment of license fees and excise taxes therefor, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as provided in section 2072 of the Compiled Laws of Alaska.

Under these enactments, the power to regulate and control the liquor traffic in Alaska now rests in the Territorial Board of Liquor Control. Assuming, without so deciding, that the regulative powers so conferred upon the Board extend to all inhabitants of the Territory, Indian and white, this would not preclude Congress from again legislating on the subject. As pointed out in *United States v. Kagama*, *supra*, the territorial governments owe all their powers to the statutes of the United States conferring upon them those powers which they exercise, and the powers so conferred are subject "to be withdrawn, modified, or repealed at any time by Congress." Accordingly, it is entirely competent for Congress, should it see fit so to do, to recall the powers now vested in the Territorial Liquor Board, and legislate directly on the subject of liquor control for all of the inhabitants of the Territory, irrespective of race or color.

In the second place, it has been repeatedly held by the Department and the courts that the Indians and other natives of Alaska are wards of the United States and that they, like the Indians of the United States proper, are subject to such legislation as Congress shall see fit to enact for their benefit and protection. *Alaska Pacific Fisheries v. United States*, 248 U. S. 78; *Territory of Alaska v. Annette Island Packing Co.*, 289 Fed. 671; *Territory of Alaska v. Annette Island Packing Co.*, 6 Alaska Reports 585, 601, 604; *United States v. Berrigan*, 2 Alaska Reports 442; *United States v. Cadzow*, 5 Id. 125; *Nagle*

v. *United States*, 191 Fed. 141, 142; (49 L. D. 592); (50 L. D. 315); (51 L. D. 155); (52 L. D. 597); (53 I. D. 593); (54 I. D. 15, 39).

The Indian origin of some of the natives of Alaska has at times been questioned but the point is unimportant from the viewpoint of Congressional power. The treaty of March 30, 1867 (15 Stat. 539), by which the Territory of Alaska was ceded to the United States, makes no distinction based on racial origin but declares in Article III that the "uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to the aboriginal tribes of that country." And in the opinion of the Solicitor for the Department, dated February 24, 1932 (53 I. D. 593), it is aptly stated:

Some disposition has been shown to make a distinction between the Indians of Alaska and other natives, particularly the Eskimos. It has been asserted by ethnologists that the Eskimos are not of Indian but more likely are of Manchurian and Chinese origin. After the Indians, the Eskimos of Alaska are probably the most advanced of the natives and for this reason these two races are best known and are more frequently referred to than the other natives such as the Aleuts, Athapascans, Tlinkets, Hydahs, and other natives of indigenous race inhabiting the Territory of Alaska. The Eskimos are said to know nothing of their early predecessors. The origin of the natives of Alaska will possibly some day become known, but whether that comes to pass or not the fact is that they are all wards of the Nation and are treated in material respects the same as are the aboriginal tribes of the United States.

The foregoing decisions refer to numerous instances in which Congress has recognized the natives of Alaska as wards of the United States. To these may be added the recent act of May 1, 1936 (49 Stat. 1250), which finally and definitely recognizes the wardship status of the natives of Alaska by extending to them various provisions of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), and by authorizing the Secretary of the Interior to create reservations for them out of the public lands in the Territory of Alaska. While further review of the subject seems unnecessary, it may not be amiss to point out that the situation with respect to the natives of Alaska is similar to that of the various Indian pueblos in New Mexico, who, prior to annexation of the territory occupied by them to the United States, were under Spanish and Mexican dominion. In *United States v. Sandoval*, 231 U. S. 28, the Supreme Court of the United States held that these Pueblo Indians were wards of the United States, that they were under the control of the laws of Congress, and that such control extends to the subject of regulating the liquor traffic with them. The Court said, and its remarks are equally applicable to the native tribes of Alaska:

But it is not necessary to dwell specially upon the legal status of this people under either Spanish or Mexican rule, for whether Indian communities within the limits of the United States may be subjected to its guardianship and pro-

tection as dependent wards turns upon other considerations. See *Pollard v. Hagan*, 3 How. 212, 225. Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State. As was said by this court in *United States v. Kagama*, 118 U. S. 375, 384: "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

The power so resting in Congress may be exercised without regard to citizenship and without regard to the locality of the traffic. *United States v. Holliday*, 3 Wall. 407, 417; *Perrin v. United States*, 232 U. S. 478, 482; *United States v. Sandoval*, *supra*; *United States v. Nice*, 241 U. S. 591. On the question of citizenship, the court in *United States v. Nice*, *supra*, said:

Of course, when the Indians are prepared to exercise the privileges and bear the burdens of one *sui juris*, the tribal relation may be dissolved and the national guardianship brought to an end, but it rests with Congress to determine when and how this shall be done, and whether the emancipation shall at first be complete or only partial. Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians or placing them beyond the reach of congressional regulations adopted for their protection.

And on the question of the locality of the traffic, the court, in *United States v. Holliday*, *supra*, a case involving a prosecution for selling spirituous liquors to a tribal Indian in Michigan when not on an Indian reservation, said:

The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or of a member of the tribe with whom it is carried on. * * * This power residing in Congress, that body is necessarily supreme in its exercise.

Specifically answering question No. 1, it is my opinion, first, that Congress by virtue of its plenary authority over the Territory of Alaska, may prohibit the sale of liquor to both Indian and white inhabitants of the territory, and, second, entirely apart from Congressional authority over the territory, and independent of any legislation that Congress may enact for inhabitants of the territory other than Indians, it has the power to regulate or prohibit the sale of intoxicating liquors to the Indians or other natives of Alaska.

2. Could Congress extend the provisions of Section 241, Title 25, United States Code, with respect to sale of liquor to Indians who are wards of the United States to embrace the Indians and Eskimos of Alaska?

Section 241, Title 25, United States Code, reads:

No ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind shall be introduced, under any pretense, into the Indian country. Every person who sells, exchanges, gives, barter, or disposes of any ardent spirits, ale, beer, wine, or intoxicating liquors of any kind to any Indian under charge of any Indian superintendent or agent, or introduces or attempts to introduce any ardent spirits, ale, wine, beer, or intoxicating liquor of any kind into the Indian country shall be punished by imprisonment for not more than two years, and by fine of not more than \$300 for each offense.

Any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian, a ward of the Government, under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, and any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than \$100 for the first offense and not less than \$200 for each offense thereafter: * * *

It follows from what has been said in answering question No. 1 that Congress may, if it sees fit so to do, extend the provisions of the foregoing section to the Indians and other natives of Alaska. The language of the section, however, is not well adapted to meet conditions in the Territory of Alaska. The prohibition against the introduction of intoxicating liquors into the "Indian country," has occasioned much difficulty in the United States proper. The meaning of the term "Indian country" has been the subject of numerous decisions. Without attempting to review this entire field, it may be said that under the generally accepted meaning of the term, any area of land is Indian country as long as the Indian title thereto exists, and it ceases to be Indian country when the Indian title is extinguished. *Bates v. Clark*, 95 U. S. 204; *Clairmont v. United States*, 225 U. S. 551. Where an Indian reservation has been created in Alaska, such as that for the Metlakahtla Indians (see act of March 3, 1891, 26 Stat. 1101), no difficulty would be presented. But in the absence of such a reservation, and bearing in mind that the natives of Alaska reside in widely separated villages or communities scattered at intervals along the 25,000 miles of coast and on the great rivers in Alaska, the determination of what is Indian country and its extent would present problems difficult of solution and capable of final

solution only by a court of competent jurisdiction in particular cases as they arise. Furthermore, that part of section 241 prohibiting the sale of intoxicants to any Indian under the charge of any Indian superintendent or agent is likely to present difficulty. While various officers and employees engaged in educational and health activities for and in behalf of these natives are stationed at various points in Alaska, no superintendencies or agencies such as are maintained for the Indians of the United States proper have been established in Alaska.

While the form of the proposed legislation is for administrative determination, the legal considerations just mentioned suggest that, if section 241, Title 25, United States Code, be extended to the Territory of Alaska, it should be coupled with language defining as clearly as possible the areas of land to which the term will apply. The necessity for some such definition is emphasized by the recent decision of the Circuit Court of Appeals, Ninth Circuit, in *United States v. One Chevrolet Automobile*, No. 2658 (not yet reported) holding that certain land purchased for a band of Indians in the State of Nevada under Congressional authority is not Indian country or an Indian reservation within the meaning of Section 241.

3. Could Congress, for the purpose of the enforcement of such an act, declare all Indians and Eskimos of Alaska to be wards of the United States?

No community or group of people may be brought within the range of Congressional power by arbitrarily calling them an Indian tribe, or by arbitrarily declaring them to be wards of the United States. *United States v. Sandoval, supra*. However, a declaration that the Indians and Eskimos of Alaska are wards of the Nation, made in legislation designed to protect them from the evils of the liquor traffic, would not only be consistent with the existing status of these people, but such a declaration would be binding upon the courts under the well-settled principle that whether the protective and regulatory power of Congress shall be extended over an Indian community is a political question with the determination of which the courts have no power to interfere. *United States v. Holliday, supra; United States v. Sandoval, supra; Wilbur v. United States*, 281 U. S. 206; *United States v. Wright*, 53 F. (2d) 301.

4. Could Congress enact legislation providing for the regulation of the liquor traffic in Alaska which would apply to Indians and whites alike?

This question has been sufficiently discussed under question No. 1, and for the reasons there stated, it must be answered in the affirmative. However, protection of the dependent native tribes of Alaska and the individual members thereof from the liquor traffic is the peculiar

responsibility of the Federal Government and that responsibility may be met by Congress without regard to legislation it may enact for control of the traffic among inhabitants of the territory other than the Indians or natives.

5. If Congress did pass legislation extending the "sale and barter" provisions of Section 241, Title 25, United States Code, to embrace the Indians and Eskimos of Alaska, would such an act be ineffective in view of the decision in the case of *Nagle v. United States*, 191 Fed. 141, or section 6 of the act of February 8, 1887?

This question is answered in the negative. The *Nagle* case involved a prosecution for selling liquor to an Alaskan Indian in violation of Section 142 of the act of March 3, 1899 (30 Stat. 1274), as amended by the act of February 6, 1909 (35 Stat. 600). That section defined the term Indian "to include the aboriginal races inhabiting Alaska when annexed to the United States, and their descendants of the whole or half blood, who have not become citizens of the United States." Under this statute, sales of liquor to Indians who had become citizens of the United States were not forbidden. It became necessary, therefore, in the *Nagle* case to determine whether the Indian to whom the liquor was sold was or was not a citizen of the United States. Section 6 of the act of February 8, 1887 (24 Stat. 388), provides that "every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits, his residence separate and apart from any tribe of Indians therein and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States and is entitled to all the rights, privileges, and immunities of such citizen." The court held that this provision of law was in effect in Alaska, and that it operated to make Indians therein, who are descendants of the aboriginal tribes, born since the annexation of Alaska, but who have voluntarily taken up their residence separate and apart from any tribe and adopted the habits of civilization, citizens of the United States, and that the sale of liquor to such an Indian did not constitute an offense under section 142 of the act of March 3, 1899, as amended by the act of February 6, 1909, *supra*.

Neither section 6 of the act of February 8, 1887, *supra*, nor the decision in the *Nagle* case, would affect the enforcement of Section 241, Title 25, United States Code, should that section be extended to embrace the Indians and natives of Alaska. Section 241 does not exclude from its operation Indians who have become citizens of the United States, and it has been repeatedly held that its prohibitions are effective notwithstanding the fact that citizenship may have been conferred upon the Indians. *United States v. Nice*, *supra*; *Brown v. United States*, 8 F. (2d) 433, cert. denied 269 U. S. 587; *United States v. Sandóval*, *supra*. Section 241, however, prohibits

sales only to those Indians "under the charge of any Indian superintendent or agent," or "over whom the Government, through its departments, exercises guardianship." When the relation of guardian and ward ceases to exist by operation of section 6 of the act of February 8, 1887, *supra*, or otherwise, Section 241 would be without application and to that extent ineffective. But this result would be due to termination of the guardianship relation and not to the conferring of citizenship on the individual.

6. If Congress did extend the prohibition against the sale of liquor to the Indians and natives of Alaska which is now embodied in Section 241, Title 25, United States Code, would it apply to the Metlakahtla Indians who emigrated from British Columbia, Canada, and settled on Annette Island under authority of the act of March 3, 1891 (26 Stat. 1101)?

While the answer to this question may depend upon the language of the legislation as finally enacted by Congress, it may be said that the Metlakahtlans, irrespective of their foreign birth, are now Indians or natives of Alaska so that the extension of Section 241 to include all such Indians or natives doubtless would embrace them. As pointed out in *Alaska Pacific Fisheries v. United States*, 248 U. S. 78, the legislation which Congress has enacted for the benefit and protection of this particular group of natives has made the fact of their foreign birth immaterial. And in *Territory of Alaska v. Annette Island Packing Co.*, 289 Fed. 671, wherein it was contended that "the Indians on Annette Island are not and never have been, since their settlement there, a 'tribe of Indians'; that their descendants by virtue of their birth on the island became American citizens; that the Alaskan natives who joined them were likewise not an Indian tribe, and that the Island never became an Indian reservation," the court said:

* * * As we view the questions necessary here to be decided, we think the fact that the Indians are not tribal, and the fact, if it be a fact, that the majority of the Indians on the island are citizens of the United States by virtue of their having been born on the soil of the United States, are immaterial, for although such Indians may be citizens, they are still subject to the care and protection of the United States. *Winton v. Amos*, 255 U. S. 391, 41 Sup. Ct. 342, 65 L. Ed. 684. The inhabitants of the Island, being Indians, stand in the same relation to the United States as do Indians on other reservations. Nor is it material that the Metlakahtla Indians were British subjects before their immigration to the United States. Congress has made that fact immaterial here. *Alaska Pacific Fisheries v. United States*, 248 U. S. 78, 39 Sup. Ct. 40, 63 L. Ed. 138. The government has always recognized these Indians as its wards. The act of March 3, 1891, declares that Annette Island be "set apart as a reservation" for their use. * * * There can be no question therefore but that the Metlakahtla Indians are wards of the government. They are dwelling on the island at the sufferance of the government and on land which belongs to the United States. The purposes sought to be accomplished by the

government are the same as its purposes for all Indian reservations, to encourage, assist, and protect the Indians in their efforts to acquire habits of industry, become self-supporting, and advance in the ways of civilized life.

These decisions make it plain that legislation prohibiting the sale of intoxicants to the Indians and natives of Alaska would bring within its protection the Indians of Annette Island. However, any possible question about the matter may, and should be obviated, by the use of language which will expressly include these particular Indians.

7. Could this group of Indians be brought under such an act by Congress declaring them to be "wards of the United States"?

The Metlakahtla Indians are now wards of the United States. *Territory of Alaska v. Annette Island Packing Co., supra.* Accordingly, no such declaration is necessary. However, such a declaration would do no harm and doubtless would be regarded as a conclusive determination of their status by the courts. *United States v. Holliday; United States v. Sandoval; United States v. Wright, supra.*

8. Would the acceptance of the provisions of the act of June 18, 1934 (48 Stat. 984) (Indian Reorganization Act), by a particular tribe or group of Alaskan Indians or Eskimos serve to bring them under the protection of Section 241, Title 25, United States Code, prohibiting the sale of intoxicants to Indians who are wards of the United States Government?

The foregoing question, which is stated in the form submitted by the Commissioner of Indian Affairs, is not clearly understood. Sections 9, 10, 11, 12, and 16 of the Indian Reorganization Act of June 18, 1934, *supra*, were extended to the Territory of Alaska by section 13 of that act. The act of May 1, 1936, *supra*, extended to the Territory of Alaska, sections 1, 5, 7, 8, 15, 17, and 19 of the Indian Reorganization Act. None of these sections, nor anything else contained in the act of May 1, 1936, makes a vote of the Indians necessary to make said sections effective. By the act of May 1, 1936, certain actions, such as organization, incorporation, and the creation of reservations, do require a favorable vote by the Indians, to be effective. In this situation, I assume that the thought the Commissioner has in mind is that extension of the sections mentioned to Alaska, coupled with a favorable vote by the Indians ratifying the adoption of a constitution and bylaws, or the issuance of a corporate charter, or authorizing the creation of a reservation, would operate to bring the particular tribe or group of Indians within the provisions of Section 241, Title 25, United States Code, without further legislation on the subject.

Inasmuch as neither the Indian Reorganization Act nor the act of May 1, 1936, deals in any way with the Indian liquor laws, either

by specific mention of Section 241, Title 25, United States Code, or otherwise, the suggestion of the Commissioner necessarily assumes that Section 241 is now and has been in the past applicable to the Territory of Alaska; that the natives of Alaska have been deprived of its protection heretofore either because they were not regarded as wards of the United States or because they did not occupy lands which could properly be classified as Indian country; and that the act of May 1, 1936, removes these obstacles to enforcement of the section in favor of the Alaskan natives by definitely recognizing them as wards of the Nation and by providing for the creation of reservations for them, which reservations would become Indian country within the accepted meaning of that term.

No reported decision has been found dealing with the application of Section 241, Title 25, United States Code, to the Territory of Alaska. As hereinbefore pointed out, Alaska is an organized territory. Section 3 of the Organic Act of August 24, 1912 (37 Stat. 512, 48 U. S. C., Sec. 23), provides that the "Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States." By virtue of a provision similar to this (Section 1891, Revised Statutes), the court in the case of *Nagle v. United States, supra*, held that section 6 of the act of February 8, 1887 (24 Stat. 388), conferring citizenship on Indians who had abandoned their tribal relations and adopted the habits and customs of civilized life, was in force in the Territory of Alaska. Like reasoning would support the view that Section 241, Title 25, United States Code, is in force in Alaska, were it not for the fact that Congress has seen fit to deal expressly with the subject of liquor control among the natives of Alaska. This it did by section 142 of the act of March 3, 1899, as amended by the act of February 6, 1909, which reads:

That if any person shall, without the authority of the United States, or some authorized officer thereof, sell, barter, or give to any Indian or half-breed who lives and associates with Indians, any spirituous, malt, or vinous liquor or intoxicating extracts, such person shall be fined not less than one hundred nor more than five hundred dollars or be imprisoned in the penitentiary for a term not to exceed two years.

That the term "Indian" in this Act shall be construed to include the aboriginal races inhabiting Alaska when annexed to the United States, and their descendants of the whole or half blood, who have not become citizens of the United States.

At the time of the foregoing enactment, the provisions of law incorporated in Section 241, Title 25, United States Code, were in full force and effect. It is evident, therefore, that Congress did not regard those provisions as having application to the natives of

Alaska; otherwise, the enactment of section 142 above would not have been necessary. That the territorial legislature entertained a like view is shown by the fact that it has also seen fit to deal specially with the subject of liquor control among the Alaska natives (see section 4963, Compiled Laws of Alaska, 1933). In any event, the enactment by Congress of a special liquor law for the natives of Alaska makes the general enactment found in Section 241 locally inapplicable, so that extension of that section to the Alaskan natives cannot be justified under the doctrine of the *Nagle* case. See in this connection *Abbate v. United States*, 270 Fed. 735, and *Stanworth v. United States*, 45 F. (2d) 158, holding that the local Bone Dry Act of Alaska was not superseded or displaced by the National Prohibition Act. In these circumstances, prosecutions for liquor sales to the Indians or natives of Alaska based on Section 241, Title 25, United States Code, doubtless would fail of conviction.

Question No. 8 is accordingly answered in the negative.

Approved: May 6, 1937.

OSCAR L. CHAPMAN,
Assistant Secretary.

CONSTRUCTION OF THE WARREN ACT CONTRACTS, NORTH PLATTE PROJECT, NEBRASKA

Decided June 4, 1937

RECLAMATION—WARREN ACT—WATER RIGHTS—STATE CONTROL—CONTRACTS.

Section 1 of the Warren Act (act of February 21, 1911, 36 Stat. 925) provides:

"That whenever in carrying out the provisions of the reclamation law, storage or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under any project, the Secretary of the Interior, preserving a first right to lands and entrymen under the project, is hereby authorized, upon such terms as he may determine to be just and equitable, to contract for the impounding, storage, and carriage of water to an extent not exceeding such excess capacity with irrigation systems operating under the act of August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and individuals, corporations, associations, and irrigation districts organized for or engaged in furnishing or in distributing water for irrigation. * * *"

Held, That a contract made by an irrigation district, pursuant to the Warren Act, and providing for the delivery of an aggregate amount of water according to a graduated schedule "as in full satisfaction of all its rights to the water, * * * both natural flow and surplus storage," limits the district's use of water to the amounts specified in the contract schedule at any given time, notwithstanding what its natural flow appropriation may be under State law.

RECLAMATION—WARREN ACT—WATER RIGHTS—STATE CONTROL—CONTRACTS—
CONSIDERATIONS—FORBEARANCE.

A promise to the United States by an irrigation district, holding a natural flow appropriation right under State law, to accept a specified graduated flow of water annually "in full satisfaction of all its rights to the water * * *, both natural flow and surplus storage," constitutes a promise to forbear the exercise of its natural flow appropriation right in consideration of the delivery by the United States of the regulated supply provided for in the contract, and the aggregate amount of water specified in the contract consequently is the total to which the contractor is entitled annually.

CONTRACTS—INTERPRETATION.

The rules that a practical construction of a contract by the parties thereto is governing, that a construction which will produce a valid and equitable result is to be favored, that an unambiguous preamble should control ambiguous operative clauses, and that the language of an instrument is to be construed most strongly against the party who drafted it, all are secondary rules of interpretation, to be used only when the meaning of words remains doubtful after the application of ordinary rules of interpretation.

WATER RIGHTS—STATE CONTROL—APPURTENANCY TO LAND CONTRACTS—ASSIGNMENT.

The doctrine of appurtenancy of water rights to land was codified by the Nebraska Legislature in 1895 (Laws 1895, ch. 69). *Quaere*, whether this legislation could validly operate to preclude the assignment of a water right having an earlier priority under the State law.

RECLAMATION—WARREN ACT—WATER RIGHTS—STATE CONTROL—CONTRACTS—
ASSIGNMENT.

When the aggregate amount of water specified for delivery by the United States in a Warren Act contract is the approximate equivalent of three acre-feet per acre annually, the limitation imposed by State law on the use of water, no sale or assignment of a water right is effected.

RECLAMATION—WARREN ACT—WATER RIGHTS—STATE CONTROL—CONTRACTS—
BREACH.

The Farmers Irrigation District, holding a right under the laws of the State of Nebraska to appropriate a certain amount of the natural flow of the North Platte River, agreed with the United States to accept a certain graduated flow "as in full satisfaction of all its rights to the water of the North Platte River, both natural flow and surplus storage." By a separate contract with the United States it agreed to carry a maximum of 250 second-feet of water in its main canal for delivery to the Northport Irrigation District, a Government project district.

Held, That the failure of the Farmers Irrigation District to deliver water to the Northport district, although itself receiving water in excess of its Warren Act schedule, constituted a breach of its carriage contract with the United States.

WEST, *Acting Secretary*.

The controversy before me for decision has its formal origin in a complaint filed by the State of Nebraska against the construction placed by the Bureau of Reclamation on contracts, made pursuant to the Warren Act (act of February 21, 1911, 36 Stat. 925), between

the United States and certain irrigation districts on the North Platte River in Wyoming and Nebraska. The material before me is voluminous, including briefs totalling some 300 pages filed by Mr. William H. Wright, then Attorney General of the State of Nebraska, District Counsel William J. Burke, of the Bureau of Reclamation, and counsel representing the Goshen Irrigation District, in Wyoming, and the Pathfinder, the Northport, and the Gering & Fort Laramie Irrigation Districts in Nebraska. None of these irrigation districts is a Warren Act contractor but each, as a Government project district, has an interest in the subject matter of the controversy. In addition, the file contains a considerable amount of argumentative correspondence, beginning in the spring of 1936, concerning the respective rights of the several parties having an interest in the waters of the North Platte River.

The Attorney General of Nebraska and Mr. T. F. Neighbors, counsel for the Farmers Irrigation District, which is the principal Warren Act contractor, orally presented their views to the Solicitor of the Department on September 2, 1936. After a careful consideration of his conclusions and the arguments presented by all interested parties, it is my conviction that there has been no misconstruction of the Warren Act contracts by the Bureau of Reclamation and that the complaint of the State of Nebraska is without merit.

Before proceeding to a detailed discussion of the issues involved and the law which I regard as controlling, it is important that the history of the North Platte project be outlined and that its physical character be described briefly.

I. HISTORICAL AND PHYSICAL BACKGROUND OF CONTROVERSY

The North Platte River has its headwaters in the mountains of northeastern Colorado and flows in a general northerly direction as far as Casper, Wyoming, where its course turns southeast across the plains of southeastern Wyoming and western Nebraska. It joins the South Platte near the city of North Platte, Nebraska, forming the Platte River, which proceeds easterly across Nebraska to empty into the Missouri.

Because of the seasonal fluctuation in its natural flow, the North Platte is not wholly satisfactory as a source of supply for the irrigation of the dry agricultural lands in southeastern Wyoming and western Nebraska during the irrigation season. Its natural flow is least during the months of July and August, when growing crops of that latitude need a maximum supply of water. In order to realize the fullest benefit of the stream's flow, therefore, some provision for the storage of flood waters is a necessity. In 1904 the United States instituted the North Platte project in Wyoming and Nebraska, under

the authority of the Reclamation Act (act of June 17, 1902, 32 Stat. 388), and has expended more than \$19,000,000 in the construction of storage works, canals, and other irrigation works. The completion in 1909 of one of the world's largest all-masonry dams, the Pathfinder Dam, situated in the streambed of the North Platte River at a point approximately 50 miles southwest of Casper, Wyoming, created a storage reservoir having a capacity of 1,070,000 acre-feet of water. A regulatory dam with a reservoir having a capacity of 71,060 acre-feet was constructed at Guernsey, Wyoming, some 175 miles downstream from the Pathfinder Dam and near the head of the project canals. The general plan of the project contemplated the release of stored water into the stream at Pathfinder and its diversion at Whalen Dam, situated a short distance below Guernsey, into large canals for distribution to adjacent irrigable areas on either side of the river in Wyoming and Nebraska.

The project was designed to furnish water to more than 200,000 acres of land which previously had not been irrigated. At the time of the institution of the project, approximately 150,000 acres in Nebraska and negligible amounts in Wyoming were under irrigation from the North Platte. A number of private canal systems with natural flow appropriation rights under State law were in operation in Nebraska, but the landowners remained in dire need of storage water during the months of July and August. Applications consequently were made to the United States for the purchase of such storage water as might be available in excess of the needs of the project lands. The authority of the Department to enter into such arrangements being doubtful, the Congress enacted the Warren Act, which was approved February 21, 1911 (36 Stat. 925), and pursuant to it contracts were entered into with a number of the private systems, as shown in the following table:

Name of district	Date of contract	Date of Nebraska priority
Tri-State Land Company, succeeded by the Farmers Irrigation District.	August 20, 1912.....	September 16, 1887.
Gering Irrigation District.....	January 17, 1913.....	May 15, 1897.
Central Irrigation District.....	March 6, 1913.....	June 23, 1890.
Chimney Rock Irrigation District.....	March 6, 1913.....	December 3, 1890.
Beerline Irrigation Canal Company.....	March 6, 1913.....	October 13, 1894.
Brown's Creek Irrigation District.....	July 14, 1913.....	January 20, 1892.
Belmont Canal Company, succeeded by the Bridgeport Irrigation District.	July 9, 1915.....	December 19, 1889.

Under Article I of the contract with the Tri-State Land Company, the predecessor of the Farmers Irrigation District, the United States agreed to release to the Company such amounts of storage water as would, together with the amounts to which the Company otherwise might be entitled, total 180,000 acre-feet annually, to be delivered in a specified graduated rate of flow between April 15 and October 15.

Article XI provides that these deliveries "will be accepted by the Company as in full satisfaction of all its rights to the water of the North Platte River, both natural flow and surplus storage from the Pathfinder Reservoir" and other reservoirs on the North Platte project. The other contracts made pursuant to the Warren Act are substantially similar and further detailed reference to particular provisions will be made subsequently in this discussion.

By a further contract dated August 10, 1915, between the United States, the Tri-State Land Company and its successor, the Farmers Irrigation District, the District agreed to carry a maximum of 250 second-feet of water through its main canal, which had an excess capacity, from its intake in Scotts Bluff County, Nebraska, to Red Willow Creek in Morrill County, Nebraska, for delivery by the United States to the Northport Division of the project.

The present controversy arose in the spring of 1936, when the Northport district complained to the Bureau of Reclamation of the failure of the Farmers District to release water carried under the contract of August 10, 1915. District Counsel W. J. Burke, of the Bureau of Reclamation, thereupon notified the Farmers District of the complaint in a letter dated May 22, making reference to the 1912 and 1915 contracts and stating (State of Nebraska Exhibit No. 1):

* * * According to information supplied this office by Mr. C. F. Gleason, Superintendent of Power at Guernsey, Wyoming, a sufficient quantity of water has been delivered during the month of May 1936 at the headgate of your main canal, to meet the schedule requirements in the contract of August 20, 1912, with your predecessor, the Tri-State Land Company, and to meet the requirements of the Northport Irrigation District at Red Willow Creek in the amount of 125 second-feet, commencing May 10, 1936, hence to this date. The quantity of water necessary to supply your schedule from all sources of water supply belonging to the United States on the several dates from May 8 to May 21, both inclusive, the quantity of water diverted by you in excess of your schedule requirement and the quantity of water delivered by you to the Northport Irrigation District at Red Willow Creek are shown in the following tabulations:

Date, May 1936	Tri-State canal diverted from river	Tri-State canal diverted from drains	Total supply	Farmers' District, Warren Act cont. schedule 40 S. F.	Balance diverted over schedule	Delivered to Northport at Red Willow
8.....	87	48	135	382		
9.....	465	52	517	390	127	
10.....	650	52	702	398	304	
11.....	720	52	772	406	366	170
12.....	822	52	874	414	460	165
13.....	830	52	882	422	460	80
14.....	853	51	904	430	474	27
15.....	832	50	882	438	444	30
16.....	932	52	984	447	537	0
17.....	952	51	1,003	455	548	0
18.....	942	50	992	463	529	0
19.....	1,045	51	1,096	471	625	0
20.....	1,172	50	1,222	478	744	0
21.....				487		25

Your attention is called to column 5, which is the total of the quantity of water necessary to supply your contract schedule, plus an additional quantity of 40 second-feet for the benefit of nondistrict preference-right landowners served with irrigation water under your main canal.

From the foregoing tabulation, it is evident that you have failed to perform your contract obligation to deliver to the Northport Irrigation District waters furnished by the United States for the irrigation of the lands under the system of Northport District.

It is requested that you desist from further breaches of your contract obligation and that the water delivered by the United States at the head gate of your main canal for the use and benefit of the Northport Irrigation District be carried through your main canal and delivered to the district at its head gate at Red Willow Creek without any diminution in quantity, except that for which provision is made in the contract to cover carriage losses.

On May 19, a request was received from the Northport District for delivery of 200 second-feet at Red Willow Creek. On May 20, a sufficient quantity of water was diverted by your main canal to supply this quantity of water at Red Willow Creek. It is requested that such delivery be made immediately.

By a letter of the same date, District Counsel Burke reported the failure of the Farmers District to deliver water to the Northport district to Mr. R. H. Willis, Chief of the Nebraska Bureau of Irrigation, Water Power and Drainage, "as the officer in charge of the State administration of the diversion of water from the North Platte River for irrigation purposes," with the request that he "render such assistance as is possible to protect the water rights of the Northport Irrigation District from illegal diversions by the Farmers' Irrigation District" (State of Nebraska Exhibit No. 2). On June 2, counsel for the Farmers District addressed a letter to District Counsel Burke, from which the following is quoted:

1. The Farmers Irrigation District emphatically denies that it has ever breached its contract to carry water to the Northport District.

2. It just as emphatically asserts that it will never consent to the construction you attempt to place upon the Warren Act Contract to the effect that the appropriation covering lands within the district was conveyed to the United States.

3. It will deliver storage water to the Northport District within the limits of the carriage contract provided it also receives its storage water.

4. It will deliver natural flow to the Northport District when there is sufficient water available to supply its own prior appropriation provided, however, the state authorities permit a diversion of sufficient quantity of water to supply the Northport District.

5. The Farmers District asserts the right to divert and use its entire natural flow appropriation as adjudicated and recognized in the State of Nebraska at any time the water can be used beneficially.

The Attorney General of Nebraska thereupon made a formal complaint, nominally in behalf of the State, against the position taken by the Bureau of Reclamation in construing the Warren Act contracts, contending that the schedules of deliveries set forth in the contracts are not to be regarded as including the natural flow

rights of the contractors. This construction has been formally challenged by briefs filed by three of the project districts, which it is to be noted are situated also in Nebraska, and by one project district in Wyoming. This feature of the controversy renders it essential that the positions of the interested parties be clearly identified and that certain statements made by the Attorney General of Nebraska be corrected at the outset of this discussion.

Throughout the briefs filed by the Attorney General it is evident that it has been sought to place a note of emphasis on this controversy as one in which the interests of the State of Nebraska and its citizens, on the one hand, and those of the Federal Government, on the other, conflict. While it is not denied that the Attorney General may assume a nominal position in behalf of the State to the extent that appropriations perfected under its law may be affected by the contracts made between the appropriators and the United States, this suggestion is ultimately inconsistent with the facts. In the first place the Federal Government, as such, is of course not a water user and its only interest in the entire controversy is one in the nature of a trustee, to see that the waters of the North Platte River are conserved and delivered according to law. It follows that the Warren Act contractors and the project districts are the real opposing parties in interest and that, as stated by District Counsel Burke in his brief (pp. 4-5),

The United States Bureau of Reclamation is neither a party nor an advocate in the matter. Its position is solely that of an advisor to the Department to the end that a decision can be made which will square with the facts and the governing law. Thus, the brief of the United States Bureau of Reclamation in reply to that filed by the Attorney General of Nebraska is in performance of the duty of an advisor.

Secondly, it is not entirely clear why the State of Nebraska, through its Attorney General, assumes to appear as an advocate of the citizens of Nebraska who live in Warren Act districts when at the same time a large number of other citizens of Nebraska, who live in the project districts, would be adversely affected if the contentions of the Attorney General should prevail. Specifically, the Attorney General states, on page 6 of his principal brief, that "the continuation of such a policy will be ruinous to Nebraska" and that "crops of the value of millions of dollars will be lost through the lack of adequate water." And on pages 47 and 48 of the same brief the following appears:

That this matter is of vital importance to the State of Nebraska as a whole is established by the fact that the total irrigable acreage included within the Nebraska districts holding Warren Act contracts is in excess of 145,000 acres. These districts hold some of the oldest water rights in this state. The lands in the districts are highly productive and include some of the best lands now under irrigation in the State of Nebraska. These lands are equal if not superior to the lands under the government canals. It would seem to us to be a violation of its duty to its citizens for the government to adopt a policy that would abso-

lutely destroy much of the finest land in Nebraska and would ruin the people who have devoted their lives and their entire capital to the development of these lands. We feel that with a complete understanding of this matter the Department of Interior will not permit any branch of that department to continue with the policies that are now being advanced by the Reclamation Bureau.

I regard the determination of this controversy as controlled by well-established principles of law rather than by policy. If comparative data are of any value, however, it is sufficient to refer to the following tabulation of areas and crop results, for the year 1936, for the Warren Act districts in Nebraska and the Government project districts in Nebraska to see that *any* determination "is of vital importance to the State of Nebraska as a whole":

Irrigation districts	Irrigable acreage	Irrigated acreage	Cropped acreage	Value of crops	
				Total	Average
<i>Warren Act contractors</i>					
Farmers.....	62,500	57,500	52,500	\$2,265,000	\$50.00
Gering.....	14,200	14,200	13,210	486,615	36.76
Central 1.....	2,250	2,250	2,100	52,500	25.00
Chimney Rock.....	5,800	5,400	4,970	78,030	15.83
Beerline 1.....	2,080	1,000	800	8,000	10.00
Brown's Creek 1.....	6,140	5,500	5,000	100,000	20.00
Bridgeport 2.....	14,170	10,000	8,200	82,000	10.00
Totals and averages.....	107,200	95,850	86,780	3,071,145	35.40
<i>Government project districts</i>					
Pathfinder.....	112,261	92,296	76,650	2,861,804	37.34
Northport.....	16,170	12,401	11,235	187,873	16.72
Gering and Fort Laramie.....	54,805	53,970	52,125	2,632,552	50.50
Totals and averages.....	183,236	158,667	140,010	5,682,229	40.58

¹ Estimate.

² Delinquent—No storage water furnished.

At pages 54-55 of his reply brief, the Attorney General answers the contention of the Gering and Fort Laramie Irrigation District, to the effect that he is unauthorized to protest the construction placed on the Warren Act contracts by the Bureau of Reclamation, by asserting that the current dispute is between Nebraska Warren Act contractors and a foreign appropriator, the Secretary of the Interior, citing *Nebraska v. Wyoming*, 295 U. S. 40. It is true that the Secretary of the Interior is a foreign appropriator. He also is a Nebraska appropriator, however, his application covering the use of storage and other waters of the North Platte. Furthermore, *Nebraska v. Wyoming* is a suit to determine the equitable apportionment, as between the two States, of the waters of the North Platte, and in the decision cited, which was upon a motion to dismiss the bill of complaint, the Court held that the Secretary of the Interior was not an indispensable party, since his rights can rise no higher than those of Wyoming, who must stand in judgment for him. The issues in this controversy, unlike those in *Nebraska v. Wyoming*,

involve the construction of Warren Act contracts and without assuming to decide the propriety of the Attorney General's appearance in behalf of the Nebraska Warren Act contractors, it must again be emphasized that the ultimate persons whose interests are now opposed are citizens of the State of Nebraska. As shown in the tabulation above, the aggregate acreage and crop valuations of the area under the Government project in Nebraska are in excess of those for the area in Nebraska under Warren Act contracts. An additional item of interest is the fact that about 80 percent of the area under the project is situated in Nebraska, a figure which is approximately the same for the area under Warren Act contracts.

II. DISCUSSION OF CONTRACTS AND THEIR MEANING

A. TERMS OF CONTRACTS AND CONTENTIONS OF WARREN ACT CONTRACTORS

At the expense of brevity, I quote Nebraska's outline of the controversy in full, as set forth at pages 6-10 of its principal brief:

As we see it, the position of the Reclamation Bureau is as follows:

1. That the United States Government now owns the natural flow rights that formerly belonged to the Nebraska Warren Act contractors;
2. That the schedule of deliveries contained in those contracts constitutes the sole source of water supply to which such districts are now entitled;
3. That the Bureau of Reclamation has the right to fill the contract schedules with natural flow, seepage, or storage waters;
4. That the difference between the quantity of water set out in the Warren Act contract schedule of deliveries and the record appropriation of the contracting districts belongs to the government to do with as it sees fit;
5. That the government can use this surplus water to store or to use for the government canals;
6. That any diversions made by any of the Nebraska contracting districts which are in excess of the contract schedule of deliveries are illegal diversions by such districts and that such excess diversions may be charged against the quantity of storage contracted for by said districts, and that, therefore, the Bureau of Reclamation may later refuse to deliver to said districts the amount of water represented by these so-called excessive diversions.

Nebraska's position is as follows:

1. That the water represented by a Nebraska appropriation attaches to the land for which it was appropriated, and cannot be sold, conveyed, or assigned, except as a part of the sale of the land to which it is appurtenant;
2. That by reason of the above fact, no irrigation district or the officers thereof could possibly sell or assign any natural flow rights belonging to the lands within that district to the government or to any other person;
3. That under the law of Nebraska an irrigator's appropriation is limited to that quantity of water that can be put to a beneficial use; that, therefore, no irrigator or irrigation district owns any surplus water;
4. That because of the fact that an appropriator has no surplus water, such appropriator cannot sell or assign any surplus to the government or to anyone else;

5. That at the time the Warren Act contracts were made the only authority contained in the Nebraska statutes for the sale of storage waters by the government permitted: (a) the sale by the government of unused, storage, and surplus water only; (b) permitted sale of such water to natural flow appropriators only; and (c) permitted the sale of such waters to such appropriators for the sole purpose of supplementing the natural flow rights of such appropriators at such times as the natural flow water should prove to be inadequate for the needs of the land to which it is appurtenant;

6. That the laws established and existing in Nebraska at the time the Warren Act contracts were made become a part of those contracts;

7. That the construction placed on the Warren Act contracts by the Bureau of Reclamation is contrary to the law of Nebraska in existence at the time such contracts were made;

8. That for over twenty years all parties to the Warren Act contracts have by their acts interpreted these contracts to be agreements on the part of the government to furnish to the Nebraska contractors storage and unused water to supplement and add to the natural flow appropriations of such Nebraska contractors at such times as their natural flow rights should prove to be inadequate for the needs of such Nebraska contractors;

9. That the practical construction placed upon these contracts by the parties thereto is entitled to great, if not controlling, weight;

10. That under the Nebraska law the only possible construction that can be placed on the Nebraska Warren Act contracts is that these contracts contemplated that the government, through the Reclamation Bureau, would sell surplus storage waters to Nebraska natural flow appropriators to supplement the natural flow rights of such appropriators in periods of shortage of natural flow;

11. That the recitals in the preamble of the Warren Act contracts show that the object and purpose of these contracts was to make available for the Nebraska Warren Act contractors an additional supply of water over and above that quantity to which they were entitled under their natural flow rights, which supplemental supply could be used at such times as the natural flow of the river should prove to be inadequate for the needs of the lands within such district;

12. That the physical facts in existence at the time the Nebraska Warren Act contracts were executed show that the Nebraska contractors needed a greater supply of water rather than a smaller supply; that it is admitted by all parties that the Nebraska contractors cannot operate under the contract schedules contained in their Warren Act contracts, if that is to be considered their sole supply of water; that the facts and circumstances in existence when these contracts were made prove that no reasonable persons would have given away their natural flow rights in exchange for an uncertain and inadequate supply of storage water;

13. That the construction placed upon the Warren Act contracts by the Reclamation Bureau would bring about an inequitable, unfair, and ruinous result, while the interpretation adopted by the State of Nebraska makes the contracts fair, equitable, and such as reasonable men might make;

14. That by reason of the ambiguities contained in the body of the Warren Act contracts, the provisions of the recitals contained in the preamble should control;

15. That the Warren Act contracts should be construed most strongly against the government, as those contracts were prepared by it.

The foregoing is a long statement and is in many respects argumentative. It is included here in full, however, to insure complete consideration of every contention of Nebraska, as presented by its Attorney General.

It is now important to examine in greater detail the facts and law in existence at the time the Warren Act contracts were made. The Warren Act contractors had natural-flow rights in the water of the North Platte prior to the beginning of construction of the North Platte project by the United States, but no storage rights in the Pathfinder or other reservoirs. The latter rights were perfected by the United States, with a priority date of September 19, 1904, by its appropriation under State law. Section 1 of the Warren Act provides in part:

That whenever in carrying out the provisions of the reclamation law, storage or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under any project, the Secretary of the Interior, preserving a first right to lands and entrymen under the project, is hereby authorized, upon such terms as he may determine to be just and equitable, to contract for the impounding, storage, and carriage of water to an extent not exceeding such excess capacity with irrigation systems operating under the act of August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and individuals, corporations, associations, and irrigation districts organized for or engaged in furnishing or in distributing water for irrigation. * * *

The Warren Act was approved on February 21, 1911. During the same year the Nebraska Legislature enacted what appeared as section 3455 of the Revised Statutes of Nebraska (1913), providing in part:

The United States of America is hereby authorized to appropriate, develop, and store any unappropriated waters under the terms and provisions of the general appropriation laws of the State of Nebraska and which water is used in connection with any project constructed by the United States pursuant to the provisions of an act of Congress approved June 17, 1902, being an act providing for the reclamation of arid lands (32 Stat. L. 388) and all acts amendatory thereof and supplemental thereto: *Provided*, when it shall be determined by the officers of the United States Reclamation Service that any water so developed or stored is in excess of the needs of the project as it may at that time be completed, it shall be lawful for the United States to enter into contract to rent or sell such developed or stored water under the terms and conditions imposed by act of Congress and the rules and regulations of the United States, to any person, association, firm, or corporation who may have theretofore been granted a permit to appropriate a portion of the normal flow of any stream, but which water rights belonging to such person, association, firm, or corporation may at some portion of the year be found insufficient for the needs of the land to which it is appurtenant. The United States and every person, association, firm, or corporation entering into a contract as herein provided shall have the right to conduct such water into and along any of the natural streams of the state, but not so as to raise the waters thereof above ordinary high-water mark, and may take out the same again at any point

desired, without regard to the prior rights of others to water from the same stream; but due allowance shall be made for evaporation and seepage * * *.

Pursuant to the foregoing Federal and State statutory authorizations, the first contract was made on August 20, 1912, with the Tri-State Land Company, the predecessor of the Farmers Irrigation District. The following, including portions of the preamble, are its significant provisions:

WHEREAS the United States has completed a reservoir on the North Platte River known as the Pathfinder Reservoir, from which certain surplus storage waters are available for disposal under the terms of the Warren Act, and

WHEREAS the Company has constructed and is operating a Canal and distributing system for the irrigation from the natural flow of the North Platte River of the lands embraced under said Canal in the Farmers' Irrigation District as shown on maps hereto attached and made a part of this contract, and has perfected a right to the use of a portion of said natural flow, the said portion being insufficient for the proper irrigation of said lands, and

WHEREAS, the Company is desirous of perfecting its water supply by arranging with the Secretary for the use of a portion of said surplus storage waters, and

* * * * *

WHEREAS, said irrigation District is desirous of having the company purchase water to supplement the appropriations already held by the company in a sufficient quantity for the irrigation of lands included within the District.

NOW, THEREFORE, for and in consideration of the mutual and dependent stipulations herein contained the parties hereto do covenant and agree as follows:

ARTICLE I.—The United States will impound and store water in the Pathfinder Reservoir or elsewhere and release the same into the North Platte River, and will supply water from other sources for the company's canal at convenient points above irrigable lands under the company's canal requiring the same, at such times and in sufficient quantities to deliver, and does hereby agree to deliver for the use of said Company, *an amount of water which will, with all the water the Company may be entitled to by reason of any appropriations, and all water to which the lands of said Irrigation District are entitled, and all water not otherwise appropriated, including drainage and seepage waters, developed by the United States, aggregate a flow of water as follows:* On April 15 One Hundred (100) cubic feet per second increasing this quantity uniformly day by day during April to Two Hundred Seventy-seven (277) cubic feet per second on April 30; increasing the latter quantity uniformly day by day during May to Five Hundred Twenty-eight (528) cubic feet per second on May 31; increasing the latter quantity uniformly day by day during June to Seven Hundred Thirteen (713) cubic feet per second on June 30; then at the uniform rate of Seven Hundred Thirteen (713) cubic feet per second during July; then diminishing uniformly day by day during August to Five Hundred (500) cubic feet per second on August 31; then diminishing uniformly day by day during September to Three Hundred (300) cubic feet per second on September 30; then diminishing the latter quantity uniformly to One Hundred (100) cubic feet per second on October 15, which latter date for the purpose of this agreement shall be considered the close of the irrigation season; *the total amount to be so delivered being approximately 180,000 acre-feet.* Provided that upon the written application of the Company to the Engineer or other proper officer of the United States in charge of the storage works constructed by the United

States, hereinafter styled the "Engineer"; this schedule may be varied without affecting the total amount delivered, if, in the judgment of the Engineer, such variation can be permitted without detriment to the interests of the United States or other irrigators. Nothing herein shall be construed to prevent the Company from diverting into its Canal waters that would necessarily otherwise run to waste, and such waters shall be charged to said Company only up to the amount provided in the schedule of delivery herein agreed upon.

ARTICLE II. It is understood that the United States has the right to deliver into the Company's Canal drainage, seepage or other waters, or waters from Minatare Reservoir during the irrigation season, and that such waters shall be counted as a part of said waters agreed to be delivered according to the preceding section; provided, however, that such waters so delivered shall be so counted that they shall bear no greater ratio to the total amount required by Article one, than the lands that can be served thereby bear to the total irrigable area of the District.

ARTICLE III. All such waters except those mentioned in Article 2 hereof shall be delivered by the United States at the Wyoming-Nebraska state line and the company upon receiving the water delivered as herein provided will at its own cost convey the same to the place of use and perform all acts necessary or required by law or custom and in order to maintain its control over such water in order to secure its beneficial application to the lands of the District. All losses or diminution of such water by reason of seepage, evaporation, defective dam or other works of said company, or other causes, after delivery thereof by the United States at the aforesaid points of delivery shall be borne by the Company.

* * * * *
ARTICLE VII. In consideration of the said delivery of water the Company agrees to pay to the United States the sum of Five Hundred Thousand Dollars (\$500,000) in instalments as follows: * * *

ARTICLE VIII. In addition to the amounts above specified the Company agrees to pay annually to the United States one-fourth part of such amounts as shall be fixed each year by the Secretary as the total operation and maintenance charges in connection with the storage works from which said stored water may be supplied; * * *

* * * * *
ARTICLE X. The United States shall not be liable for failure to supply water under this contract caused by hostile diversion, unusual drought, interruption of service made necessary by repairs, damages caused by floods, unlawful acts or unavoidable accidents.

ARTICLE XI. The delivery of the water supply provided for in this contract will be accepted by the Company as in full satisfaction of all its rights to the water of the North Platte River, both natural flow and surplus storage from the Pathfinder Reservoir and other Reservoirs of the Reclamation Service constructed in connection with the North Platte Project.

ARTICLE XII. It is further understood that the water users under projects of the United States Reclamation Service dependent for storage upon said storage works shall be prior to the Company and to water users under its canal in right to the use of the stored waters from the said storage works in accordance with Article I of the Warren Act. [Italics supplied.]

The Warren Act contracts with other districts differ from that with the Farmers District in certain particulars. Article 10 of the contract with the Beerline Irrigation Canal Company, for example, as amended by a supplemental contract of July 3, 1918, contains the following

provisions, which do not appear in the contract with the Farmers District:

In order to enable the United States to deliver the supply of water herein specified on the basis of payments as herein provided, the Company assigns to the United States all its right, title, and interest to the waters of the North Platte River appurtenant to the above described lands over and above the amount provided in this contract, and limits its claims to such amounts and the Company shall assist the United States in the defense of such claims by the furnishing of all evidence and other like matters in its power or knowledge, in consideration whereof, upon the failure of the United States, through drought or otherwise, to fulfill its obligations hereunder, the said claims to water shall revert to the Company until deliveries of water as provided by this contract shall be resumed.

Since the Farmers District is the principal Warren Act contractor and since its contract has been used in the brief of Nebraska for illustrative purposes, the discussion here will be chiefly addressed to it. Further reference will be made to the other contracts to the extent that they may be controlled by different principles. I shall first discuss what I believe to be the clear and obvious meaning of the provisions quoted from the contract with the Farmers District. It may then be determined whether there is any legal obstacle to the enforcement of the contract according to that interpretation.

B. TRUE CONSTRUCTION OF CONTRACTS

The briefs filed in behalf of Nebraska are not wholly clear on what construction it seeks to place on the contract, given a certain set of facts. It appears from the course of the argument, however, that it contends at least that the Farmers District is entitled to take natural flow water under its appropriation at any time and then, when and if this supply becomes insufficient, to demand storage water under the contract, although to what extent is not clear. Such a construction is inconsistent with the express language of the contract.

By Articles I and XI of the contract, the Company clearly elected not to exercise its right to take natural flow from the river at any time, whatever the extent of that right might be, either then or later, in consideration of the promise by the United States to deliver an aggregate of 180,000 acre-feet of water annually in a specified graduated rate of flow. There, of course, is no room whatever for a construction that the contractor is entitled to receive 180,000 acre-feet of storage water in addition to the amount to which it might be entitled under its appropriation. Either there is a contract providing for the delivery of a maximum of 180,000 acre-feet of water annually to the contractor, or there is no contract at all, in which event the contractor is dependent entirely on natural flow throughout the irrigation season. The Company's right to take natural flow as such from the river was a right which it could elect to exercise or not, and a

promise to forbear to exercise it clearly was sufficient consideration for the return promise by the United States to deliver water according to the schedule. See Williston on Contracts (1936), sections 135-136; Contracts Restatement (Am. L. Inst., 1932), sections 75-76. While the contract nowhere contains an express promise of forbearance, such a promise is necessarily implied from the provisions of Articles I and XI, since the Company could not take the full natural flow now claimed by the Farmers District at any point of time during the season consistently with the agreement that "the delivery of the water supply provided for in this contract [i. e., at any given point of time at a rate less than natural flow] will be accepted by the Company as in full satisfaction of all its rights to the water of the North Platte River."

If the first part of Article I were to be considered alone, it would not be unreasonable to construe it to mean that the United States merely would augment the natural flow right of the contractor with storage water from day to day, *if it should become necessary*, in order to provide it with the total amount set out in the schedule for the particular point of time. Such a construction is rendered impossible, however, by two provisions: (1) the clause "the total amount to be so delivered being approximately 180,000 acre-feet," which is the total of the graduated schedule, indicating that *all* water to be used by the contractor would be *delivered* by the United States, and (2) Article XI, providing for the acceptance of *these deliveries* by the contractor *in full satisfaction of all its rights to the water of the river, including both natural flow and surplus storage*.

It is contended by Nebraska that the contracts are indefinite and ambiguous and that they hence are subject to the application of the usual rules for the construction of ambiguous contracts, including reference to what is alleged to have been a practical construction by the parties in favor of the position now taken by Nebraska, the propositions that an interpretation which will produce a valid and equitable result is to be favored and that an unambiguous preamble should control ambiguous operative clauses, and the principle that the language of an instrument is to be construed most strongly against the party who drafted it, in this instance the United States. At page 53 of its reply brief, Nebraska points to the varying interpretations placed on the contracts by the several irrigation districts and the Bureau of Reclamation "as the best evidence of their ambiguity." It is sufficient to say that while varying legal analyses of the contracts have been proposed, all interested parties save the State of Nebraska concur in their ultimate meaning and application. I find no ambiguity in the contracts and it is elementary that the rules sought to be invoked by Nebraska are secondary rules of interpretation which are to be used

only when the meaning of words remains doubtful after the application of ordinary rules of interpretation. *E. H. Stanton Co. v. Rochester German Underwriters' Agency*, 206 Fed. 978 (1913); *Smith v. Bailey*, 105 Nebr. 754, 181 N. W. 926 (1921); *Williston on Contracts* (1936), Sec. 609; *Contracts Restatement* (Am. L. Inst., 1932), Sec. 236, *Comment* (a).

In connection with the rules of construction sought to be invoked by Nebraska, several comments nevertheless should be made in passing. Nebraska alleges at page 4 of its principal brief that "from the very first after these contracts were executed the Nebraska Districts continued to use their natural flow waters as they had always done before," that when it became insufficient they requested and obtained storage water from the Bureau of Reclamation, and that "this system of operation was followed for over twenty years." In the first place, while there is no occasion for reference to a practical construction of the contracts, as already stated, it must be borne in mind that for the greater portion of the life of the Warren Act contracts there has been sufficient water in the North Platte, including storage water, to meet the needs of all interests. When there was no lack of water the quantity diverted by each appropriator was not material so long as a sufficient amount remained to satisfy the needs of other appropriators. The schedule of deliveries for which provision was made in the contracts became highly important, however, when a scarcity of water occurred, as in 1931 and subsequent years, and it was then incumbent on the Bureau of Reclamation to supervise deliveries so that no contractor should receive a greater aggregate than that provided in the schedule if this would result in prejudice to the rights of other water users.

Secondly, in connection with the same argument concerning practical construction, it cannot be denied that the Farmers District is limited by the contract, so far as its *rights* are concerned, to an aggregate of 180,000 acre-feet of water annually, which, under Article XI, is in full satisfaction of all its rights to the water of the North Platte, *both natural flow and surplus storage water*. This aggregate amount is required to be delivered according to a specified schedule. The only authority to vary this schedule is contained in Article I, which provides that upon the written application of the contractor to the officer of the United States in charge of the storage works, the schedule may be varied *without affecting the total amount delivered*, if, in the judgment of the officer, such variation can be permitted without detriment to the interests of the United States or other irrigators. Nebraska again alleges at pages 32-33 of its principal brief, however, that it has been the practice of the Warren Act contractors to use natural flow until it became depleted, whereupon they would

request and obtain storage water, and that "this practice has been followed continuously up to the present year when the Reclamation Bureau suddenly decided to force certain Nebraska contract holders to limit their diversions of water to the quantities set out in their schedule of deliveries contained in their contracts." Whether it was "suddenly decided" to limit the Warren Act contractors' deliveries to the contract schedule or not, the fact remains that Article XI permits no other construction, since no officer of the United States is authorized to deliver water other than according to the contracts, and any practice which may have resulted in the receipt of excess amounts of water by the contractors, even during dry years, obviously cannot bind the United States to an obligation which is directly contradictory to the terms of the contracts.

As for the contention that the preambulatory recitals should control the operative clauses of the contract, it should be pointed out that there is no necessary inconsistency between the two in any event. Nebraska emphasizes the supplementary character of the storage water to be delivered and contends that the right to natural flow was intended to remain in force as such. At the time the contract was made, however, the Tri-State Land Company's appropriation was limited to 28.57 second-feet of water, under the decree of the trial court in *Enterprise Irrigation District v. Tri-State Land Co.*, 92 Neb. 121, 138 N. W. 171 (1912), as against the Company's contention that it was entitled to 1,142 $\frac{2}{7}$ second-feet. A continual flow at the lower rate would have given the contractor only 9,656.66 acre-feet of water during the period covered by the contract, as compared with the aggregate of 180,000 acre-feet for which provision was made. The difference naturally was "supplemental" in the sense that at the time the contract was made the contractor stood to receive more water under it than otherwise. On October 18, 1912, less than two months after the execution of the contract, the Nebraska Supreme Court reversed the judgment of the trial court and upheld the Tri-State Land Company's contention. This circumstance did not exist when the contract was made but even if it had, the use of the word "supplement" in the preamble need not have been in support of the position now taken by Nebraska, since the vagarious character of the flow of the North Platte offered no assurance that there would be either 1,142 $\frac{2}{7}$ second-feet or a substantially less amount of water available even to a senior appropriator during the dry season, whereas the contract offered 180,000 acre-feet, which in practice might well be a greater aggregate although at a lesser average rate of flow than that afforded by the sometimes empty appropriation right. Thus in the *Enterprise* case, *supra*, there was a stipulation, according to the court, that (138 N. W. at 175)—

² The average flow of the North Platte river during the last half of July and in August, September, and October at or near the head gate of the canal

of the Tri-State Company does not exceed 800 second-feet, and frequently runs as low as 300 second-feet; that in those months in 1910 the Tri-State Company diverted from 300 to 400 second-feet, and during portions of the time this diversion exceeded all the water flowing in the bed of the river at that point; that while the Tri-State was diverting all the water flowing in the river at its head gate water had come to the surface below and was flowing in the river so that some of the plaintiffs received a specified part of the water they were entitled to.

C. LEGAL OBJECTIONS INTERPOSED TO FOREGOING CONSTRUCTION

It may now be determined whether there is any legal obstacle to the enforcement of the contract according to the foregoing interpretation. Nebraska contends that the limitation of the Warren Act contractors to the amounts of water set out in the contract schedule of deliveries necessarily involves a sale or assignment of their natural flow rights to the United States, whereas a Nebraska water right is appurtenant to land and cannot be sold or assigned except as a part of the land itself, citing a line of Nebraska cases beginning with *Farmers Canal Company v. Frank*, 72 Neb. 136, 100 N. W. 286 (1904). The contract with the Tri-State Land Company contains no provision by which natural flow rights were expressly assigned, although the other contracts do contain a provision assigning all rights in excess of the schedule of deliveries, as in Article 10 of the Beerline contract, heretofore quoted. The doctrine of appurtenancy was codified by the Nebraska Legislature in 1895 (Laws 1895, ch. 69), but it is contended by counsel for the Bureau of Reclamation that since a water right was independent of land prior to 1895 this legislation could not affect water rights acquired prior thereto without constituting an illegal exercise of the police power. All of the Nebraska Warren Act contractors say the Gering Irrigation District have priorities antedating 1895. As to its contract, counsel for the Bureau of Reclamation suggests that the article purporting to effect an assignment may be regarded merely as an authorization to the United States to store natural flow water which later would be used to fill the district's schedule of deliveries, since the district itself, under section 46-618, Compiled Statutes of Nebraska (1929), could have stored appropriated water not needed for immediate use, and no separation of land and water therefore is necessarily involved. Nebraska contends that this involves the transformation of a natural flow right into a storage right, whereas a defined statutory procedure is required in order to perfect a storage right.

I am not convinced that the Nebraska act of 1895 could validly operate to preclude the assignment of a water right acquired as of a prior date. It is unnecessary, however, to consider this question in detail because the construction which I have placed on the Warren

Act contracts appears not to be inconsistent with Nebraska's contention that such rights could not be assigned. The validity of the contract with the Bridgeport District, which includes the assignment provision, was upheld in *Bridgeport Irrigation District v. United States*, 40 F. (2d) 826 (C. C. A. 8th, 1930), certiorari denied, 282 U. S. 866. In the district court the Bridgeport District sought to avoid the obligation to make payments under the contract on a number of grounds, one of which was the precise contention now raised by the State of Nebraska. The following is quoted from paragraph 6 of the district's amended answer (Tr., p. 16) :

Further answering said petition, the defendant alleges that the defendant district did not own and could not assign to the United States the amount of water this district was entitled to in excess of the amounts provided for in said contract, and could not limit its claims to the amounts provided for in said contract; that the right purported to be assigned to the United States by said contract and particularly Article 10 thereof, was the property of the landowners of said district and was appurtenant and a part of the irrigable lands of said district, and that said attempted assignment and limitation of claim to water to irrigate said lands is absolutely void, and, by reason thereof, the whole of said contract is absolutely void.

It may be noted, parenthetically, that in this instance the Warren Act contractor sought to have the contract declared *void* as involving an invalid assignment, whereas in the controversy now before me the State of Nebraska, in behalf of all Warren Act contractors, in effect contends that for the same reason they are entitled to *both natural flow as such and storage*. The district court thus disposed of the contention that the contracts involved an assignment (Tr., p. 22) :

To avoid it [the contract] except upon most convincing proof of invalidity would be unconscionable. The relinquishment of the district's existing water rights to the United States, embodied in the contract, *was simply the effective means to fix the amount of water which the district should receive*.

The law limited its taking of water to the amount which could be beneficially and economically used. This amount is fixed and provided for by the contract. It being within the power of the board to contract for the sufficient water supply, as it did, the provision for relinquishment, therefore, was a matter of the form of the contract and not of substance. [Italics supplied.]

If a contract including the assignment provision is unobjectionable, then *a fortiori* the Tri-State contract, which does not include it, need not be regarded as involving an attempt to do a prohibited act.

In connection with the court's statement above concerning the limitation imposed by law on the use of water, section 86-6311 of the Compiled Statutes of Nebraska (1929), quoted at page 21 of Nebraska's principal brief, is worthy of note. At the time the Warren Act contracts were made this section existed in a slightly different form (Revised Statutes of Nebraska [1913], Sec. 3404) :

Each appropriation shall be determined in its priority and amount, by the time at which it shall have been made, and the amount of water which the

works are constructed to carry: *Provided*, such appropriator shall at no time be entitled to the use of more than he can beneficially use for the purposes for which the appropriation may have been made, and the amount of any appropriation made by means of enlargement of the distributing works heretofore shall be determined in like manner: *Provided*, no allotment for irrigation shall exceed one cubic foot per second of time for each seventy acres of land nor three acre-feet in the aggregate during one calendar year for each acre of land for which such appropriation shall be made, neither shall it exceed the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry. * * * [Italics supplied.]

This section was later amended (Laws 1929, p. 486) by adding the words "from the natural flow of streams" following the word "allotment" in the portion emphasized above and by adding a specific proviso that these limitations should not apply to storage waters.

Since the Tri-State Land Company was limited by law to three acre-feet of water per acre annually from all sources at the time it entered into its contract and since the United States undertook to deliver to it 180,000 acre-feet or the approximate equivalent of the maximum to which it was entitled, it is difficult to see how the transaction can be regarded as having effected an assignment. The Company merely promised to forbear its right to take natural flow water as such from the river and the United States promised to deliver the aggregate amount of water to which the Company was entitled under the law of Nebraska at a specified graduated rate of flow which would enable it to have water during that part of the season when it would be most needed. For example, according to the stipulation in the *Enterprise* case, *supra*, the average rate of flow of the North Platte at the head gate of the Tri-State Land Company's canal during the latter half of July was stated not to exceed 800 second-feet and frequently to run "as low as 300 second-feet," whereas under Article I of the contract the Company obtained a right to have water delivered to it "at the uniform rate of Seven Hundred Thirteen (713) cubic feet per second during July." That a portion of this 713 second-foot flow might consist of natural flow not taken by the Company on April 15, when it was entitled to a flow of only 100 second feet under the contract, does not mean that that portion was sold or assigned to the United States.

Neither does it involve, as contended by Nebraska, an ineffectual attempt to transform a Nebraska natural flow right into a Wyoming storage right. Under its appropriation the United States has the right to impound and store surplus waters and the State of Nebraska cannot object if it impounds and stores waters which Nebraska appropriators could take, apart from the contract, but which by reason of the contract they have bound themselves not to take. If, for some highly improbable reason not here material, all of the Nebraska appropriators except the most junior one should expressly elect not to

take any water during a given season although in a position to make beneficial use of it, and if the United States should impound and store all water except a sufficient amount to satisfy the needs of the junior appropriator, surely neither the State of Nebraska nor the junior appropriator could successfully contend that the United States should have permitted an amount equivalent to the aggregate of the remaining natural flow rights to run to waste.

As for the other Warren Act contracts, they are subject to the same construction as the Tri-State contract unless such a construction is precluded by the provision assigning to the United States all the contractor's "right, title, and interest to the waters of the North Platte River appurtenant to the above-described lands over and above the amount provided in this contract." This possibility is sufficiently answered by the decision in the *Bridgeport* case, discussed above in connection with the Tri-State contract. It should be noted also that this provision does not, as stated by Nebraska at page 37 of its reply brief, purport to assign *all* of the contractor's natural flow rights. It merely purports to assign natural flow water to the extent that the aggregate of that natural flow water, if put to beneficial use in a given year, might exceed the amount of water for which provision is made in the schedule of deliveries. And since these contracts also provide for the delivery of aggregate amounts of water which are the approximate equivalents of the maximum amounts to which the contractors were entitled in any event under the Nebraska statute then in force, the objection that they effected prohibited assignments is without merit. At page 56 of Nebraska's reply brief it is stated:

We believe that this argument is specious, and that it is a sufficient answer to say that the amount of an appropriation is wholly a matter of state concern and state administration. It in no way comes within the orbit of the authority of the Bureau of Reclamation.

While it is not for the Bureau of Reclamation or any other branch of the Federal Government to say what limitations shall be placed on appropriations by State law, it is certainly not too presumptuous for it to examine the State law in determining the scope and meaning of a contract to which it is a party. As stated at pages 24-25 of Nebraska's principal brief,

We are entitled to the presumption that the Bureau of Reclamation, as well as the irrigation districts entering into the Warren Act contracts, were familiar with the law of this state. We can also presume that these contracts were made with the view of complying with the existing law. * * *

Nebraska further contends that the construction which has been placed on the Warren Act contracts at least involves an invalid attempt to sell or assign surplus waters, i. e., the amount by which the aggregate of a particular contract schedule is less than the con-

tractor's appropriation. It is contended that under the law of Nebraska an appropriator has no surplus water above the amount which can be put to beneficial use. This is true and it also is true, as already pointed out above, that it is limited to 3 acre-feet per acre annually. The objection therefore is applicable, if at all, only in the several instances in which the contract schedule may have fallen somewhat short of providing an aggregate of 3 acre-feet of water. And in those instances, even if it be conceded that water rights antedating 1895 could not thereafter be assigned, the fact remains, as already discussed at great length, that the contractors nevertheless promised to use only a specified amount of water. That this obligation was accompanied by a further consideration which in terms is now argued to have been invalid does not entitle the party from whom both considerations moved to avoid the first obligation.

At this point a further observation may be made in connection with Nebraska's statement, quoted above, to the effect that the contracts must have been made with a view of complying with existing law. It contends that by the act of 1895 and cited decisions of the Nebraska Supreme Court no water rights, including those antedating 1895, were thereafter assignable. At the time the first Warren Act contract was made this act had been in effect seventeen years and two of the three Nebraska decisions cited had been handed down by the Nebraska court. Presumably, then, the parties to the contracts did not intend to accomplish that which was forbidden. Indeed, it is further stated by Nebraska at page 26 of its principal brief:

It is equally obvious that the parties to these Warren Act contracts did not intend to go through the motions of making a contract that was a nullity. Surely they intended these contracts to have some effect and to fulfill some definite purpose. It becomes necessary to pursue the matter further to determine the proper construction that should be placed upon such agreements in order to determine the purpose for which such instruments were executed. * * *

As already stated, the meaning of the contracts is clear and I am unable to find any merit whatever in Nebraska's contention that the contractors retained their rights to take natural flow from the river at any time they could make beneficial use of it and in addition acquired rights to demand storage water when natural flow should become depleted.

Since the submission of briefs in this controversy the Attorney General of Nebraska on several occasions has invited attention to *Ickes v. Fow*, *Ickes v. Parks*, and *Ickes v. Ottmuller*, 85 F. (2d) 294 (1936), in which a decree denying a motion to dismiss the bills was affirmed by the Supreme Court of the United States on February 1, 1937 (57 Sup. Ct. Rep. 412). In a letter dated February 18 he quoted

the following language of the Supreme Court (pp. 416-417) as sustaining the position of the State of Nebraska :

Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works. * * * The government was and remained simply a carrier and distributor of the water, with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works. * * * And in those states, generally, including the state of Washington, it long has been established law that the right to the use of the water can be acquired only by prior appropriation for a beneficial use; and that such right when thus obtained is a property right, which, when acquired for irrigation, becomes, by state law and here by express provision of the Reclamation Act as well, part and parcel of the land upon which it is applied.

I do not regard the conclusions which I have advanced in this discussion as precluded by this decision. In the first place, as stated by Mr. Justice Sutherland at the outset of the opinion, "The sole question presented in each of these three cases is whether the United States is an indispensable party defendant." Secondly, the decision was on a motion to dismiss, which assumed the allegations of the bill to be true, including certain allegations of conspiracy. Lastly, it has not here been denied that by the Nebraska act of 1895, at least water rights dating thereafter became appurtenant to land and could not be sold or assigned separately. As already stated repeatedly, I do not regard the Warren Act contracts as involving prohibited sales or assignments of the water to be delivered to the contractors.

III. CONCLUSION

In summary, my conclusions are :

1. The amounts of water for which provision is made in the Warren Act contracts constitute the total amounts to which the contractors are entitled as a matter of right under the Nebraska law and the Warren Act contracts with the United States.

2. The United States may permit the delivery of the amounts of water stated in the contracts from natural flow, which the contractors have obligated themselves not to take as such, and from storage, drainage, and seepage.

3. The only authorization to vary deliveries from the schedules provided in the contracts is in the provision for a written request to the officer in charge of the storage works, which further provides, however, that the variation shall not affect the total amount delivered.

4. Any diversion made by a Warren Act contractor in excess of the flow for which provision is made in its schedule for that par-

ticular point of time consequently is chargeable against the aggregate of the schedule.

5. From the foregoing it follows without the necessity of further discussion that the refusal of the Farmers Irrigation District to deliver water to the Northport Division of the North Platte project in the spring of 1936, at a time when the district was receiving its full amount of water under the schedule set out in the Warren Act contract of August 20, 1912, was a breach of its carriage contract of August 10, 1915, with the United States.

This discussion has been long and in some respects repetitious. This has been necessitated at least in part, however, by the lengthy and elaborate arguments which have been presented to the Department by the several interested parties. I am constrained to say further that some of the arguments which have been advanced in behalf of the Warren Act contractors border on being frivolous. I have regarded the issue immediately presented as a narrow one—that of the construction of the Warren Act contracts, and nothing can be clearer than that either the districts undertook to limit their annual use of water to the aggregates of the schedules, in consideration of deliveries of water according to those schedules by the United States, or the contracts are not capable of enforcement. The contracts are unambiguous and if, as contended by Nebraska, the districts were without authority to limit their consumption of water, a proposition with which I do not agree in any event and which was held untenable in the *Bridgeport* case, *supra*, it still is impossible to say that they are entitled both to natural flow as such and to storage water. The consequence then would be that they would be relegated solely to the exercise of their natural flow rights throughout the irrigation season, including the dry months. It does not follow that if the districts had no authority to limit their diversions, a construction may be placed on the contracts which is not only different from but directly contradictory to the express language of the contracts.

While it is not of great import, before concluding it should be pointed out that these contracts were not negotiated at the instance of the United States, as implied by the State of Nebraska in its briefs. To the contrary, the records of the Department show that petitions to purchase water from the Pathfinder Reservoir were on file prior to the enactment of the Warren Act. By a letter dated February 1, 1911, Secretary Ballinger acknowledged receipt of such a petition from the Winter's Creek Irrigation Company, stating that "as the law now stands, the Department is without authority to furnish water to irrigation districts as requested" and that even if the pending legislation should be enacted "a further question arises whether

surplus water is available for this purpose from the Pathfinder reservoir." And on March 14, 1911, Acting Secretary Pierce acknowledged the receipt of a similar petition from Mr. C. N. Wright, Vice-President and General Manager of the Tri-State Land Company, and referred to a report by the Board of Army Engineers, which expressed doubt that surplus storage water would be available. Departmental records show that prior to and following the enactment of the Warren Act the Secretary of the Interior was further importuned from various sources and by various interests in Nebraska to enter into the contracts.

It is conceded by everyone that the natural flow of the North Platte was insufficient during the latter part of the irrigation season to permit the effective reclamation of all of the arid lands in the valley. Storage water was a necessity. It became available through the medium of the Pathfinder Reservoir and there can be no question that the irrigation districts intended the United States to take control of the river's flow and intended in exchange to accept a regulated supply of water that was estimated to be sufficient to irrigate the land successfully throughout the irrigation season. Whether as a physical fact 180,000 acre-feet of water annually or approximately 3 acre-feet per acre is a sufficient supply of water for the Farmers Irrigation District, for example, is not before me for decision; the district's predecessor, the Tri-State Land Company, agreed to accept that amount in full satisfaction of all its rights to the water of the North Platte River, *including both natural flow and surplus storage*, and the law of Nebraska at the time the contract was made set the same maximum.

The project records show that in 1936 the Farmers Irrigation District diverted some 233,000 acre-feet of water from the river. This was 53,000 feet more than the aggregate for which provision was made in the contract. It consequently ill becomes it to attempt to enforce a construction of the contract which is not only impossible but which would result in depriving many other Nebraska water users, who have not been inarticulate in this controversy, of their rights in the waters of the North Platte.

It is essential, not merely for the Federal Government or the State of Nebraska as such, but for the benefit of the water users of Nebraska, in whose interests both governments ultimately are acting, that there be a final recognition by the Warren Act contractors of the obligations which they voluntarily incurred in exchange for rights which they sought, and that the division of the waters of the North Platte, which are indispensable to the existence of all those living in the valley, be accomplished in a spirit of harmony and cooperation.

ON PETITION FOR RECONSIDERATION

December 11, 1937

WEST, *Acting Secretary*:

During the summer of 1936 the State of Nebraska filed a complaint with the Department against the construction placed by the Bureau of Reclamation on contracts made pursuant to the Warren Act (act of February 21, 1911, 36 Stat. 925) between the United States and certain irrigation districts on the North Platte River in Wyoming and Nebraska.

By the complaint the State of Nebraska contended that the Warren Act contractors were entitled to exercise their natural flow rights at any time beneficial use thereof could be made, notwithstanding a contract provision by which they had agreed to accept deliveries of water at a specified graduated rate of flow "in full satisfaction" of all their rights to the waters of the North Platte, "both natural flow and surplus storage." By a departmental decision dated June 4, 1937, Nebraska's complaint was held to be without merit and the action of the Farmers Irrigation District, one of the Warren Act contractors, in withholding deliveries of water to the Northport Division of the North Platte project at a time when the district was receiving its full amount of water under the Warren Act schedule was held to be a breach of a separate carriage contract, dated August 10, 1915, with the United States.

On July 29 the Attorney General of Nebraska filed a formal protest, supported by a brief, against the Department's decision and requested that it be reconsidered. While in the due course of departmental procedure this request would have been granted to the extent that new arguments had been presented, the United States Attorney for the District of Nebraska has since filed a bill of complaint in the United States District Court for that district, joining as defendants the Nebraska State Engineer, the Chief of the Nebraska Bureau of Irrigation, Water Power and Drainage and the Farmers Irrigation District, its manager and directors. An examination of the allegations of the bill and the prayer for relief indicates that the suit embraces the same subject matter as that involved in the departmental decision of June 4.

In these circumstances, the Department can no longer with propriety continue to consider the merits of the controversy and Nebraska's request that the decision of June 4 be reconsidered accordingly is denied, without prejudice to the right of any of the interested parties to request consideration, following the conclusion of the suit, of any matters not therein determined.

INTERPRETATION OF THE MINERAL LEASING ACT OF FEBRUARY 25, 1920 (41 STAT. 347), AS AMENDED

Opinion, June 4, 1937

OIL AND GAS LANDS—INCLUSION OF PERMIT AREA IN UNIT AREA NOT PROVEN PRODUCTIVE.

The inclusion of an entire permit area in an approved unit plan, under the amendatory act of March 4, 1931, does not authorize the issuance of a lease or leases therefor if no part of the unit area subject to the plan has been proven productive of oil or gas.

OIL AND GAS LANDS—PERMIT AREA NOT WITHIN PRODUCTIVE PART OF UNIT AREA.

The inclusion of an entire permit area in an approved unit plan does not authorize the issuance of a lease or leases therefor if, although production has been obtained within the unit area, no part of such permit area has been proved, by discovery and reasonable geologic inference therefrom, to be within the probable productive area.

OIL AND GAS LANDS—LEASE FOR PERMIT AREA IN UNIT PLAN AREA, PART OF WHICH IS PRODUCING.

The inclusion of an entire permit area in an approved plan for a unit area, part of which is producing, and determination that part of the permit area is within the probable productive limits of the unit area, authorizes the issuance of a lease or leases for all of such permit.

OIL AND GAS LANDS—SECTION 14 OF MINERAL LEASING ACT—ROYALTIES.

The phrase "issue a lease for the area of the permit so included in said plan without further proof of discovery" does not authorize the issuance of a lease at 5 percent and another lease at not less than 12½ percent royalty as provided in section 14 of the Mineral Leasing Act.

SUBSEQUENT DISCOVERY ON LEASEHOLD WITHIN UNIT PLAN AREA.

If a lease or leases issue under section 27 for the area of a permit included in an approved unit plan, the subsequent discovery on such leasehold within the unit area of a valuable deposit will not constitute, under section 14, a proper basis for issuance of a lease or leases for the area of the permit not included in the plan.

RENTAL RELIEF—ACT OF FEBRUARY 9, 1933—LESSEES.

If a lease or leases issue under sections 14 and 27, the lessees are entitled to rental relief under the provisions of the act of February 9, 1933, where none of the lands included within the "unit" area are within the "primary" or "participating" area and to which no production is allocated under the unit agreement.

SAME—LEASE PARTLY WITHIN AND PARTLY WITHOUT PARTICIPATING AREA.

If a unitized lease is situated partly inside and partly outside a "participating area," the lessee is not entitled to rental relief under the provisions of section 39 (act of February 9, 1933) for the portion of his lease to which no production is allocated under the unit agreement.

If only a portion of a lease is unitized, the lessee is not entitled to rental relief under the provisions of section 39 for the remaining ununitized portion of the lease during a period of approved suspension of operations and production applicable to all or part of the unitized portion. The unitized and ununitized portions cannot be considered, in effect, as separate leases in determining the application of section 39.

AUTHORITY TO REQUIRE AGREEMENTS FOR UNIT OPERATION.

Under the Mineral Leasing Act, as amended by the act of March 4, 1931, the Secretary of the Interior has the implied power to condition the granting or extension of oil and gas prospecting permits on the filing of stipulations agreeing to unit operation.

LESSEES' CONSENT TO UNIT OPERATION AND ROYALTY RATES.

Oil and gas lessees cannot be forced to unitize their holdings, nor to consent to an increase of the low royalty rates which already have been crystallized in the leases issued to them under section 14. Negotiations for unitization become abortive if the lessees cannot come to a mutually satisfactory understanding with the Secretary as to what the royalty rate under the proposed unit plan or agreement shall be.

PERMITTEES' CONSENT TO UNIT OPERATION AND ROYALTY RATES.

Section 27 of the Mineral Leasing Act, as amended, authorizes the Secretary to establish the royalty only with the consent of the permittees about to enter into the unit plan, and if a permittee withholds his consent, the acreage covered by his permit cannot be unitized.

SECRETARY'S DISCRETION UNDER SECTION 27—LEASES ISSUED WITHOUT DISCOVERY COVERING PERMIT AREAS WITHIN UNIT PLAN AREAS.

While the Secretary has discretion to fix a royalty rate in a lease issued under section 27, as amended, to a permittee who has filed a unitization stipulation, comparable to the rates for primary and secondary leases fixed in section 14, he is not obligated to do so. Section 14 does not apply to leases issued without discovery covering permit areas within a producing field which have been unitized either through an agreement voluntarily entered into or through a unit plan prescribed by the Secretary pursuant to authority vested in him by a unitization stipulation filed by the permittee in order to obtain a permit or an extension of a permit period.

PERMITS PARTLY WITHIN AND PARTLY WITHOUT UNIT PLAN AREAS.

If one portion of the area covered by a permit has been included in a unit plan for the development and operation of a producing field of which it is a part and another portion has not, the permit area is, in effect, split up into two independent entities. The non-unitized portion should be treated as if it alone comprised the entire area of a permit issued under section 13 and entitled, on proof of discovery, to primary and secondary leases under section 14. The unitized portion becomes entitled to a lease under section 27 at a royalty to be fixed by agreement between the Secretary and the permittee, or by the Secretary, pursuant to authority vested in him, by stipulation. The Secretary, in the lease issued under section 27, may fix a single flat rate or several rates applicable to different parts of the leased area as he sees fit. He may also divide the lease into two component parts analogous to primary and secondary leases under section 14; but he is not required to do so.

MARGOLD, *Solicitor*:

At the request of the Director of the Geological Survey, you [the Secretary of the Interior] have asked my opinion concerning the answers to nine specific questions relating to the proper interpretation of section 27 of the Mineral Leasing Act of February 25, 1920 (41 Stat. 347), as amended, and concerning the possibility of establishing a basis in principle for the disposition of other related questions which

may arise. Actually two of those related questions have arisen since your request was made, and I shall address myself in this opinion to those questions in addition to the original nine.

The questions presented require the consideration of several sections of the act other than section 27. Indeed, they are in certain instances hardly susceptible of intelligent answer without a clear comprehension of the fundamental purposes underlying the basic act of February 25, 1920, and of the changes in those purposes sought to be expressed by amendatory enactments. Consequently, instead of making immediate answer to the specific questions, I shall first seek to develop the desired basis in principle for answering all questions that may arise with reference to the administration of the statutory provisions under consideration. The answers to the specific questions then will follow almost as a matter of course.

The act of February 25, 1920, was enacted at a time when there was no real knowledge either of the vast deposits of petroleum soon thereafter to be discovered in this country or of the possibilities for conserving our natural petroleum resources through scientific development and operation of oil fields. There appeared to be serious danger of a speedy exhaustion of the domestic supply, and the most effective way then known to seek relief from the threatened shortage was to stimulate the search for new fields. This the Congress sought to do, so far as public lands were concerned, through certain provisions in the act of February 25, 1920.

The act made a sharp distinction between operations on public lands embracing the known geologic structure of a producing oil or gas field and prospecting on public lands not embracing such a structure. As to the latter, sections 13 and 14 provided, so far as relevant, as follows:

SEC. 13. That the Secretary of the Interior is hereby authorized, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this Act a prospecting permit, which shall give the exclusive right, for a period not exceeding two years, to prospect for oil or gas upon not to exceed two thousand five hundred and sixty acres of land wherein such deposits belong to the United States and are not within any known geological structure of a producing oil or gas field upon condition that the permittee shall begin drilling operations within six months from the date of the permit, and shall, within one year from and after the date of permit, drill one or more wells for oil or gas to a depth of not less than five hundred feet each, unless valuable deposits of oil or gas shall be sooner discovered, and shall, within two years from date of the permit, drill for oil or gas to an aggregate depth of not less than two thousand feet unless valuable deposits of oil or gas shall be sooner discovered. The Secretary of the Interior may, if he shall find that the permittee has been unable with the exercise of diligence to test the land in the time granted by the permit, extend any such permit for such time, not exceeding two years, and upon such conditions as he shall prescribe.

SEC. 14. That upon establishing to the satisfaction of the Secretary of the Interior that valuable deposits of oil or gas have been discovered within the limits

of the land embraced in any permit, the permittee shall be entitled to a lease for one-fourth of the land embraced in the prospecting permit: *Provided*, That the permittee shall be granted a lease for as much as one hundred and sixty acres of said lands, if there be that number of acres within the permit.

* * * Such leases shall be for a term of twenty years upon a royalty of 5 per centum in amount or value of the production and the annual payment in advance of a rental of \$1 per acre, the rental paid for any one year to be credited against the royalties as they accrue for that year, with the right of renewal as prescribed in section 17 hereof. The permittee shall also be entitled to a preference right to a lease for the remainder of the land in his prospecting permit at a royalty of not less than 12½ per centum in amount or value of the production, and under such other conditions as are fixed for oil or gas leases in this act, the royalty to be determined by competitive bidding or fixed by such other method as the Secretary may by regulations prescribe: *Provided*, That the Secretary shall have the right to reject any or all bids.

The provision in section 14 entitling a permittee, on discovery of oil or gas, to a primary lease at a royalty rate of 5 percent marked an unprecedented departure from the royalty rates customarily current in the industry. A 12½ percent rate was the minimum commonly accepted before February 25, 1920, and actually has remained the prevailing minimum rate ever since. Rates of 16⅔ percent have not been unusual, and, under competitive conditions, royalties as high as 65 percent have been exacted. The establishment of the low 5 percent rate for primary leases issued under section 14 of the Leasing Act not only was a radical departure from the normal but also was a departure made purely by way of experiment for the purpose of encouraging prospectors to probe the oil possibilities of public lands not within the geologic structure of any producing oil or gas field.

With respect to leases of public lands which were within a known producing field, on the other hand, the act of February 25, 1920, provided a royalty rate more in conformity with current practice. Thus section 17 provided—

That all unappropriated deposits of oil or gas situated within the known geologic structure of a producing oil or gas field and the unentered lands containing the same, not subject to preferential lease, may be leased by the Secretary of the Interior to the highest responsible bidder by competitive bidding under general regulations to qualified applicants in areas not exceeding six hundred and forty acres and in tracts which shall not exceed in length two and one-half times their width, such leases to be conditioned upon the payment by the lessee of such bonus as may be accepted and of such royalty as may be fixed in the lease, which shall not be less than 12½ per centum in amount or value of the production, and the payment in advance of a rental of not less than \$1 per acre per annum thereafter during the continuance of the lease, the rental paid for any one year to be credited against the royalties as they accrue for that year.

To prevent the effectuation of any monopolistic control over the oil resources discovered through prospecting under the act, section 27 provided that—

* * * no person, association, or corporation shall take or hold, at one time, more than three oil or gas leases granted hereunder in any one State, and not more than one lease within the geologic structure of the same producing oil or gas field; no corporation shall hold any interest as a stockholder of another corporation in more than such number of leases; and no person or corporation shall take or hold any interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease under the provisions hereof, which, together with the area embraced in any direct holding of a lease under this act, or which, together with any other interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease under the provisions hereof, for any kind of mineral leased hereunder, exceeds in the aggregate an amount equivalent to the maximum number of acres of the respective kinds of minerals allowed to any one lessee under this act. * * * *And provided further*, That if any of the lands or deposits leased under the provisions of this act shall be subleased, trusteeed, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever, so that they form part of, or are in anywise controlled by any combination in the form of an unlawful trust, with consent of lessee, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, phosphate, oil, oil shale, gas, or sodium entered into by the lessee, or any agreement or understanding, written, verbal, or otherwise to which such lessee shall be a party, of which his or its output is to be or become the subject, to control the price or prices thereof or of any holding of such lands by any individual, partnership, association, corporation, or control in excess of the amounts of lands provided in this act, the lease thereof shall be forfeited by appropriate court proceedings.

While many of the provisions in the act bestowed specific authority on the Secretary of the Interior to impose conditions or to establish rules and regulations appropriate to the particular subject matter dealt with, the act contained, in addition, a catch-all provision in section 32 conferring such authority in general terms. The provision reads as follows:

That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this act, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this act:

During the decade following the enactment of the act of February 25, 1920, the discovery of one large oil field after another turned apparent scarcity into actual overabundance. These physical discoveries were matched by scientific discoveries which worked radical changes in engineering concepts concerning conservation in the development of oil fields and in the production of oil. Among the scientific discoveries probably the most important were those revealing the enormous advantages derivable from unit development and operation of oil fields, not merely through the elimination of unnecessary production costs but also, and even more vital, through

the conservation of the oil itself and the assurance of the largest ultimate recovery.

To the changed situation many features of the act of February 25, 1920, were not attuned. Designed to stimulate prospecting and production in a time of scarcity, section 14 could not fulfill its intended purpose without increasing the chaos into which the oil industry had been plunged by reason of an already overabundant supply. Framed to prevent the monopolization of oil fields in the public domain, section 27 became, in effect, an express prohibition against the utilization on the public lands of the newly discovered engineering principles concerning conservation through unit development and operation of oil fields.

In those circumstances, Secretary of the Interior Wilbur announced on March 13, 1929, that until further notice no more oil and gas prospecting permits would be issued under the act of February 25, 1920. His action was met by an immediate attempt, through mandamus proceedings, to compel him to continue the issuance of permits to qualified applicants. The litigation ultimately was carried to the Supreme Court of the United States, which unanimously held that no writ of mandamus should issue (*United States v. Wilbur*, 283 U. S. 414). The grounds of that decision are set forth in the following excerpt from the opinion of the court, 283 U. S. 414, at 419-420:

The answers aver "that under the Act (1920), the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety as the facts may be deemed to warrant." Having examined the Act we cannot say that by any clear and indisputable language it refutes his position. Certainly, there is ground for a plausible, if not conclusive, argument that so far as it relates to the leasing of oil lands it goes no further than to empower the Secretary to execute leases which, exercising a reasonable discretion, he may think would promote the public welfare.

It is unnecessary now to declare the precise meaning of the relevant provisions of the Act. It was passed when according to a widely accepted view decline of petroleum production in the United States was imminent. In fact, there has been an enormous increase and a consequent troublesome surplus. Looking only at its words one may interpret Sec. 13 as the Secretary says he did. And this conclusion is aided by consideration of his general powers over the public lands as guardian of the people. Sec. 441, R. S.; *United States v. Grimaud*, 220 U. S. 506; *Williams v. United States*, 138 U. S. 514; *Knight v. U. S. Land Assn.*, 142 U. S. 161; also the right of the President to withdraw public lands from private appropriation. *United States v. Midwest Oil Co.*, 236 U. S. 459; Withdrawal Act, 1910 (36 Stat. 847).

Under the established rule the writ of mandamus cannot be made to serve the purpose of an ordinary suit. It will issue only where the duty to be performed is ministerial and the obligation to act preemphory, and plainly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable.

During the pendency of this litigation, Congress itself had taken action to meet the new situation by making, through the act of July 3, 1930 (46 Stat. 1007), several vital amendments in the act of February 25, 1920. Although those amendments expressly were made operative only until January 31, 1931, they were reenacted with slight modifications as permanent legislation by the act of March 4, 1931 (46 Stat. 1523). By these amendments the following provisions were inserted into section 17 of the act of February 25, 1920 (46 Stat. 1523, 1524):

* * * *Provided*, That any lease heretofore or hereafter issued under this act that has become the subject of a cooperative or unit plan of development or operation of a single oil or gas pool, or area, or other plan for the conservation of the oil and gas of a single pool or area, which plan has the approval of the Secretary of the department or departments having jurisdiction over the Government lands included in said plan as necessary or convenient in the public interest, shall continue in force beyond said period of twenty years until the termination of such plan: *And provided further*, That said Secretary or Secretaries shall report all leases so continued to Congress at the beginning of its next regular session after the date of such continuance.

Any cooperative or unit plan of development or operation which includes land owned by the United States shall contain a provision whereby authority, limited as therein provided, is vested in the Secretary of the department or departments having jurisdiction over such land to alter or modify from time to time in his discretion the quantity and rate of production under said plan. The Secretary of the Interior is authorized, whenever he shall deem such action necessary or in the public interest, with the consent of lessee, by order to suspend or modify the drilling or producing requirements of any oil and gas lease heretofore or hereafter issued, and no lease shall be deemed to expire by reason of the suspension of production pursuant to any such order.

Section 27 likewise was amended through the insertion of the following provisions (46 Stat. 1523, 1525):

* * * *And provided further*, That for the purpose of more properly conserving the natural resources of any single oil or gas pool or field, permittees and lessees thereof and their representatives may unite with each other or jointly or separately with others in collectively adopting and operating under a cooperative or unit plan of development or operation of said pool or field, whenever determined and certified by the Secretary of the Interior to be necessary or advisable in the public interest, and the Secretary of the Interior is thereunto authorized in his discretion, with the consent of the holders of leases or permits involved, to establish, alter, change, or revoke drilling, producing, and royalty requirements of such leases or permits, and to make such regulations with reference to such leases and permits with like consent on the part of the lessee or lessees and permittees in connection with the institution and operation of any such cooperative or unit plan as he may deem necessary or proper to secure the proper protection of such public interest: *And provided further*, That when any permit has been determined to be wholly or in part within the limits of a producing oil or gas field which permit has been included, with the approval of the Secretary of the Interior, in a unit operating agreement or other plan under this act the Secretary of the Interior may issue a lease for the area of the permit so included in said plan without further proof of discovery: *Provided further*, That

the Secretary of the Interior is hereby authorized, on such conditions as he may prescribe, to approve operating, drilling, or development contracts made by one or more permittees or lessees in oil or gas leases or permits, with one or more persons, associations, or corporations, whenever in his discretion and regardless of acreage limitations, provided for in this Act, the conservation of natural products or the public convenience or necessity may require it or the interests of the United States may be best subserved thereby:

The most obvious purpose and effect of the amendments was to remove the barrier in the 1920 act against unitization of oil fields in the public lands. This it did by authorizing permittees and lessees in the same field or pool to join in a unit plan whenever the Secretary of the Interior determined and certified that it was in the public interest to do so. At the times the amendments were enacted and reenacted, Secretary Wilbur's order against the issuance of any new permits was in force. Shortly after their reenactment, the United States Supreme Court sustained the Secretary's authority to make that order, and it actually continued in effect until April 4, 1932. On that date, Secretary Wilbur promulgated a new rule or regulation allowing permits to be issued again, but only to applicants willing to accompany their applications with a stipulation containing, among others, the following provisions:

(a) *Cooperative prospecting development and unit plans*: The applicant agrees to submit to the Secretary of the Interior for his approval within two years from the date of the permit an acceptable plan for the prospecting and development as a unit of the pool, field or area affecting the permit land, with evidence either that such plan has been agreed to by the parties in interest and will insure effective unit operation if oil or gas is discovered, or that in the event of failure to so agree the parties will conform to such plan as the Secretary may prescribe, which shall adequately protect the correlative rights of all permittees and other parties in interest, including the United States.

After May 15, 1933, a similar stipulation was required in all instances in which extensions of time were granted for existing permits.

Although the Secretary of the Interior was not *expressly* authorized by the 1920 act, as amended, to condition the granting of permits on the filing of such a stipulation, he clearly had implied power to do so both under the general provisions of section 32, authorizing him to prescribe rules and regulations to carry out the purposes of the act, and under the specific provisions of section 13, authorizing him to grant permits "under such necessary and proper rules and regulations as he may prescribe." Indeed, his authority in this regard is authoritatively established as a necessary corollary to the decision of the Supreme Court in *United States v. Wilbur, supra*. There, having reference to the 1920 act before its amendment, the court held that the Secretary of the Interior, if he deemed it in the public interest, could refuse to issue permits altogether. This enabled him, even at a time when the entry into unit plans actually was prohibited by the act, to

refuse to issue permits which, in the absence of such plans, would result in unscientific and wasteful development of the government's oil resources.

Of course, as long as the prohibition against cooperative holding or development of areas in excess of 2,560 acres remained in the statute, the Secretary could not do more than refuse to issue permits altogether. He was powerless to limit the granting of them to applicants who filed stipulations agreeing to unit operation. To do this would have been affirmatively to require applicants to violate an explicit prohibition in the statute; and obviously, no express or implied rule-making power of an executive officer can go so far. But as soon as the Congress amended the 1920 act, the Secretary of the Interior, by granting permits only to those who were willing to file stipulations agreeing to unit operation, no longer was requiring applicants to agree, as a condition for a favorable exercise of his discretion, to do something that was prohibited by the statute. On the contrary, unit plans were now expressly permitted by the statute whenever the Secretary of the Interior deemed them in the public interest. There therefore was no reason why the Secretary, exercising the discretion which the Supreme Court had held to be his, should not decide that the granting of permits was in the public interest only when it was certain that oil, if discovered by the permittee, would be conserved, developed, and produced in accordance with a unit plan prescribing the best methods and requirements known to engineering science. The new rule or regulation promulgated by Secretary Wilbur on April 4, 1932, was designed to effectuate such a decision. It was neither unreasonable nor inappropriate nor inconsistent with the 1920 act as amended. Its validity consequently is not open to successful attack (see *United States v. Morehead*, 243 U. S. 607, 613, 614; *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316; *Utah Power and Light Co. v. United States*, 230 Fed. 328, 333) and it has never been questioned. Since April 4, 1932, approximately 5,400 permits have been issued and in each case a satisfactory stipulation agreeing to unit operation has been filed.

With reference to the extension of permits already outstanding, a somewhat different policy was followed for a time. Until May 15, 1933, a two-year extension was granted in each case where the equities warranted favorable action; and instead of conditioning the extension on the filing of a stipulation agreeing to unit operation, the permittee merely was notified that the next application for an extension would be conditioned on the filing of such a stipulation. On May 15, 1933, the policy as to extensions was changed to bring it into complete uniformity with the policy as to permits; and since that time every extension has been conditioned on the filing of a stipulation embodying the provisions of paragraph (a) of the order of April 4, 1932, hereinabove quoted.

The authority of the Secretary of the Interior to grant or deny applications for extension of permits about to expire is no less discretionary than his authority to grant or deny applications for the issuance of permits in the first place. Although *United States v. Wilbur, supra*, involved only the latter, the basis of the United States Supreme Court's decision is equally applicable to the former. The power to grant the first two-year extension was bestowed by Section 13 of the original 1920 act in the following terms:

* * * The Secretary of the Interior may, if he shall find that the permittee has been unable with the exercise of diligence to test the land in the time granted by the permit, extend any such permit for such time, not exceeding two years, and upon such conditions as he shall prescribe.

Authority to grant a three- instead of a two-year extension is conferred in similar terms by the act of January 11, 1922 (42 Stat. 356). Then came the acts of April 5, 1926 (44 Stat. 236), and of March 9, 1928 (45 Stat. 252), authorizing further extensions of two years each in terms which were clearly permissive and not mandatory, but which did not expressly mention the power to make rules and regulations or to impose conditions. Subsequently two more acts were passed (46 Stat. 58; 47 Stat. 445), authorizing additional extensions of three years each in terms which not only were permissive rather than mandatory but also again expressly referred to the Secretary's power to impose conditions. Since none of the acts makes it mandatory for the Secretary of the Interior to grant any extension whatsoever, he has discretion to refuse extensions inimical to the public interest and hence implied authority to specify reasonable conditions in protection of the public interest which must exist or be met as a basis for a favorable exercise of his discretion. (See *United States v. Wilbur, supra*; *United States v. Morehead, supra*; *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301, 309.)

Consequently, although the acts authorizing the first (alternative), fourth, and fifth periods of extension grant this power in express terms, they can be regarded merely as confirming, in this respect, an authority that would have existed by implication from the permissive or discretionary nature of the duty imposed on the Secretary. Since no express confirmation was necessary, its omission from the acts authorizing the second and third periods of extension does not necessarily preclude the existence of the implied authority to prescribe reasonable conditions. On the contrary, existence of implied authority is precluded only if the omission is ascribable to a deliberate intention on the part of the Congress to deprive the Secretary of any authority to refuse extensions under conditions which he reasonably deems contrary to the public interest. That such an intention cannot properly be ascribed to the Congress is, I believe, clear.

The omission occurs without specially indicated reason in two acts sandwiched in between four others which deal with the same subject matter and in which the Congress actually has expressed precisely the opposite intention. If the Congress had intended to reverse its policy, after twice expressly confirming the Secretary's authority to prescribe conditions in the acts authorizing extensions for the first three years, it no doubt would have indicated that intention expressly rather than left it to doubtful inference. There was no reason to empower the Secretary to impose conditions as a basis for extensions during the first three years, then to preclude his doing so with respect to extensions for the next four years, and then to permit it again with respect to the last six years. If the omission of the express reference to the power to impose conditions were attributable to a drastic reversal of Congressional policy, it is reasonable to suppose that the Congress would have made the new policy uniformly applicable to all extensions by appropriate amendments to the prior statutes. Likewise, if the Congress thereafter had decided to change back again to the old policy, it surely would have amended the two intervening acts to make them conform to the Congress' current notion of what the proper policy should be. The failure to do this at the time of either supposed change of policy is a strong indication that no change actually occurred and that the omission of any express reference in two of the acts to the authority to impose conditions was a mere fortuitous failure to confirm expressly an authority which was implicit in the permissive rather than mandatory character of the very statutes in question.

Indeed, the fact that the Congress did not require the Secretary to grant extensions but merely gave him discretionary authority to do so, itself negatives any inference that the Congress at the same time deliberately intended to strip the Secretary of the very essence of that discretion by precluding him from conditioning its exercise on the ability and willingness of applicants for extension to meet the requirements which he deems it necessary to prescribe in the public interest. In this connection, it is significant that the legislative history of the various extension statutes discloses no intent on the part of the Congress to alter the Secretary's authority to impose reasonable conditions not inconsistent with statutory provisions, and that it clearly discloses Congressional intent to make the Secretary's authority to grant extensions purely discretionary. The discretionary character of that authority is manifest from an examination of Senate Report No. 186, 69th Congress, 1st Session, in which the Committee on Public Lands and Surveys, reporting on the bill which ultimately became the act of April 5, 1926, recommended the amendment of the original language that permits "shall be extended by the Secretary" by substituting "may" for "shall." That amendment was adopted.

In addition, the administrative construction uniformly followed in this Department and uniformly acquiesced in by all permittees applying for extension, has recognized no difference among the various extension acts so far as concerns the Secretary's power to prescribe reasonable rules, regulations, and conditions as a basis for granting extensions. The conditions, rules, and regulations that have been promulgated have applied to all extensions alike without reference to the particular periods in which they fell or to the particular extension statutes by which they were authorized.

Once the Secretary's power to impose reasonable and appropriate conditions is established, there is no difficulty in sustaining the validity of the Secretary's uniform course of action, since May 15, 1933, in granting extensions only to those applicants who filed the unitization stipulation specified in paragraph (a) of the order of April 4, 1932, *supra*. Such a condition is in the interests of conservation and of scientific development of the Government's oil resources. Since the enactment of the 1930 and 1931 amendments, compliance with the condition has not required applicants for extensions to do or agree to do anything that has been prohibited by law. On the contrary, the condition has furthered the general policy of conservation which the act of February 25, 1920, itself sought to promote; and it actually embodies the very means of conservation that was developed after February 1920, and that has specifically been made available for use in connection with oil production on the public lands by the 1930 and 1931 amendments to the 1920 act. Furthermore, as has been the case with respect to new permits, the Secretary's authority has been accepted without question. Since May 15, 1933, approximately 2,750 extensions have been granted, each conditioned on the filing of the unitization stipulation; and in each case the requisite stipulation has been filed.

In connection with the formation and operation of unit plans pursuant to unitization stipulations, various problems have arisen as to the nature of the leases which must or may be issued in lieu of prospecting permits affected by the plans. Those problems provide the occasion for this opinion.

The necessity for answering these questions is not obviated by the amendatory act of August 21, 1935 (49 Stat. 674). That act provides that no more oil and gas prospecting permits shall be issued except on applications filed 90 days or more before the effective date of the act. It also limits the applicability of the dual lease system of section 14 of the act of February 25, 1920, including the anomalous lease at a 5-percent royalty, to instances in which a prospecting permit had been issued or applied for 90 days or more prior to the effective date of the amendatory act. All other applicants for oil and

gas rights on the public domain are to receive leases in the first instance at a royalty rate of not less than 12½ percent. But the questions concerning the issuance of leases in lieu of prospecting permits affected by unit plans still remain pertinent as to existing permits and as to those for which application was made prior to May 23, 1935. The amendatory act of August 21, 1935, necessitates no change either in those questions or in the answers that must be made to them. All of the appropriate statutory provisions, hereinbefore quoted, remain unaffected in substance by the 1935 amendment.

The amendments to section 27 of the 1920 act, which were made by the 1930 and 1931 enactments not only have made possible a new situation in which permittees in the same field or geologic structure can combine together to develop the field or structure as a common enterprise, but they also have indicated when and how leases are to be issued in lieu of prospecting permits in this new situation. The second of the three new provisos inserted into section 27 by the 1930 and 1931 amendments is as follows:

* * * *And provided further*, That when any permit has been determined to be wholly or in part within the limits of a producing oil or gas field which permit has been included, with the approval of the Secretary of the Interior, in a unit operating agreement or other plan under this act the Secretary of the Interior may issue a lease for the area of the permit so included in said plan without further proof of discovery.

The foregoing provision is the only one in the entire act as amended in 1930 and 1931 which purports to establish a basis for the issuance of leases in lieu of prospecting permits without proof of discovery. Its meaning is clear and its application simple so far as the questions of when such leases may be issued and what areas they may cover are concerned. The provision applies to "*any* permit" which "has been determined to be wholly or in part within the limits of a producing oil or gas field" and which "has been included, with the approval of the Secretary of the Interior, in a unit operating agreement or other plan under this act." The area covered by each permit is defined explicitly in the permit itself. Authority to determine the limits of every producing field in the public domain is vested expressly in the Secretary by the provision in section 32 of the 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.

Thus, a simple comparison of the area covered by the permit with the area of the producing field, as defined by the Secretary, is all that is necessary in order to determine whether the former falls wholly or partly within the latter and hence whether the first requirement for the issuance of a lease has been satisfied.

As to the second requirement, a possible ambiguity might suggest itself at first blush because the provision under consideration does not expressly state whether the permit must be included in a unit agreement with respect to its entire acreage or whether it is necessary only that the unit agreement include all or so much of the permit area as falls within the limits of the producing field sought to be unitized. But this ambiguity disappears completely when it is remembered that the only kind of unit agreement authorized under the act, as amended, is one which relates to a single pool or field. Where a permit covers an area which falls partly inside and partly outside of a producing field, only the part inside the pool can be included in an agreement to unitize the development and operation of that field. Since the first clause of the provision in section 27 here under consideration expressly authorizes the issuance of a lease as to permits only partly within the producing field, the second clause must be interpreted to authorize the issuance of the lease if the permit has been included in the agreement for the unit operation of that field to the full extent permitted under the law, i. e. to the extent that the permit falls within the field in question. To interpret the second clause as authorizing a lease only where the entire permit area is included in the unit plan is to limit such leases to permits which fall wholly within the limits of some producing field, for these are the only permits which can be included in the unit plan as to their entire area without violating the law. Thus to limit the issuance of leases by implication based on the second clause, however, is to fly directly in the face of the first clause which clearly and *expressly* indicates that leases may be issued with respect to permits which fall *partly* within a producing field as well as with respect to permits which fall wholly within the field.

Obviously express language in one clause of a statutory provision cannot be rendered meaningless and nugatory by an implication merely inferable from another clause in the same provision. Especially is this so where the implication is not really necessary and can serve no purpose other than a harmful one. So far as the language of the second clause is concerned, it refers to the permit rather than to the area covered by the permit. It is neither unreasonable nor unusual to speak of a permit as having been "included" in a unit agreement even though only a part of the area covered by the permit actually falls within the producing field to which the plan for unit development and operation applies. So far as concerns the purpose of the provision, i. e., the encouragement of agreements to conserve oil and gas through the development and operation of each separate field as a unit, there would be neither rhyme nor reason in an interpretation requiring land outside of the field to be included in the

unit agreement. And an interpretation requiring the exclusion of land inside of the field because it happened to be covered by a permit which also covers land outside of the field actually would tend to disrupt the orderly development and operation of the rest of the field sought to be achieved by the unit agreement. Permittees thus excluded would be forced to drill wells on the part of their land falling within the field; and they would do so in the manner best suited to their own immediate interests rather than to the scientific and orderly development of the field according to the plan from which they have been excluded. To prevent drainage, offset wells would have to be drilled on the lands that were included in the unit plan, likewise without reference to the scientific development of the field as a unit. More likely than not there will be many such permittees on the fringe of each pool or field, multiplying many times the disruption of unit development and operation of the field as a whole.

Even if the language of the statute were ambiguous, it could not properly be interpreted to achieve such a result. But, as I have indicated, the language is not even ambiguous. When both clauses in the provision under consideration are read together, the only reasonable meaning is to authorize the issuance of a lease under section 27 whenever so much of the area of a permit as falls within a producing field has been subjected by agreement to a plan for the scientific and orderly development of the field as a single unit. And this in fact has been the interpretation adopted at the very outset by this Department and consistently adhered to ever since. (See Circular No. 1252, 53 I. D. 386.)

The provision specifying the acreage which properly can be included in a lease under section 27, as amended, is even clearer than those stating when and to whom such leases may be issued. The language that "the Secretary of the Interior may issue a lease for the area of the permit so included in said plan" needs no comment.

When we come to the question of the royalties to be fixed in the lease, however, a real problem is encountered; for while the amendments to section 27 have supplied a specific provision for the issuance of leases in every case and covering every acre that can enter into the new situation made possible by their enactment, they have not also specified precisely how much royalty must or may be reserved to the United States in each lease. But the amendments do provide a method for arriving at the amount of the royalty in every case. Immediately preceding the provision just considered and immediately following the provision permitting the entry into unit plans and agreements, the amendments contain the following provision:

* * * and the Secretary of the Interior is thereunto authorized in his discretion, with the consent of the holders of leases or permits involved, to establish, alter, change, or revoke drilling, producing, and royalty requirements of such leases or permits, and to make such regulations with reference to such leases and permits with like consent on the part of the lessee or lessees and permittees in connection with the institution and operation of any such cooperative or unit plan as he may deem necessary or proper to secure the proper protection of such public interest:

This is a composite provision covering every manner of case in which entry into a unit plan or agreement is possible. It applies to cases where leases already have been issued, whether under section 14, or under section 17, or under various combinations of both. In such cases, the leases already have fixed the drilling, royalty, and other requirements. Yet even here, if the lessees desire to join in an agreement or plan of unit operation, the Secretary is given authority, with the consent of the lessees, to "alter" or "change" the royalty rates in any manner that may be mutually satisfactory. The provision also applies to permits already issued and not in need of extension, with respect to which no unitization stipulation either has been filed or presently can be required. Here, too, if the permittees are willing to give up their rights under section 14 to drill to a discovery during the permit term and to obtain primary and secondary leases at the royalty rate specified in section 14, they can enter into a unit plan of operation and each obtain a lease under the provisions of section 27, as amended, at a royalty which "the Secretary of the Interior is thereunto authorized in his discretion, with the consent of the holders of * * * permits involved, to establish." Finally, since there is no limitation on the kind of "permits" to which it refers, the provision likewise applies to permits with reference to which the unitization stipulation specified in paragraph (a) of the regulations of April 4, 1932, already has been filed.

The question arises as to what happens in each of these various instances if the lessees or permittees are unwilling to consent to the royalty rate which the Secretary of the Interior deems it advisable, in his discretion, to establish. In the case of lessees, of course, nothing can happen. The lessees cannot be forced to unitize their holdings, nor to consent to an increase of the low royalty rates which already have been crystallized in the leases issued to them under section 14. (See Solicitor's Opinion of December 6, 1934, M-27829.) The negotiations for unitization become abortive if the lessees cannot come to a mutually satisfactory understanding with the Secretary as to what the royalty rate under the proposed unit plan or agreement shall be.

The same consequence must follow in the case of permittees who have filed no unitization stipulation and who are not in need of any extension of their permit period. Every such permittee is entitled under section 14 to drill to a discovery during the permit period and, on successful completion of a discovery well on his permit area, he earns the right to a primary lease of one-fourth of that area at a 5-percent royalty, and to a preference right, as to the remainder, to obtain a secondary lease at a higher rate arrived at as specified in the section. He cannot be forced to give up these rights and to enter into a unit plan or agreement to unitize under section 27 or to accept a lease thereunder at a royalty rate fixed by the Secretary. Section 27 authorizes the Secretary to establish the royalty only with the consent of the permittees about to enter into the unit plan, and if a permittee withholds his consent the acreage covered by his permit cannot be unitized.

There is, however, an important difference between the situation of these permittees and that of lessees. Lessees have a vested right to continue to develop their holdings and to produce oil, paying the royalty fixed in the lease, for a term of twenty years. Permittees have a vested right, if any at all, only to prospect for oil for a period of two years, and on finding it, to obtain primary and secondary leases under section 14. If they do not succeed in drilling to a discovery within the two-year period, their vested rights expire. They can only apply to the Secretary of the Interior for an extension which, as has already been shown, he has discretion to grant or refuse. Unless the practice uniformly followed by the Secretary since May 15, 1933, is abandoned by him, every such applicant will have to file a unitization stipulation as a condition for receiving an extension. He will then pass from the class of permittees who have not stipulated or consented to unitization to the class of permittees who have.

To permittees in the latter class the provisions of section 27, as amended, are just as expressly and specifically applicable as to lessees or permittees who, without the necessity of doing so in order to continue the life of their lease or permit, voluntarily enter into a unit plan or agreement renouncing such rights as they may have acquired or may have a right to acquire under section 14.

This is true even though section 27 undoubtedly requires a real and not a fictitious consent on the part of lessees or permittees. Obviously, a consent is real and not fictitious even though it is induced by a powerful desire to obtain something one is not entitled to get. Thus, if a permittee having an unexpired permit not already subject to unitization, wants very much to enter into a unit plan because he is unable financially or otherwise, to comply with the permit requirements and is certain to be refused an extension for that reason when the permit

expires, his consent to the entry into a unit plan or agreement is no less real because it is impelled by dire necessity. And if the Secretary of the Interior were unwilling to approve any plan which did not reserve a minimum royalty of 12½ percent, for example, with respect to the entire permit area included in the plan, the royalty thus fixed certainly would bind the permittee, if he consented to enter into the plan, even though he had no other choice if he did not want to lose his permit as soon as its current period expired. The test is not what practical choice the permittee had, but whether the advantage or benefit he sought to gain by "consenting" is something that he was not legally entitled to get whether he consented or not. The same test applies when a permit actually has expired and the permittee applies for an extension. Even though he has complied with every requirement of the permit during the permit period, if he has not drilled to a discovery before the end of that period he is not entitled to any leases under section 14, and he is not entitled as a matter of right to any extension of the permit period. He may get an extension only as a matter of grace and only if he complies with the reasonable conditions specified by the Secretary. One of these conditions is that he shall consent or agree to a plan of unit operation. He has a choice of complying with this condition and getting an extension to which he otherwise is not entitled, or of refusing to do so and not getting an extension. If he chooses the former by filing the requisite stipulation or consent, he does so to gain something which he was not entitled to get without consenting; and the consent is real and binding even though he had no other choice if he wanted the extension.

The stipulation in actual use binds the applicant to enter into a unit plan or agreement with other operators in the same field or, if that proves impossible, to comply with the plan prescribed by the Secretary of the Interior. Consequently, if agreement upon the rate of royalty proves impossible in this case, the permittee already has consented in advance to any reasonable rate which the Secretary may insert in the plan which he prescribes. Since there is no provision in section 27 concerning the time when the permittee must consent to royalty rates established by him, there is no reason why such consent may not be given in advance of the determination of the precise rate to be established. Consents given in advance in the form of an authorization to fix the rate must, of course, be supported by consideration in order to prevent a withdrawal of the consent before the rate is fixed. But, as has been seen already, the fact that the consent is given in exchange for an extension of the permit to which the permittee is not otherwise entitled, supplies an ample consideration to bind the permittee to his undertakings in the stipulation.

Of course, the Secretary may not fix a rate that is unreasonably high. And it probably is true that there has been a widespread expectation, on the part of permittees who have filed unitization stipulations, that royalties would be fixed on a basis similar to the one specified in section 14 for nonunitized areas. Thus far that expectation actually has been fulfilled; and there being no reason to anticipate a change of policy on the part of the Secretary, there is no need to inquire more closely into the question of how high a rate the Secretary could fix without overstepping the bounds of his discretion. Certainly, rates that are not higher than those specified in section 14, or in the 1935 amendment (act of August 21, 1935), or even than those customarily current in the industry hardly could be challenged as unreasonable.

While the Secretary has discretion to fix the rate, in a lease issued under section 27 to a permittee who has filed a unitization stipulation, comparable to the rates for primary and secondary leases fixed in section 14, it should be noted that he is not obligated to do so. Section 14 does not apply to leases issued without discovery covering permit areas within a producing field which have been unitized either through an agreement voluntarily entered into or through a unit plan prescribed by the Secretary pursuant to authority vested in him by a unitization stipulation filed by the permittee in order to obtain a permit or an extension of a permit period. Section 14 authorizes leases to be issued as a reward for an actual discovery of oil or gas on the permit area itself. It contemplates actual production on each leasehold separate and apart from production on every other leasehold. It authorizes the issuance of two leases to each permittee, one lease at a 5-percent royalty for one-fourth of the permit area, the other at a royalty rate "not less than 12½ per centum * * * to be determined by competitive bidding" or by regulation. Under section 27, on the other hand, leases may be issued without any discovery of oil or gas on the permit area. Only the field in which the permit area is wholly or partly situated, not the permit area itself, need be productive. Section 27 contemplates cooperative development and operation of the field as a whole under a unit plan and may defer for years or entirely eliminate production on particular leaseholds. It provides for the issuance of a single lease for the entire area of the permit included in a unit plan of operation for the field and for the establishment of royalty rates by the Secretary of the Interior with the consent of the lessee. Obviously, there are marked differences between the provisions of sections 14 and 27; and these differences are due to the fact that each section is addressed to an altogether different situation. Section 14 was enacted at a time when it was unlawful for permittees or lessees in the same field to

enter into any plan or agreement for the development and operation of the field as a unit. It did not have to be, and was not actually, adapted to govern in the prohibited situation. When the prohibition was removed by amendatory legislation, Congress did not amend section 14 so as to enable it to be applied in the new situation thus made possible. Congress permitted section 14 to remain precisely as it was and inserted the new provisions specially applicable to the issuance of leases in utilized productive areas into section 27. The conclusion is inevitable that while section 14 continues to apply whenever leases are issued to permittees who are not subject to a unit plan, who have never filed a binding unitization stipulation under which the Secretary has been empowered to prescribe a plan and make it applicable to their particular holdings, and who have made a discovery on the permit area, section 27, and that section alone, provides when and how leases shall be issued for unitized areas and how the royalties therein shall be fixed.

In the light of the foregoing discussion it is now possible summarily to answer the specific questions submitted to me. For purposes of convenience I shall quote each question before indicating my answer to it.

1. Does inclusion of an entire permit area in an approved unit plan authorize issuance of a lease or leases therefor if no part of the unit area subject to the plan has been proven productive of oil and gas?

The answer is in the negative. In the absence of proven productiveness no part of the permit area can be said to be "within the limits of a producing oil or gas field" as required by amended section 27 as a condition precedent to the issuance of a lease or leases.

2. Does inclusion of an entire permit area in an approved plan authorize issuance of a lease or leases therefor if, although production has been obtained within the unit area, no part of said permit area has been proved (by discovery and reasonable geologic inference therefrom) to be within the probable productive area?

The answer is in the negative. In accordance with the provisions of amended section 27 the lease or leases may issue only if all or part of the permit area "has been determined to be * * * within the limits of a producing oil or gas field." By reasonable geologic inference or by actual discovery it must be determined that at least a part of the area of the permit is included in the probable productive area. Otherwise no part of the permit area can be said to be within the limits of a producing field.

3. Does inclusion of an entire permit area in an approved plan for a unit area, part of which is producing, and determination that part of the permit area is within the probable productive limits of the unit area, authorize issuance of a lease or leases for all of such permit?

The answer is in the affirmative. If all of the land embraced by the permit is included in the unit plan and if part of that land is determined to be productive, all of the requirements of amended section 27 have been met.

4. Does the phrase "issue a lease for the area of the permit so included in said plan without further proof of discovery" authorize the issuance of a lease at 5 percent and another lease at not less than 12½ percent royalty as provided in section 14?

The answer is in the negative. As has been pointed out, section 14 does not govern leases issued under section 27.

5. If so authorized, and the Secretary determines to issue a lease or leases, is he required by law to issue the two types of leases provided for in section 14, or could he legally issue a lease for an entire permit area at 5 percent, or at 10 percent, or at 20 percent, as he determines to be right and proper, provided, of course, the permittee will execute such a lease?

6. If question 4 is answered in the affirmative and part of a permit area has become subject to lease by reason of inclusion in an approved plan, shall the provisions of section 14 apply, separately and individually to the part of the permit included in the plan and to the part of the permit not so included?

7. If question 4 is answered in the affirmative, and the permit area consists, say, of 320 acres half included in the approved plan, and half not so included, will a lease issue at 5 percent for the included half without discovery, under the terms of sections 14 and 27, and later a lease at 5 percent for the nonincluded portion by reason of discovery of a valuable deposit thereon as provided in section 14?

Since question 4 has been answered in the negative, questions 5, 6, and 7, strictly speaking, are incapable of being answered. But for the sake of clarity, it may be stated that if one portion of the area covered by a permit has been included in a unit plan for the development and operation of a producing field of which it is a part and another portion has not, the permit area is, in effect, split up into two independent entities. The nonunitized portion should be treated as if it alone comprised the entire area of a permit issued under section 13 and entitled, on proof of discovery, to primary

and secondary leases under section 14. The unitized portion, on the other hand, becomes entitled to a lease under section 27 at a royalty to be fixed by agreement between the Secretary and the permittee, or by the Secretary pursuant to authority vested in him by stipulation. The Secretary, in the lease issued under section 27, may fix a single flat rate or several rates applicable to different parts of the leased area as he sees fit. He also may divide the lease into two component parts analogous to primary and secondary leases under section 14; but he is not required to do so.

8. If a lease or leases issue under section 27 for the area of a permit included in an approved plan will the subsequent discovery on such leasehold within the unit area of a valuable deposit constitute, under section 14, a proper basis for issuance of a lease or leases for the area of the permit not included in the plan?

The answer is in the negative. Here again no other conclusion is possible since the original permit is divided into two independent entities by the formation of the unit plan.

9. If a lease or leases are issued under sections 14 and 27, are the lessees entitled to rental relief under the provisions of section 39 of the act (47 Stat. 798), where none of the lands included within the "unit" area is within the "primary" or "participating" area and to which no production is allocated under the unit agreement?

The answer is in the affirmative. Section 39 provides as follows:

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.

That section, added to the Leasing Act by amendment in 1933, is clearly a relief section and, as such, it is to be liberally construed. "Nonparticipating" acreage in a unit plan produces no revenue to its holder. Section 39 is meant to give relief in just such circumstances and should be so construed. Particularly is that true in view of the fact that the Secretary of the Interior has himself made possible the predicament of the lessee by consenting to the unit plan which excludes the lessee's land from the "participating" area after determining that the plan as drawn was necessary or advisable in the public interest.

10. If question 9 is answered in the affirmative, if a unitized lease is situated partly inside and partly outside such a "participating area," is the lessee entitled to rental relief under the provisions of section 39 for the portion of his lease to which no production is allocated under the unit agreement?

The answer is in the negative. Section 39 has reference to the suspension of operations or production on the lease as a whole. Its application in this instance is no different from its application to a nonunitized lease. Certainly it would not be seriously contended that relief from the payment of rental might be allowed for a non-producing portion of such a lease while production continued from another portion.

11. If question 9 is answered in the affirmative, if only a portion of a lease is unitized, is the lessee entitled to rental relief under the provisions of section 39 for the remaining ununitized portion of the lease during a period of approved suspension of operations and production applicable to all or part of the unitized portions? Shall the unitized and ununitized portions be considered, in effect, as separate leases in determining the application of section 39?

The situation to which this question is addressed is possible only where a lease originally issued under section 14 is unitized, as to a part of the leased acreage, by the voluntary participation of the lessee in a unit agreement. In such a situation, only one lease is involved and the unitized and nonunitized portions cannot be considered, in effect, as separate leases for the purposes of granting rental relief in accordance with the provisions of section 39. As stated above, section 39 has reference only to the suspension of operations or production on the lease as a whole. Consequently, if operations or production are not suspended on any part of the area covered by the lease, or if production is allocated to any part of that area under an operating unit plan, relief from the payment of rentals for any portion of the lease area is not authorized by section 39. Thus, even though operations and production on the entire unit area were suspended with the necessary approval, rental would still be payable for the entire area of the lease if operations and production were not likewise suspended on the nonunitized portion of the lease.

Approved: June 4, 1937.

T. A. WALTERS,

First Assistant Secretary.

SOUTHERN PACIFIC RAILROAD COMPANY

Decided July 24, 1937

RIGHTS OF WAY—RAILROADS—EVIDENCE—VESTING OF RIGHT.

Under section 1 of the act of March 3, 1875 (18 Stat. 482), a right of way for a railroad or for station grounds claimed by a railroad company which has filed due proof of its incorporation and organization may be fixed by the actual construction of the road or by the use of the station grounds for the purposes indicated. Actual use and improvement of a tract for station ground purposes is unmistakable evidence of appropriation to the extent of 20 acres applied for.

Stalker v. Oregon Short-Line Railroad Company, 225 U. S. 142, distinguished. If at the date of a withdrawal for reclamation purposes, the boundaries claimed as station grounds were plainly marked on the ground used and improved for such purposes, the railroad company secured a vested right unaffected by the withdrawal.

SAME—FIXING OF RIGHTS—EFFECT OF FILING MAP—ACT OF AUGUST 30, 1890—RESERVATIONS BY RAILROAD GRANTEE.

The rights of a railroad company cannot be qualified or restricted by any stipulation for reservations other than those authorized by the law existing at the time the company had marked the ground and improved it for station ground purposes. Upon approval of the map of definite location of a right of way, under the act of March 3, 1875, the right of the company relates back to the date of the filing of the map, or if the date of construction was before, to the date of construction. The proviso to the act of August 30, 1890 (26 Stat. 391), applies to rights of way acquired under the act of March 3, 1875. The rights of the United States are adequately safeguarded by approving the map of right of way in the usual form as subject to valid existing rights with reservation under the proviso of the act of August 30, 1890, for rights of way for ditches and canals constructed by authority of the United States, and no stipulation for such a reservation from the railroad grantee is necessary.

WALTERS, *First Assistant Secretary*:

July 31, 1916, the Southern Pacific Railroad Company filed a map of location of its station grounds at Mohawk, Arizona, adjoining its main line grant of right of way covering a portion of what would be when surveyed Sec. 13, T. 8 S., R. 15 W., G. & S. R. M. The map was accepted for filing for general information in accordance with section 14 of the Regulations of May 21, 1909 (37 L. D. 787). The official plat of survey of the land involved was accepted April 2, 1935, and filed in the local office June 25, 1936. October 15, 1936, the company filed its map of station grounds and proof of improvements, showing its relation to the public survey lines and corners in compliance with section 4 of the act of March 3, 1875 (18 Stat. 482), and regulations of May 21, 1909. The map as to location of the ground appears to correspond exactly with the original profile map and bears the affidavit of the chief engineer of the company which states, among other things,

that improvement was commenced on the 9th day of May 1915 and has been continued periodically since that date; and that the improved station grounds conform to the map and field notes herewith submitted for approval of the Secretary of the Interior.

It is alleged in the appeal that the company took actual possession of the station grounds at the time of the survey of the grounds, May 9, 1915. On March 14, 1929, public land in the township involved was withdrawn under the first form, Reclamation Act of July 17, 1902 (32 Stat. 388).

By letter of February 1, 1937, the Commissioner of the General Land Office upon request of the Bureau of Reclamation, as a condition to the approval of the map of station grounds, required the company to execute and file a stipulation as follows:

In granting the right-of-way herein described, there is reserved to the United States, its successors and assigns, the prior right to use any and all of the lands herein described (a) for the construction, operation, and maintenance of telephone, telegraph, and/or electrical transmission lines, and other appurtenant works, along, across, or over the railway and (b) for the construction, operation, and maintenance of canals and ditches thereover. The United States, its officers, agents, and employees, and its successors and assigns, shall not be liable for any damage to the said railway station grounds resulting from the construction, operation, or maintenance of any such canals, ditches, telegraph, telephone and/or electrical transmission lines, and for and in consideration of the grant of right-of-way as herein described the grantee hereby agrees to construct and maintain at its own cost and expense any special structures required to be constructed, across said right-of-way by reason of the United States, its successors and assigns, exercising its reserved rights hereunder, where such structures would not have been necessary except for the existence of the said railway station grounds within the right-of-way herein described.

The company has appealed contending that the exaction of the stipulation as a condition to the approval of its map is erroneous and contrary to the laws under which the station grounds were granted and the withdrawal made for reclamation purposes. It is argued that the grant by the act of March 3, 1875, for station grounds was a grant *in praesenti*, that the rights of the railroad company to the station grounds attached in their appropriation and related back to the date of the granting act, that they were in private ownership at the date of the reclamation withdrawal, and were not subject to the provisions of the reclamation act, or to the terms of the proviso to the act of August 30, 1890 (26 Stat. 391), relating to rights of way for ditches or canals constructed by authority of the United States.

It may be assumed from the allegations of the applicant, nothing appearing to the contrary, that at the time of the reclamation withdrawal the land depicted on its plats as station grounds was used and occupied for such purpose. According to the settled rulings of this Department, *Dakota Central Railroad Company v. Downey* (8

L. D. 115); *St. Paul, Minneapolis & Manitoba Ry. Co. v. Maloney et al.* (24 L. D. 460); *Montana Central R. R. Co.* (25 L. D. 250); *St. Paul & Minneapolis Ry. Co.* (25 L. D. 83), held correct in *Jamestown and Northern Rd. Co. v. Jones*, 177 U. S. 125, 131, a right of way for a railroad or for station grounds claimed by a railroad company which has filed due proof of its incorporation and organization may be fixed by the actual construction of the road or by use of the station grounds for the purposes indicated and that the railroad company secures the grant under section 1 of the act of March 3, 1875, by actual construction of the railroad, or by filing a map as provided by section 4 of said act in advance of construction, and that the construction of the road is unmistakable evidence of appropriation. Likewise, actual use and improvement of the tract for station ground purposes is unmistakable evidence of appropriation to the extent of the 20 acres applied for.

There is a conclusion expressed in *San Pedro, Los Angeles, and Salt Lake R. R. Co.* (43 L. D. 392), deduced from certain language of the Supreme Court in *Stalker v. Oregon Short Line Railroad Company*, 225 U. S. 142, that under the authority of that case,

save as provided in the fourth section of said Act (Act of March 3, 1875), station grounds can only be secured by the construction of station houses, side tracks, etc., and only to the extent of the ground actually occupied.

This expression of opinion is *obiter dictum* as the rejection of the railroad's application for station grounds was necessitated and was placed on the ground that the land was patented and the Department was therefore without jurisdiction. Moreover, the *Stalker* case is not authority for such a view. In that case the court said:

Possibly station grounds might also have been secured by the actual marking of the boundaries and the construction of station houses, side tracks, etc. This we do not decide.

All that the *Stalker* case held in this respect was that a mere staking and surveying of the station grounds would no more than the staking and surveying of a railroad right of way be an actual construction of the right of way that would give effect to the grant. There is no intimation in that case that if the marking of the boundaries of the station grounds if accompanied or followed prior to the initiation of adverse rights with actual use of the ground for station buildings, depots, machine shops, side tracks, turn outs, water stations, or as decided by the Department (*Western Pacific R. R. Co.*, 41 L. D. 599), any use in the general business of railroading the grant would not take effect to the extent of the ground marked. The limiting of the right to station grounds upon unsurveyed land to the space improved by structures would necessitate the construction of station ground facilities in advance of immediate necessities upon every part of the 20 acres in order to preserve the company's right to that ex-

tent. The Department is of the view that if at the date of the reclamation withdrawal, the boundaries of the tract claimed as station grounds were plainly marked on the ground used and improved for such purposes, the company secured a vested right to the land.

The character of the interest the railroad company acquires by such a grant is well settled to be a limited fee with all the remedies and incidents usually attending a fee. The right of way is private property even to the public in all else but an interest and benefit in its use and cannot be invaded without trespass or appropriated except upon payment of compensation (*Western Union Telegraph Co. v. Pennsylvania Railroad Company*, 195 U. S. 540). Upon the facts presented the station grounds were private property when the withdrawal under the first form was made and were not affected thereby. The rights of the railroad company cannot, therefore, be qualified or restricted by any stipulation for reservations other than those authorized by the law existing at the time the company had marked the ground and improved it for station ground purposes.

The contention of the appellant that upon appropriation of the station grounds in 1915 the grant related back to March 3, 1875, the date of the granting act, and therefore the grounds would not be subject to the act of August 30, 1890 (26 Stat. 371, 391) is untenable. Upon approval of the map of definite location of a right of way under the act of March 3, 1875, the right of the company relates back to the date of the filing of the map, or if the date of construction was before, to the date of construction. *Chicago, M. & St. P. Ry. Co. v. United States*, 218 Fed. 288, Aff. 244 U. S. 351. See also cases cited under Sec. 427, 50 C. J., pages 1067, 1068.

The act of August 30, 1890, contains the proviso:

That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by the authority of the United States.

The Department has held that this act applied to rights of way acquired under the act of March 3, 1875, *supra* (Instructions, 36 L. D. 482, 484). The company assails this construction of the act, but the authorities cited in support of its contention do not seem to be in point. The Supreme Court of Idaho in *Minidoka & S. W. R. Co. v. Weymouth*, 113 Pac. 455, held squarely that the above quoted proviso did not apply to grants of right of way under the act of March 3, 1875, and expressly declined to follow the Department's view. One judge, however, dissented and agreed with the construction of the act by the Department, which is an admissible one, considering the spirit and purpose of the act. This construction has been invariably followed since by the Department and no sufficient reason appears to disturb it.

The stipulation above set forth imposes conditions that would not be warranted by the act of August 30, 1890, but aside from that objection, the existing law having reserved the right to construct ditches and canals upon the station grounds, no stipulation to that effect is necessary. The rights of the United States would be adequately safeguarded by approving the map of right of way in the usual form as subject to valid existing rights with reservation for rights of way for ditches and canals constructed by authority of the United States.

The decision of the Commissioner is accordingly reversed.

Reversed.

NORTHERN PACIFIC RAILWAY COMPANY

Decided July 29, 1937

MINERAL LANDS—CANCELATION OF INDEMNITY SELECTION BY RAILROAD—ACT OF JUNE 25, 1929.

Under the provisions of the act of February 26, 1895 (28 Stat. 683), a section of land in Montana was classified in April 1901 by the Board of Mineral Commissioners as nonmineral and the classification approved by the Secretary on July 23, 1902. November 26, 1920, the Northern Pacific Railway Company filed an indemnity selection for the land under its grant, which was approved. The section is within the purview of the act of June 25, 1929 (46 Stat. 41), which declared a forfeiture of the rights claimed by the railroad to certain lands within its indemnity limits and directed proceedings in the courts looking to the adjustment of the railroad rights. Patent to the selection was withheld in conformity with said act to await final determination of the suit under the act pending between the United States and the railroad, in which the section in question was involved. The section was included within the boundaries of a national forest on October 3, 1905. A mineral application for the land was filed September 27, 1934, based upon a location made April 24, 1929.

Held: (1) That under the settled rule that the mineral character of land claimed under a railroad grant may be determined by the Department at any time prior to the issue of a patent for the land, that the Department was not precluded from canceling the selection for the reason that the land was mineral in character although the selector had complied with all the conditions precedent resting upon him.

(2) That the inclusion of the land in the pending suit did not suspend the jurisdiction of the Department to determine whether the land was mineral in character.

(3) That by the force of the presumption created by the statute upon approval of the mineral classification, the land must be regarded as nonmineral to which the rights of the railroad attached under its grants, unless the classification was shown to be fraudulent.

(4) That the selection should have been rejected for the reason that the right of the railroad grantee to the land was forfeited by the act of June 25, 1929, and not because of its mineral character.

WALTERS, *First Assistant Secretary*:

The Northern Pacific Railway Company has appealed from the decision of the Commissioner of the General Land Office rendered August 22, 1935, wherein was held for cancelation its indemnity selection made under the acts of July 2, 1864 (13 Stat. 356), and May 31, 1870 (16 Stat. 378), for Sec. 31, T. 4 N., R. 15 W., M. M., exclusive of M. S. 9988 to the extent of conflict with mineral entry Great Falls 080062 for the Pick and Shovel lodé claim. The land is inadvertently described in the decision in "S. L. M. Utah."

All of Sec. 31 was in April 1901 classified nonmineral by the Board of Mineral Commissioners for the Missoula district in accordance with the provisions of the act of February 26, 1895 (28 Stat. 683). The classification was approved by the Secretary of the Interior on July 23, 1902. The railway company filed its selection, Missoula List 162, Serial 08979, November 26, 1920, which was approved by the local office December 9, 1920. The tract described is a part of the land within the purview of the act of June 25, 1929 (46 Stat. 41), which declared a forfeiture of the claimed rights of the Northern Pacific Railroad Company and the Northern Pacific Railway to certain lands within the indemnity limits of the grant and directed proceedings looking to the adjustment thereof.

Under joint resolutions of Congress (see Circular No. 931, 50 L. D. 399), as well as under section 9 of the Act of June 25, 1929, patent has been withheld until the suits contemplated by said act are finally determined.

The mineral application was filed September 27, 1934, based upon a location made August 24, 1929.

Error is assigned (1) in the holding of the Commissioner—

that the case of the *United States v. Southern Pacific Company et al.* (251 U. S. 1) applies to the Northern Pacific land grant as to the above described land and that indemnity selections that are ascertained to be mineral at any time prior to patenting of sections do not accrue to the railway company under its indemnity grant.

(2) In canceling said list for any reason.

Under assignment of error (2), it is argued that no irregularity in the nonmineral classification is charged, hence the classification is final.

It is further alleged in support of the appeal that—

All of the section except M. S. 8343, 8344, 9988 and containing five hundred sixty (560) acres is described in Exhibit "Q"—Tabulation 4 in the case of *United States of America, Plaintiff*, versus *Northern Pacific Railway Company, et al., Defendants*, Equity 4359, in the District Court of the United States for the Eastern District of Washington, Northern Division, as being lands within the First Indemnity Limits of the grant to the Northern Pacific Railroad Com-

pany under the Act of July 2, 1864, which, on or after March 1, 1898, were embraced in reservations for governmental purposes and so remained on June 5, 1924.

From this it is contended that—

The tract in question having been expropriated under the Act of June 25, 1929 (46 Stat. 41) and the question of deficiency and the valuation of the expropriated lands being still before the Court, the Railway Company's selection should not be canceled while said Equity Suit No. 4389 is pending.

The Northern Pacific Railway Company makes no objection to such disposition of said land as the United States may desire to make, the land itself no longer being a part of its grant because of said expropriation by the Act of June 25, 1929, but requests that its right to compensation be respected.

It is well settled that as to railway selections the character of the land whether mineral or nonmineral may be determined by the Land Department at any time prior to the issuance of patent. *Barden v. Northern Pacific R. R. Co.*, 154 U. S. 288; *Wyoming v. United States*, 255 U. S. 480, 507, 508; *United States v. Southern Pacific R. Co.*, 43 Fed. (2d) 592; *United States v. Southern Pacific Company et al.*, 251 U. S. 1, 7. The Department therefore would not be precluded from canceling the selection for the reason that the land was mineral in character by reason of the general rule that the mineral or nonmineral character of the land shall be determined as of the time the selector or entryman fully complied with all conditions precedent resting upon him, selections under railroad grants being tested by a different rule. *Wyoming v. United States*, *supra*, p. 507.

Neither is it thought that the inclusion of the land selected in a pending suit to adjust the grant under the act of June 25, 1929, and the expropriation of the land, so called, suspends the jurisdiction of the Department to decide whether the land by reason of its mineral character was subject under any circumstances to selection. Section 9 of the act in directing that the Secretary withhold approvals and patents to selections until final determination of the suits contains the proviso:

That this act shall not prevent the adjudication of any claims arising under the public land laws where the claimants are not seeking title through the grants to the Northern Pacific Railway Company, or its successors, or any acts in modification thereof or supplemental thereto.

The Instructions, Circular No. 931, provides:

All applications by parties not claiming or asserting a right under or through the company, apparently conflicting with a claim, or claims, by or through the company, will be received and acted upon as heretofore.

If the land by reason of its mineral character was excepted from the grants it could not "be taken out and removed from operation of the said land grants" as provided in section 1 of the act of June 25,

1929. The company could not therefore rightfully claim compensation for land it could not have acquired under the terms of the grant.

Turning now to the effect of the classification of the land as non-mineral by the Board of Commissioners under the act of February 26, 1895, section 6 thereof provides:

That as to the lands against the classification whereof no protest shall have been filed as hereinbefore provided, the classification when approved by the Secretary of the Interior shall be considered final, except in case of fraud, and all plats and records of local and general land offices shall be made to conform to such classification.

It has been held by the Department that under the provision above quoted the approved classification by the Board of Commissioners is final as between the Government and the railroad and impeachable only for fraud. *Lamb v. Northern Pac. R. Co.* (29 L. D. 102, 105); *Luthyè v. Northern Pac. R. Co.* (29 L. D. 675, 677); *Beveridge et al. v. Northern Pac. Ry. Co.* (36 L. D. 40), and a protest by a subsequent mineral applicant is insufficient unless it appears therefrom that at the date of the report of classification by the Board of Commissioners there was a substantial demonstration of mineral value or exploitation of consequence from which actual or constructive fraud in the classification could be concluded. *Beveridge v. Northern Pac. Ry. Co., supra.* By the force of the presumption created by the statute upon the approval of the nonmineral classification, the land must be regarded as nonmineral to which the rights of the railroad grantee attached under its grants unless it is shown that the classification is fraudulent.

Although the validity of the selection was not affected by the character of the land, and it may be considered as land within the purview of the original grant, the question still remains whether all rights of grantee company to acquire the *land* were not extinguished by the act of June 25, 1929, *supra*, so as to render the land, if mineral, subject to location, entry, and patent under the mining law.

Section 1 of the act reads as follows:

That any and all lands within the indemnity limits of the land grants made by Congress to the Northern Pacific Railroad Company under the Act of July 2, 1864, and the resolution of May 31, 1870, which on June 5, 1924, were embraced within the exterior boundaries of any national forest or other Government reservation and which, in the event of a deficiency in the said land grants to the Northern Pacific Railroad Company upon the dates of the withdrawals of the said indemnity lands for governmental purposes, would be, or were, available to the Northern Pacific Railroad Company, or its successor, the Northern Pacific Railway Company, by indemnity selection or otherwise in satisfaction of such deficiency in said land grants, are hereby taken out of and removed from the operation of the said land grants, and are hereby retained by the United States as part and parcel of the Government reservations wherein they are situate, relieved, and freed from all claims, if any exist, which the Northern

Pacific Railroad Company or its successor, the Northern Pacific Railway Company, may have to acquire the said lands by indemnity selection or otherwise in satisfaction of the said land grants: *Provided*, That for any or all of the aforesaid indemnity lands hereby retained by the United States under this Act the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, or any subsidiary of either or both, or any subsidiary of a subsidiary of either or both, shall be entitled to and shall receive compensation from the United States to the extent and in the amounts, if any, the courts hold that compensation is due from the United States.

The records show that section 31 with other lands was included within the exterior boundaries of the Hellgate, now Deer Lodge National Forest, on October 3, 1905. Whether the land was available for selection at the time the selection was made would seem to hinge on the determination whether at the date of the forest withdrawal there was sufficient land outside the withdrawal to satisfy the losses of lands within the place limits. *United States v. Northern Pacific Ry. Co.*, 256 U. S. 51, 65-68. If there was sufficient land within the indemnity limits to supply such losses, exclusive of those so withdrawn, the selection was barred by the withdrawal, and the lands "were not of the class that would be or were available" for selection. On the other hand, if there was at the time of selection a deficiency of indemnity lands, the lands were within the purview of section 1, appropriated by the Government, and as to which the Court was to determine the matter of compensation. As to such lands though selected, the Department has repeatedly approved the rejection of the selections where they were made after the forest withdrawal. See *Northern Pacific Railway*, decided December 9, 1929 (A. 14297), involving Spokane 015607, also, approved decisions of the Commissioner of the General Land Office involving Great Falls 075701 rejecting the selection, October 9, 1929; Seattle 04858, rejected October 17, 1929; Spokane 015614, rejected March 1, 1930; Spokane 015595, rejected March 11, 1930; Roseburg 018927, rejected April 5, 1930; Billings 023293 in conflict with Forest Homestead 024610, where the selection was held forfeited and the homestead relieved from suspension by departmental decision of December 19, 1929. The action of the Commissioner in rejecting the selection was proper, but placed on erroneous grounds. The selection should have been rejected for the reason that the right of the railroad grantee to the land was forfeited by the act of June 25, 1929, and not because the land was not subject to selection because of its mineral character. The railroad grantee had the right to complain as to the basis of the decision that possibly might affect its right to compensation.

For these reasons that action of the Commissioner as modified is affirmed.

Modified.

USE OF RAILROAD RIGHT OF WAY FOR EXTRACTING OIL

Opinion, September 8, 1937

RAILROAD RIGHT OF WAY—ACT OF MARCH 3, 1875—EXTRACTION AND REMOVAL OF SUBSURFACE OIL.

Under the Granting Act of March 3, 1875 (18 Stat. 482), the Great Northern Railway Company acquired neither the right to use any portion of its right of way for the purpose of drilling for and removing subsurface oil nor any title or interest in or to such oil.

RAILROAD RIGHT OF WAY—USE FOR ADDITIONAL PURPOSES.

A right of way through the public domain granted to a railroad by Congress may be used only and exclusively for railroad purposes, irrespective of whether the use of a portion of the right of way for other purposes interferes with the continued operation of the railroad.

RAILROAD RIGHT OF WAY—INTEREST THEREIN GRANTED.

Only such interest in the right of way was vested in the grantee as may be essential to the continued use and enjoyment of the land for the purpose specified in the grant.

MARGOLD, Solicitor:

My opinion has been requested with respect to certain questions propounded on behalf of the Great Northern Railway Company relative to the right of the company to drill for, extract, and remove oil underlying its right of way granted by the United States under section 1 of the act of March 3, 1875 (18 Stat. 482), which provides:

That the right-of-way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to said right-of-way for station-buildings, depots, machine shops, side-tracks, turn-outs, and water-stations, not to exceed in amount 20 acres for each station, to the extent of one station for each ten miles of its road.

The questions stated are:

1. Has the Great Northern Railway Company the right to drill for and remove the oil under the above-described right of way and dispose of it to third parties and to license others to do so?

2. If not, has the Great Northern Railway Company the right to remove and refine the oil underlying said right of way, disposing of the more volatile portions and using approximately 60 percent of the product upon its own locomotives?

3. If your answer to both of the foregoing questions is in the negative, has the Great Northern Railway Company the right to drill for and remove the oil underlying said right of way and use the entire product upon its own locomotives?

It is contended on behalf of the railroad company that the above questions should be answered in the affirmative. In support thereof a brief has been submitted, the burden of which is that under the granting act the railroad company acquired a base or limited fee in the right of way, the condition being the continued use thereof for railroad purposes; that such an estate, until determined, has all the incidents of an estate in fee simple and carries with it ownership of any minerals underlying the land; and that the company may accordingly, drill for and utilize or dispose of oil underlying the right of way so long as the use of the land for railroad purposes is not interfered with or discontinued.

It may be conceded that under the act of March 3, 1875, a limited fee was granted in the right of way and not a mere easement or right of passage. *New Mexico v. United States Trust Co.*, 172 U. S. 171; *Northern Pacific Ry. Co. v. Townsend*, 190 U. S. 267; *Rio Grande Western R. Co. v. Stringham*, 239 U. S. 44. But it by no means follows as a necessary conclusion from this proposition that the entire interest in the land passed from the United States.

The term "limited fee" in and of itself carries with it no such implication. A "limited fee" is merely an estate which may possibly endure forever but which is subjected to the possibility of termination on the happening of an event. See Tiffany, *A Treatise on the Modern Law of Real Property*, 1912 ed., section 81. And while some cases have held that a grant of a base or limited fee in land vests in the grantee the whole title and leaves to the grantor only a possibility of reverter (*State v. Brown*, 27 N. J. L. 13; *Dees v. Chewronts*, 88 N. E. 1011), other cases have indicated that the granting of such an estate does not necessarily extinguish the interest of the grantor in the land.

In *United States v. Soldana*, 246 U. S. 530, the question involved was whether a station platform and land comprised within a right of way granted to a railroad through the Crow Indian Reservation was "Indian country." The court held that the right of way was "Indian country" within the meaning of a statute making it a criminal offense to introduce intoxicating liquors "into the Indian country," saying (page 532):

Whether these acts should be held to have granted a mere easement or a limited fee or some other limited interest in the land, *New Mexico v. United States Trust Co.*, 172 U. S. 171; *Northern Pacific Ry. Co. v. Townsend*, 190 U. S. 267; *Rio Grande Western Ry. Co. v. Stringham*, 239 U. S. 44; it is clear that it was not the purpose of Congress to extinguish the title of the Indians in the land comprised within the right-of-way.

The case of *New Mexico v. United States Trust Co.*, *supra*, held that the railroad right of way granted by the act of July 27, 1866, was corporeal property and had "the attributes of the fee, perpetuity and exclusive use and possession." However, the court, by quoting the following from *Smith v. Hall*, 103 Iowa 95, 72 N. W. 427, impliedly recognized that an interest in the land was retained by the grantor:

'The easement is not that spoken of in the old law books, but is peculiar to the use of a railroad which is usually a permanent improvement, a perpetual highway of travel and commerce, and will rarely be abandoned by nonuser. The exclusive use of the *surface* is acquired, and damages are assessed on the theory that the easement will be perpetual; so that, ordinarily, the fee is of little or no value, unless the land is underlaid by quarry or mine.' [Italics supplied.]

Similarly, in *Western Union Tel. Co. v. Penn. R. R.*, 195 U. S. 540, 570, the court said with reference to a railroad right of way:

It is "a *fee in the surface* and so much beneath as may be necessary for support * * *." [Italics supplied.]

It is thus plain that the mere characterization of a grant as a limited or base fee is of no aid in determining the respective rights and interests of the grantor and grantee. The decisive factor, then, must be not whether a limited fee was granted but rather the nature of the limitation imposed. This would seem to be the view expressed in Washburn on Real Property, 6th Ed., Sec. 168:

So long as the estate in fee remains the owner in possession has all the rights in respect to it which he would have if tenant in fee simple, *unless it be so limited that there is properly a reversionary right in another*, something more than a possibility of reverter belonging to a third person when perhaps chancery might interpose to prevent waste of the premises. [Italics supplied.]

And the cases themselves suggest such a rationale.

An analysis of the cases indicates that grants of a base or limited fee, in which the limitation is a restriction on the use of the land granted, fall into two categories. In one class we find grants conditioned upon the use of the land for a particular purpose, with no apparent intention on the part of the grantor that the land should be used solely for such purpose. Such grants have been construed to vest in the grantee the full title and interest and to permit the use of the land for any additional purpose so long as the use specified is not interfered with or abandoned. In the second category are grants of land to be used only and exclusively for the purpose designated? Lands so granted may not be used for any other or additional purpose and the grants vest in the grantee only such rights and interest as may be essential to the continued use and enjoyment of the land for the purpose specified, the remaining interest in the land being impliedly reserved by the grantor.

The case of *Priddy v. School District*, 92 Okla. 254, 219 Pac. 141, would appear to fall within the first classification. There, the land

was granted to the defendant "As long as used for a schoolhouse site." The defendant granted an oil and gas mining lease and a producing well was brought in on the school site. The court denied a forfeiture of the land by reason of this additional use, saying (219 Pac. 141, 143) :

It is admitted by all parties that the school district has used the property for a school site at all times, but the complaint is made that the defendant school district has put the property to additional use. Though the acts of the defendant school district in causing the development of the property for oil production is an additional use, such action upon the part of the school district will not support the right of forfeiture.

Similarly, in *Dees v. Chewronts*, 240 Ill. 486, 88 N. E. 1011, where land was conveyed "so long as it shall be used as a schoolhouse site, and whenever it shall be discontinued as a schoolhouse site then revert to the grantors," injunctive relief to restrain drilling for oil on the land was denied on the ground that the plaintiffs had no present estate in the land. The court said (88 N. E. 1011, 1012) :

It is not alleged in the bill, or contended in the brief, that the land in question is not still used as a schoolhouse site, or that the exercise of the right granted by the lease to Kimmel to go on said land and drill for oil would in any way interfere with such use of the land. Apparently appellees have not filed their bill for the purpose of having this base fee determined by the court on the ground that it had been defeated by noncompliance with the conditions in the said deed. Appellees seek rather, through a court of equity, to direct said school trustees and directors as to the use of said property. On this record it must be held that the land is still used for the purposes set out in the deeds, and that the title to the estate granted by said deeds is still held by the trustees of schools.

And in *State v. Brown, supra*, a grant of land "as long as used for a canal" was held to convey all the right, title, and interest of the grantors in the land.

The following cases fall within the second category :

In *Union Missionary Baptist Church v. Fyke*, (Okla.) 64 Pac. (2d) 1203, where land was conveyed to the plaintiff upon the condition "that the said premises herein granted are to be used *exclusively* for a site for the erection and maintenance of a church building * * *," it was held that the plaintiff was not entitled to oil and gas royalties accrued from a well drilled on said land. The court said (page 1205) :

Certainly the special provision limits the use to which the premises may be put. The exclusive use granted is for the site for the erection and maintenance of a church building. It is clearly apparent from the language used in the special clause that the intention of parties was that the grantors conveyed the land for the exclusive use as a site for the erection and maintenance of a church building, for that exclusive purpose and none other. The use thereof for the carrying on of the production of oil and gas from the land being wrongful, it is difficult to understand how the church could acquire title to the fruits of its wrongful acts.

In *Jordan et al. v. Goldman*, 1 Okla. 406, 34 Pac. 371, although it was held that the estate granted to the Cherokee Nation in a "perpetual outlet west" was a base or qualified fee, the court refused to enjoin the defendant, an Army officer, from interfering with the operating of a stone quarry on the outlet on the ground that the Cherokee Nation could not lawfully use any part of the outlet for the purpose of operating a stone quarry and could not license the plaintiffs to do so. The court said (34 Pac. 371, 379) :

As the lands were ceded and granted as an outlet, the law annexes the qualification or condition that they can be used for no other purpose, and that the estate shall continue no longer than the proper use of the land continues.

In the case of *United States v. Big Horn Land and Cattle Co.*, 17 F. (2d) 357, the Government sought a forfeiture of a right of way granted through the public lands for an irrigation ditch or canal and reservoir by the act of March 3, 1891, which provided (sec. 21) that the right of way could be used only for a canal or ditch. The claim of the grantee to exclusive fishing privileges in two natural lakes comprised within the right of way was overruled, the court saying (page 366) :

However highly prized may be the piscatorial privileges claimed by the defendant, we find nothing in the Act of March 3, 1891, granting to the defendant a limited fee in the land surrounding the lake for such purpose.

It thus becomes necessary to consider the nature of the limitation imposed with respect to the railroad right of way granted by the act of March 3, 1875.

In *Northern Pacific Ry. v. Townsend*, 190 U. S. 267, the court, construing the act of July 2, 1864, which is substantially the same as the act of March 3, 1875, held that a homesteader could not acquire, by adverse possession, a portion of a right of way granted to a railroad. The basis for the holding was that the grant "was explicitly stated to be for a designated purpose," namely, a railroad right of way, that the railroad could not alienate any portion of the right of way for use for private purposes since it would be inconsistent with the special purpose for which the land was granted; and that to permit an individual to acquire, by adverse possession, a portion of the right of way for private use, "would be to allow that to be done by indirection which could not be done directly." The court further stated (page 271) :

Nor can it be rightfully contended that the portion of the right-of-way appropriated was not necessary for the execution of the powers conferred by Congress, for, as said in *Northern Pacific Railroad Co. v. Smith*, 171 U. S. 261, 275, speaking of the very grant under consideration: "By granting a right-of-way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary, for a public work of such

importance." Neither courts nor juries, therefore, nor the general public, may be permitted to conjecture that a portion of such right-of-way is no longer needed for the use of the railroad and title to it has vested in whomsoever chooses to occupy the same. The whole of the granted right-of-way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes.

It is clear, therefore, from the foregoing decision that any use of a railroad right of way, or any portion thereof, for other than railroad purposes is prohibited. A right of way granted by Congress through the public domain may be used only and exclusively for railroad purposes. And this is true irrespective of whether the use of a portion of the right of way for other purposes interferes with the continued operation of the railroad, since it must be presumed that the entire right of way is essential for railroad purposes. The case of *Northern Pacific Ry. v. Townsend, supra*, is susceptible of no other meaning.

That the proposed use by the Great Northern Railway Company of a portion of its right of way for the purpose of drilling for oil underlying the right of way would contravene the manifest intention of Congress, is plain. No distinction is perceived between the use a portion of a right of way by a homesteader for the purpose of cultivation and the use by the railroad for the purpose of drilling an oil well. If the one use is prohibited, the other must also fall. Both uses suffer from the same vice; neither are for railroad purposes.

Nor does the fact that the oil which may be produced will be utilized as fuel for the railroad locomotives alter this conclusion. It is the land which must be used for railroad purposes and not the products of the land. Otherwise it would be logical to conclude that the land might also be used to cultivate crops to feed employees of the railroad. The statement of the claim refutes it. A similar contention was considered in *Union Missionary Baptist Church v. Fyke, supra*, with respect to which the court said, page 1205:

It is contended that plaintiff is entitled to the proceeds of the oil taken under the lease given by it to maintain the church building, that is to say, it is entitled to use the land in such a way as to produce oil therefrom and with the proceeds therefrom defray the expense of maintaining the church building. But reference to the special provision in the deed discloses that the premises were to be used exclusively for a site for the erection and maintenance of a church building, and not to pay the expense of erecting and maintaining the building.

And it would seem equally true that under the act of March 3, 1875, land was granted for the location, construction, and maintenance of a railroad and not to provide the means of operating the railroad.

It is further urged that the granting act confers the right to take material, earth, stone, and timber from the public lands adjacent

to the line of the road, that such right extends *a fortiori* to right of way itself and that, therefore, oil or other minerals, in addition to such materials, may be removed from the right of way. With respect to this contention, it need only be pointed out that the right is granted to take materials "necessary for the construction of said railroad." No reference is made to the *operation* of the railroad. And in *United States v. Denver and Rio Grande Railway Co.*, 150 U. S. 1, the court, while holding that timber or material taken under the authority of the act might be used by the railroad for the erection of necessary structures, said (page 15):

* * * this court does not mean to be understood as holding that the defendant, under the act of 1875, has the right to use timber taken from the public lands for the purpose of constructing rolling stock or equipment employed in its transportation business.

If timber may not be taken for the purpose of constructing rolling stock, surely, oil may not be taken to provide motive power for the rolling stock.

It is a settled rule in the construction of grants "that nothing will pass to the grantee by implication or inference, unless essential to the use and enjoyment of the thing granted." *Barden v. Northern Pacific Railroad Co.*, 154 U. S. 288, 319. Accordingly, only such interest in the right of way was vested in the grantee as may be essential to the continued performance of the purpose specified in the grant. And since it is quite clear that underlying oil or minerals are not essential to the use of the right of way for railroad purposes, it must follow that no right or interest therein passed to the grantee under the granting act.

In *Hollingsworth v. Des Moines Ry. Co.*, 63 Iowa 443, 19 N. W. 325, the court made the following statement with respect to the right and interest acquired by a railroad in land condemned for right-of-way purposes:

It is certainly true that the railway corporation acquires but a limited right or interest in lands condemned under the statute for right-of-way purposes. It is empowered by the statute (section 1241 of the Code) to take and hold so much real estate as may be necessary for the location, construction, and convenient use of the railway and to take, remove, and use, for the construction and repair of its railway and its appurtenances, any earth, gravel, stone, timber, or other material on or from the land so taken. The right acquired by it by virtue of the condemnation proceedings is to occupy and use the surface of the land taken for the purposes of its railway, and to appropriate and use so much of the earth or other material upon the land as may be necessary for the construction and repair of its road. The owner of the land is not divested of his title, and the interest remaining in him may in some cases be of great value. If the land should be underlaid with stone, coal, or other mineral, the owner would have the right, doubtless, to quarry or mine the same, provided

this could be done without interfering with the use of the surface by the railroad company. * * *

See *Smith v. Hall*, 103 Iowa 95, 72 N. W. 427, to the effect that the interest of a railroad in a right of way is the same whether granted or condemned; see also *Penn. Schuylkill Valley Ry. Co. v. Reading Paper Mills*, 149 Pa. St. 18, 24 Atl. 205.

And the conclusion that no interest in the oil or minerals underlying the right of way passed to the railroad under the granting act, is in no way negatived by the fact that it has been held that a railroad has sufficient title in the right of way to maintain possessory actions (*Northern Pacific Ry. v. Townsend, supra*; *Rio Grande Western R. Co. v. Stringham*, 239 U. S. 44); that a railroad's right of way is private property and cannot be occupied without its consent (*Western Union Tel. Co. v. Penn. R. R. Co., supra*); that the right of way is real estate and that structures erected thereon are fixtures (*New Mexico v. United States Trust Co., supra*).

But it is contended that if minerals underlying the right of way were not intended to pass under the grant, they would have been expressly reserved just as mineral lands were expressly excluded from the alternate sections abutting the right of way granted to certain railroads in aid of construction. Sec. 3 of act of July 2, 1864 (13 Stat. 365); Sec. 3 of act of July 27, 1866 (14 Stat. 292). However, upon analysis, it will be seen that the difference in treatment by Congress of grants of land in aid of construction and grants of right of way is consistent with the views herein expressed. The grants of land in aid of construction contain no restriction or limitation as to use, and were intended to pass the entire title and interest of the United States therein. It thus became necessary, in order to effectuate the apparent intention of Congress to confine such concessions to lands other than mineral, to reserve and exclude mineral lands from such grants. This Congress did. *Barden v. Northern Pacific Railroad, supra*. Rights of way, however, were granted to be used for a special purpose and only such right and interest passed to the grantee as was essential to the use of the land for the purpose designated. A specific reservation of subsurface minerals was, therefore, unnecessary in the right-of-way grants since such grants operated, by necessary implication, to effect such a result.

Furthermore, it has long been the settled policy of Congress to reserve and exclude mineral lands from any grant in the absence of an express provision for their inclusion and to dispose of them only under laws specially including them. This policy has been recognized by the Supreme Court in a long line of decisions. Thus, in *United States v. Sweet*, 245 U. S. 563, a school land grant to the State of Utah

was held not to embrace mineral lands, although the grant was absolute on its face and such lands were not expressly excepted. The court said, pages 569, 572:

* * * Noticeable among those acts is one which, in dealing with grants to Nevada and surveys in that State, declared, "in all cases lands valuable for mines of gold, silver, quicksilver, or copper shall be reserved from sale," c. 166, 14 Stat. 85, and another declaring, "no act passed at the first session of the thirty-eighth congress, granting lands to states or corporations, to aid in the construction of roads or for other purposes, or to extend the time of grants heretofore made, shall be so construed as to embrace mineral lands, which in all cases shall be, and are, reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant." 13 Stat. 567. Although applied in one instance to lands in Nevada and in the other to grants made at a particular session of Congress, *these declarations were but expressive of the will of Congress that every grant of public lands, whether to a State or otherwise, should be taken as reserving and excluding mineral lands in the absence of an expressed purpose to include them;* * * *

What has been said demonstrates that the school grant to Utah must be read in the light of the mining laws, the school land indemnity law and the settled public policy respecting mineral lands, and not as though it constituted the sole evidence of the legislative will. *United States v. Barnes*, 222 U. S. 513, 520. When it is so read it does not, in our opinion, disclose a purpose to include mineral lands. Although couched in general terms adequate to embrace such lands if there were no statute or settled policy to the contrary, it contains no language which explicitly or clearly withdraws the designated sections, where known to be mineral in character, from the operation of the mining laws, or which certainly shows that Congress intended to depart from its long prevailing policy of disposing of mineral lands only under laws specially including them. It therefore must be taken as neither curtailing those laws nor departing from that policy. [Italics supplied.]

See also *Mining Company v. Consolidated Mining Co.*, 102 U. S. 167; *Deffeback v. Hawke*, 115 U. S. 392; *Davis v. Weibbold*, 139 U. S. 507; *Dunbar Lime Co., v. Utah-Idaho Sugar Co.*, 17 F. (2d) 351. In the light of this established policy, it is not to be presumed that the failure of Congress to reserve expressly the minerals underlying the right of way granted under the act manifested an intention on its part to vest title to such minerals in the grantee.

For the reasons above stated, it is my opinion that under the granting act of March 3, 1875, the Great Northern Railway Company acquired neither the right to use any portion of its right of way for the purpose of drilling for and removing subsurface oil nor any title or interest in or to such oil and the questions propounded are accordingly answered in the negative.

Approved: September 8, 1937.

T. A. WALTERS,

First Assistant Secretary.

YUKON FUR FARMS, INC.

Decided September 20, 1937

ALASKA—TRADE AND MANUFACTURING SITES—FUR FARMING—STATUTORY CONSTRUCTION—ACT OF MAY 14, 1898.

Section 10 of the act of May 14, 1898 (30 Stat. 413), authorized the purchase of a tract in Alaska for fox farming, and was not repealed either expressly or by implication by the act of July 3, 1926 (44 Stat. 821), making provision for the leasing of lands in Alaska for fox farming.

Posadas v. National City Bank, 296 U. S. 497, cited and applied.

WALTERS, First Assistant Secretary:

The Yukon Fur Farms, Inc., has appealed from a decision of the Commissioner of the General Land Office rendered July 26, 1935, which held for rejection its application, Anchorage 08396, made June 13, 1935, under section 10 of the act of May 14, 1898 (30 Stat. 413), to purchase lot 5 (19.22 acres); Sec. 29, T. 58 S., R. 79 E., C. R. M., Alaska.

The application alleged that the land was first occupied for fur farming in 1926, and that \$14,354.85 had been expended in improvements. The rejection of the application was based upon the view expressed in departmental letter of June 3, 1927, that subsequent to the passage of the act of July 3, 1926 (44 Stat. 821), making provision for the leasing of public lands in Alaska for fur farming, the Department was unwilling to adhere to its previous ruling of May 20, 1916, holding that applications to purchase land for the raising of foxes came within the purview of section 10 of the act of May 14, 1898, and that except as to those persons who made permanent improvements prior to April 7, 1925, applicants for lands for the purpose of fur farming must invoke the provisions of the act of July 3, 1926. In the letter, the Department stated that:

As early as April 7, 1925, Senator John B. Kendrick was advised that this Department is without authority to lease or sell islands or other lands for fox farming or for the propagation of fur bearing animals, citing 30 L. D. 417. The letter to Senator Kendrick no doubt influenced the legislation which resulted in the approval of the act of July 3, 1926 (44 Stat. 821), making provision for leasing public lands in Alaska for fur farming.

April 17, 1925, was evidently made the critical date for the acceptance of applications for fur farming under the act of May 14, 1898, as it announced a change of view as to statutory authority to sell land for the purpose of a fur farm, which, was not, however, to be invoked against those who had prior thereto made improvements and expenditures in reliance upon the prior incompatible ruling.

The appeal is based substantially on two grounds; first, that the business of fur farming is a "productive industry" within the pur-

view of section 10 of the act of May 14, 1898, and that public land in Alaska desired for the purpose of fur farming is subject to application and purchase under the terms of that section; and second, that the act of July 3, 1926, contains no words of repeal of the act of May 14, 1898, nor anything that justifies the view that it was repealed in any of its applications by implication under the accepted standard rules of construction as to repeals by implication.

As the appellant assails the soundness of the conclusion expressed in departmental letter of June 3, 1927, and that conclusion being inconsistent with a previous decision of the Department, a reexamination of the bases for the conclusions reached seems advisable.

By decision of April 22, 1916, approved by the Department May 20, 1916, the Commissioner held allowable under section 10 of the act of May 14, 1898 an application to purchase a tract in Alaska for the purpose of fishing and for the propagation of foxes and fur bearing or other animals. Attention was directed to the provisions of section 12 of the act of March 3, 1891 (26 Stat. 1095), which declares that persons

now or hereafter in possession of and occupying public lands in Alaska for the purpose of trade or manufacture may purchase not exceeding one hundred and sixty acres, to be taken as near as practicable in square form, of such land at two dollars and fifty cents per acre;

26 C. D.
232 (1898).

to decisions of the Department holding that the raising of foxes and cattle was not "trade and manufacture" and to section 10 of the act of May 14, 1898, which substantially reenacted, with modification, the provisions of section 12 above quoted of the act of March 3, 1891; one of such modifications being the adding of the words "or other productive industry" after the words "trade, manufacture." It was held that the raising of foxes was a productive industry within the meaning of the statute, and by the insertion of the words "or other productive industry" in section 10 it was intended to broaden the scope of the former act and that the raising of foxes was a legitimate enterprise coming within the purview of said section 10. There is nothing in the act that suggests that the words "productive industry" were to be restricted to any particular kind of industry. No record appears of any committee hearing had upon the bill which resulted in the act of May 14, 1898. The Congressional Record, 55th Congress, Vol. 31, part 3, p. 2368, however, discloses that in the debate upon the bill in the Senate, a colloquy occurred between Mr. Carter in charge of the bill and Mr. Spooner as to what things might be considered a productive industry as follows:

Mr. CARTER. Mr. President, the law as it stands on the statute book provides that land may be sold in quantities of 160 acres for trade or manufacture. The words "or other productive industry" are added for the reason that in the canning of fish, and particularly the canning of salmon, which is the principal

business of that coast country, it has been held by the Department that canning salmon was neither trade nor manufacture, and we did not think that it was probably a productive industry.

Mr. SPOONER. What would it be?

Mr. CARTER. I suppose it would be a productive industry.

Mr. SPOONER. Can the Senator imagine anything that would be productive at all that would not be a productive industry.

Mr. CARTER. Canning salmon would doubtless come under the category.

Mr. SPOONER. Or canning anything else or producing anything on earth.

Mr. CARTER. It might be suggested that if we put in the bill a provision as to the canning of salmon, which is a great industry, then we might have to put in next year, possibly, the canning of cod. I believe cod is canned, but I am not familiar with the fishing business. I know they dry cod.

The fact that attention was called to the very broad meaning of the words "productive industry," which was not disputed, and that the words were retained in the bill without limitation or qualification tends to support the view that the legislative intent was not to confine their operation to canning fish or any particular form of productive industry, and the debate, if extrinsic aid in construction is needed, rather vindicates the view accepted in the decision of April 22, 1916, above mentioned. The opinion of Assistant Attorney General Van Devanter (30 L. D. 417), had nothing to do with the question whether land could be acquired under section 10 of the act of May 14, 1898, for fox farming. The sole question there was whether the Secretary of the Interior has authority to *lease* public lands in Alaska for the propagation of foxes, and nothing said therein conflicts with the view that lands may not be purchased for a fur farm under the last mentioned act. The Department is of the opinion that section 10 of the act of May 14, 1898, authorized the purchase of a tract for fox farming, and if it is right in this view, the remaining question is whether the act, so far as applicable to fox farming, was superseded or repealed by the act of July 3, 1926, section 1, thereof reading as follows:

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

And provided further, That any permit or lease issued under this Act shall reserve to the Secretary of the Interior the right to permit the use and occupation of parts of said leased areas for the taking, preparing, manufacturing, or storing of fish products, or the utilization of the lands for purposes of trade or business, to the extent and in the manner provided by existing laws or laws which may be hereafter enacted (U. S. C., 3d supp., title 48, sec. 360).

The remaining section (sec. 2) authorized the Secretary of the Interior to perform any and all acts and make such rules and regulations necessary to carry the act into effect and provides for a forfeiture of leases on failure to stock the leased area. It is plain that if the act of July 3, 1926, repealed the act of May 14, 1898, so far as it applied to the purchase of tracts for fur farming, it did so by implication. The rules as to repeals by implication are rather comprehensively stated in *Posadas v. National City Bank*, 296 U. S. 497, 503, 504, and so far as applicable here are as follows:

* * * The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible. There are two well-settled categories of repeals by implication—(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act and will continue to speak, so far as the two acts are the same, from the time of the first enactment.

The law on the subject as we have just stated it finds abundant support in the decisions of this court, as well as in those of lower federal and state courts. It will be enough to direct attention to a few of these decisions out of a very large number. In *United States v. Tynen*, 11 Wall. 88, 92, Mr. Justice Field, speaking for the court, after stating the general rule, said that if two acts "are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act." It was not meant by this statement to say, as a casual reading of it might suggest, that the mere fact that the latter act covers the whole subject and embraces new provisions demonstrates an intention completely to substitute the latter act for the first. This is made apparent by the decision in *Henderson's Tobacco*, at the same term, 11 Wall. 652, 657, where, in an opinion delivered by Mr. Justice Strong, it is said, "But it must be observed that the doctrine [of the *Tynen* case] asserts no more than that the former statute is impliedly repealed, so far as the provisions of the subsequent statute are repugnant to it, or so far as the latter statute, making new provisions, is plainly intended as a substitute for it. Where the powers or directions under several acts are such as may well subsist together, an implication of repeal cannot be allowed." [Italics are in the original.] These two cases, with others, are briefly reviewed by this Court in *Red Rock v. Henry*, 106 U. S. 596, 601, by Mr. Justice Woods, and the court's conclusion stated as follows:

"The result of the authorities cited is that when an affirmative statute contains no expression of a purpose to repeal a prior law, it does not repeal it unless the two acts are in irreconcilable conflict, or unless the later statute covers the whole ground occupied by the earlier and is clearly intended as a substitute for it, and the intention of the legislature to repeal must be clear and manifest."

The implication of which the cases speak must be a necessary implication. *Wood v. United States*, 16 Pet. 342, 362-363. It is not sufficient, as was said by Mr. Justice Story in that case, "to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary." The question whether a statute is repealed by a later one containing no repealing clause, on the ground of repugnancy or substitution, is a question of legislative intent to be ascertained by the application of the accepted rules for ascertaining that intention. *United States v. Claflin*, 97 U. S. 546, 551; *Eastern Extension Tel. Co. v. United States*, 231 U. S. 326, 332.

No irreconcilable conflict is perceived in the grant in fee of 80 acres or less and the lease of 640 acres or more for the same purpose. Such a scheme of disposal and use was adopted in the potash act of October 2, 1917 (40 Stat. 297). And, it is not perceived why a grant of a fee title to portion of the land devoted to fur farming would not further rather than hinder the object of the act of July 3, 1926, namely, the development and production of furs in Alaska, as it would enable the fur farmer to secure an indefeasible title to that part of his farm upon which he had made extensive and valuable improvements. It is obvious that the later act does not cover the whole subject of the former and nothing appears in the Congressional Record or in the report of the committee on H. R. 8048, Sixty-ninth Congress, which was enacted, to indicate that the act was intended as an exclusive method of securing rights in public land for the purpose of fur farming. There is nothing in the history of the passage of the bill that supports the surmise expressed in the Department's letter of June 3, 1927, that the letter of April 7, 1925, to Senator Kendrick influenced its passage. The record shows that both H. R. 8048 and the identical bill S. 2688 were introduced at the request of the Department of the Interior and that bills providing for the lease of public lands for fur farming were introduced in both the Sixty-seventh and the Sixty-eighth Congresses, and it is pertinent to notice that the bills on this subject (H. R. 10408 and S. 3586), introduced in the Sixty-seventh Congress, contained a provision which did not appear in the bill that was subsequently passed, which reads:

That no person, partnership, corporation, or association shall use any lands of the United States within the provisions of this Act for grazing or for fur farming except under a lease or permit granted in accordance with the rules or regulations prescribed by the Secretary of Agriculture under the provisions of this Act.

It would seem that if Congress intended that the act of July 3, 1926, should be an exclusive method of acquiring rights in public lands for the purpose of fur farming, a provision to the same effect as that last quoted would have been incorporated in the law.

In accordance with the views above expressed, the Commissioner's decision is reversed and the application should be considered without regard to the departmental letter of June 3, 1927.

Reversed.

ASA W. JUDD

Decided September 20, 1937

PUBLIC LANDS—APPLICATION FOR ADJOINING FARM ENTRY.

An application for adjoining farm entry under section 2289, Revised Statutes, based upon allegations of continued occupation and cultivation thereof, and continued occupation of adjoining town-site lots for agricultural purposes, where the town-site lots were patented under the act of July 28, 1914 (38 Stat. 558), which directed the survey, platting, and patenting of town lots and agricultural tracts, is not within the rule that a town lot bordering public land subject to entry cannot be made the basis for an adjoining farm entry.

William F. Roedde (39 L. D. 365), distinguished.

Continuous claim and occupation of public land as a settler initiated prior to various withdrawals and before the rights of the State attached under its school land grant creates equities that may be considered the basis for acquisition of the land as an adjoining farm. Where a settler continues to claim and occupy a tract of public land, abandonment of various attempts to acquire title under the public land laws in the absence of adverse claim is not an abandonment of the claim.

WALTERS, First Assistant Secretary:

Asa W. Judd has appealed from a decision of the Commissioner of the General Land Office rendered March 4, 1937, holding for cancellation his adjoining farm entry, Phoenix 074640, for the NW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 16, T. 41 N., R. 2 W., G. & S. R. M., made February 9, 1937, under Section 2289, Revised Statutes.

The basis assigned for the entry was the ownership by the applicant of blocks 1 and 10 of the Fredonia town site adjoining said tract and residence thereon. The records show said lots were applied for and patented April 12, 1936, under the town-site laws in the name of A. Walter Judd, Jr., who entryman states is his son and who still retains the legal title. The Commissioner held as a basis for cancellation that the entryman was not the owner of the land and was not therefore qualified to make the entry.

Entryman avers in his appeal, in substance and effect, that the lots were acquired for him and are his property; that in their acquisition his son's name was used for the reason that he being the only

United States Commissioner in the locality before whom the necessary papers could be executed would have had to journey a long way to Flagstaff, Arizona, to have the necessary jurats administered had he made the application for the lots in his own name; that the lots are transferable to him on request. These averments are corroborated in an affidavit executed by the patentee.

It has been held by the Department that equitable ownership of adjoining land and residence thereon is a sufficient basis for an adjoining farm entry. A possible objection to present adjoining farm entry, however, is the rule in *William F. Roedde* (39 L. D. 365) that a town lot bordering on public land subject to entry cannot be made the basis for an adjoining farm entry.

This ruling seems, however, based on the spirit and not the letter of Section 2289, Revised Statutes, the applicable part of which reads that:

* * * every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.

The rule in the *Roedde* case was deduced from the doctrine theretofore frequently announced that land devoted to urban uses could not be made the basis for an adjoining farm entry. The act of July 28, 1914 (38 Stat. 558), directed the Secretary of the Interior to survey, plat and patent town lots and *agricultural tracts* in section 17 and other sections which were occupied and improved.

In view of entryman's recitals of long-continued occupation of both the tract applied for and the town blocks, and the character of such occupancy, it is not believed that the rule in the *Roedde* case is applicable.

Gleaning material averments from the entryman's various showings, it appears that he exchanged land in Utah for a squatter's claim which included the land in the patented lots and the NW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 16; that in 1898 or 1899 he settled upon the claim establishing his residence on the land now included in the lots which has continued to be his home to the present time; that part of the land originally claimed by him was invaded by other claimants and settlers and part surveyed as town lots, including that in which he lived, over his protest, but that he has continued in uninterrupted possession of blocks 1 and 10 and NW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 16 which he has farmed and improved and fenced, and has had from 12 to 15 acres under irrigation and raised wheat and other crops. The records show that on October 24, 1922, Asa W. Judd made application 054473 for 320 acres under the enlarged homestead act, including NW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 16, but that subsequently he requested the return of his filing fees, which was construed as a withdrawal of his applica-

tion, and the filing fees were returned to him and the case closed November 29, 1927; that on February 4, 1925, he filed stock-raising homestead application 057701 which included NW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 16, which was rejected for conflict and incorrect description and because the land in Sec. 16 was held to belong to the State of Arizona; that on March 2, 1927, he filed desert land application 060492 for the NW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 16, which was rejected by the register for the reason that the tract was within a school section, but upon review of this action the Commissioner by decision of May 19, 1927, considering the effect of various withdrawals and restorations, the grant to the State and Judd's allegations of settlement prior thereto, held that his claim was superior to that of the State and in the absence of protest after notice to the State his application would be governed by the desert land laws and regulations thereunder. The State filed no protest. However, Judd, on September 20, 1927, withdrew his application and his filing fees were returned to him.

The record shows that T. 41 N., R. 2 W., was withdrawn October 16, 1927, for the use of the Kaibab and other Indians, which appears to have embraced what was upon survey of 1911 (plat approved June 12, 1912) described as W $\frac{1}{2}$, T. 41 N., R. 2 W., including Sec. 16. The Indian reservation was revoked as to said township July 8, 1913, but on July 8, 1913, the township was withdrawn by Executive Order No. 1786 under the act of June 25, 1910, for the purpose of classifying the lands and for further legislation. The act of July 28, 1914, *supra*, was thereafter enacted. Plat of the township (Fredonia) was accepted April 22, 1921, which did not include NW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 16. October 22, 1918, Executive Order No. 1786 was revoked and the public lands, the disposition of which was provided for in the act of July 28, 1914, were directed to be restored to entry. April 24, 1924, departmental order specified NW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 16 among the tracts released from the withdrawal, but did not include it in the tracts ordered to be restored to entry, presumably because it was in a school section.

November 26, 1934, by Executive Order No. 6910, the vacant, unreserved, and unappropriated public lands in Arizona and 11 other States were temporarily withdrawn from settlement, location, sale, or entry for classification under the Taylor Grazing Act (act of June 28, 1934, 48 Stat. 1269). The NW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 16 was included in Grazing District No. 1, Arizona, established July 9, 1935.

According to the showings of Judd, the tract for which title is sought is a part of the land occupied and claimed by him as a settler prior to the withdrawal for the Indians and before the rights of the State would have otherwise attached and such occupation and claim have been maintained until the present time. The Department is,

therefore, of the opinion that his rights are not affected by the various withdrawals, the grant to the State or the inclusion of the land in a grazing district. The State has acquiesced in the ruling that he had a superior right to that acquired under the school land grant and no other claim adverse to him has been asserted. His failure to acquire the title under the homestead or the desert land law is not due to any action of the Land Department but to his voluntary abandonment of his application, but the abandonment of his attempts to procure the title was not an abandonment of his claim to the land, and the Department is of the opinion that his equities are such that if he files a deed from his son to himself conveying the legal title to blocks 1 and 10 as evidence that he is the equitable owner and entitled to acquire the legal title thereof, his adjoining farm entry should not be disturbed but allowed to proceed to patent. As modified, the decision of the Commissioner is affirmed.

Modified.

MANUEL S. MONTOYA

Decided September 24, 1937

STOCK-RAISING HOMESTEAD—RIGHT TO MAKE ENTRY.

Settler rights to make entry not prejudiced by misdescription of tracts, relinquishments by entrymen filing in the wrong land district, or erroneous cancelations by the General Land Office due to confusion and uncertainty as to the boundary between Colorado and New Mexico. Where claimant has a valid settlement claim and a right to reinstatement and amendment of his entry prior to withdrawal of the land, such rights are not barred for the reason that he filed an application for second entry subsequent to a withdrawal of the land, as there was no occasion for an application for second entry.

Where rights of claimant were initiated by his settlement and such settlement was maintained until the withdrawal of November 26, 1934, the claimant has a valid existing right excepted from the force of the withdrawal and the subsequent establishment of a grazing district embracing the land, and the claimant, though somewhat tardy in asserting his rights, in the absence of an adverse claim, may be allowed to change his application for the land settled upon and other land under the stock-raising homestead law, which is unallowable, to one under section 2289, Revised Statutes, for the land actually settled upon.

WALTERS, *First Assistant Secretary:*

Manuel S. Montoya has appealed from a decision of the Commissioner of the General Land Office, rendered May 22, 1936, which held for rejection his application for second entry and application under the stock-raising homestead act, Pueblo 056044, embracing Tract No. 37, lots 3, 4, 6, and 8 of Sec. 21, lots 5 and 6, Sec. 22, T. 32 N., R 1 E., N. M. P. M., Colorado, containing 382.10 acres.

The record shows claimant filed application for second entry and application under section 2289, Revised Statutes, on June 16, 1934. The applicant was advised that the land was misdescribed, was on the wrong form, and that the area sought should be applied for under the stock-raising homestead act. Applicant filed an amended application properly describing the land on the proper form October 6, 1934, accompanied by petition for designation.

The lands involved have never been designated as subject to entry under the stock-raising act. July 8, 1935, the Division of Grazing declined to designate the land as of stock-raising character and advised that on September 14, 1934, the township in question had been withdrawn for the proposed Animas Grazing District No. 4, which was established April 6, 1935.

Upon the facts appearing, the action, rejecting the stock-raising homestead application, is in accord with settled precedents and was right, but from other showings of the claimant and reference to other records of his attempts to enter a part of the land under the homestead laws, it seems the Commissioner overlooked his claim to substantial rights as a settler and failed to advise him of the proper steps to be taken to have them recognized.

The record shows that on September 4, 1914, claimant made homestead entry, Santa Fe 021771, for $S\frac{1}{2}NE\frac{1}{4}$, $NE\frac{1}{4}NE\frac{1}{4}$ Sec. 21, $NW\frac{1}{4}NW\frac{1}{4}$ Sec. 22, T. 32 N., R. 1 E., N. M. P. M. April 16, 1917, he applied to amend his entry to $SW\frac{1}{4}NE\frac{1}{4}$, $SE\frac{1}{4}NW\frac{1}{4}$ and Lot 2, Sec. 21 in same township and range "In Colorado" and lots 1 and 2, Sec. 8 in the same township and range "In New Mexico," stating that part of his land has been shown by a private survey to be in Colorado and part in New Mexico. The register at Santa Fe transmitted a copy of the application to the register at Durango who serialized it as a homestead application Durango 06871 for the lands he had described as in Colorado. Both applications were suspended because of a dispute as to the true boundary between Colorado and New Mexico. The claimant represented, in substance, that by the amendment he intended to apply for the tracts covering his improvements. November 7, 1921, claimant relinquished entry 021771 and the case was closed in the Santa Fe office. Upon instructions from the Commissioner, application 06871 was rejected and closed. July 13, 1927, applicant filed an application in the Pueblo office to amend Durango 06871 to embrace $SE\frac{1}{4}NW\frac{1}{4}$, $S\frac{1}{2}NE\frac{1}{4}$ Sec. 21, and $SW\frac{1}{4}NW\frac{1}{4}$ Sec. 22, T. 32 N., R. 1 E., and no other land, as the land first intended to be entered, in which he called attention to his previous filings and alleged that he filed relinquishment of 021771 because by the resurvey of the new boundary between Colorado and New Mexico his land was found to be in the former. The application was rejected

for the reason there was nothing to amend. In his application for second entry filed June 16, 1934, he describes his prior entry as Durango 06871 for SW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$ and lot 2, Sec. 21, T. 32 N., R. 1 E. and states that he established residence on said land in October 1914 and had lived thereon continuously since. He mentions his improvements on the land consisting of houses, corrals, road, and other buildings and values them at \$375. July 18, 1918, the township in question was withdrawn from all forms of entry pending resurvey. September 23, 1926, plat of resurvey of portions of T. 32 N., R. 1 E., N. M. P. M. was accepted showing the land described in 06871 segregated as Tract 37 and indexed as Manuel S. Montoya, canceled homestead entry, and that such tract with the other tracts now applied for were in Colorado. What was known as the Darling line is depicted on the plat as the boundary between the States.

Judicial notice will be taken of the fact that at the time Montoya made his first filings dispute existed as to the boundary between New Mexico and Colorado; that New Mexico claimed to what is known as the Carpenter line, established in 1903; that the Carpenter line was accepted by the General Land Office and was much farther north than the older Darling line which theretofore had been recognized and accepted as the boundary; that the Supreme Court by decision of January 26, 1925, decreed that the latter was the true boundary (*New Mexico v. Colorado*, 267 U. S. 30). It also appears that a plat of township 32 N., R. 1 E., approved in 1887, showed the boundary mentioned as passing through Sec. 8 and sections in the same tier and shows lot 2, Sec. 8 as in New Mexico and as abutting the State boundary, and apparently adjacent to the tracts Montoya claimed in Colorado.

There is small wonder that confusion and uncertainty existed as to the proper description of the land upon which Montoya claimed settlement and as to the proper district in which to file. The relinquishment of entry made in New Mexico was obviously not intended as an abandonment of his right to the land he had settled upon, and as the description therein does not cover all the land described in his application, Durango 06871, the propriety of directing cancellation thereof because of relinquishment of Santa Fe 021771 is questionable.

Claimant's rights cannot be regarded as first initiated with the filing of application 056044. He had not lost, forfeited, or abandoned the land intended first to be entered within the meaning of the act of September 5, 1914 (38 Stat. 712), providing for second homestead or desert-land entries and there is no occasion for an application for second entry. A prior withdrawal will not bar his right to amendment merely because he filed an application for second

entry instead of an application for reinstatement and amendment (*Edgar A. Potter*, 40 L. D. 571). The rights of claimant were initiated by his settlement, and such a settlement continued to be maintained until the time of the withdrawal of November 26, 1934, is recognized as a valid existing right excepted from the force of the withdrawal and the subsequent establishment of the grazing district.

There is no suggestion of an adverse settlement claim so that the fact that claimant has been somewhat tardy in seeking to perfect his rights does not preclude the exercise of his rights. The applicant should be allowed to change his application to one under section 2289, Revised Statutes, for the tracts he settled upon in 1914 described according to the present governing plat of survey, subject to the limitation of acreage prescribed in that section. His application for any additional land should be rejected. As herein modified, the decision of the Commissioner is affirmed.

Modified.

INTERPRETATION OF THE TAYLOR GRAZING ACT

Opinion, October 8, 1937

TAYLOR GRAZING ACT—AUTHORITY OF SECRETARY TO ACCEPT CONTRIBUTIONS OF FUNDS RECEIVED BY STATE UNDER SECTION 10—USE OF SUCH FUNDS IN GRAZING DISTRICT

The Secretary of the Interior is authorized under section 9 of the Taylor Grazing Act to accept contributions consisting of or including funds received by a State under section 10 of the act when proffered to him by the State or by those vested, under the State law, with control over the expenditure of such funds, even though the contributions are conditioned on his use of the money for a particularly specified type of expense incident to the administration, protection, or improvement of the grazing district wherein the funds originated.

There is no need for modification of the Executive order of January 17, 1873, in order to permit a regional grazier to participate in the expenditure of State grazing funds in the manner authorized by the State laws enacted pursuant to section 10 of the Taylor Grazing Act.

MARGOLD, *Solicitor*:

At the request of the Director of Grazing, certain problems involving, among other things, a construction of sections 9 and 10 of the Taylor Grazing Act (act of June 28, 1934, 48 Stat. 1269) as amended by the act of June 26, 1936 (49 Stat. 1976), have been referred to me for opinion.

Section 9, as amended, provides in part:

* * * The Secretary of the Interior shall also be empowered to accept contributions toward the administration, protection, and improvement of the district, moneys so received to be covered into the Treasury as a special fund,

which is hereby appropriated and made available until expended, as the Secretary of the Interior may direct, for payment of expenses incident to said administration, protection, and improvement, and for refunds to depositors of amounts contributed by them in excess of their share of the cost.

Section 10, as amended, provides:

That, except as provided in sections 9 and 11 hereof, all moneys received under the authority of this Act shall be deposited in the Treasury of the United States as miscellaneous receipts, but 25 per centum of all moneys received under this Act during any fiscal year is hereby made available, when appropriated by the Congress, for expenditure by the Secretary of the Interior for the construction, purchase, or maintenance of range improvements, and 50 per centum of the money received under this Act during any fiscal year shall be paid at the end thereof by the Secretary of the Treasury to the State in which the grazing districts or the lands producing such moneys are situated, to be expended as the State Legislature of such State may prescribe for the benefit of the county or counties in which the grazing districts or the lands producing such moneys are situated: *Provided*, That if any grazing district or any leased tract is in more than one State or county, the distributive share to each from the proceeds of said district or leased tract shall be proportional to its area in said district or leased tract.

Eight States in which grazing districts have been established have enacted laws which, in one form or another, place control over the expenditure of funds received under section 10, *supra*, partly or wholly in the hands of the district advisory boards created by the Secretary of the Interior to advise him on matters affecting the administration of the Taylor Grazing Act. Thus, the Arizona statute (Chap. 11, Arizona Laws of 1937) provides for the allocation, to each of its counties containing a grazing district established under the Taylor Grazing Act, of so much of the State fund as corresponds to the amount originally contributed by the lands in that district, and for the disbursement of each county fund "upon the warrant of the grazing district signed by the chairman of the board of district advisors and countersigned by the vice-chairman thereof and the regional grazier in administrative charge of said district." The statute also provides that the fund "shall be expended as the board of district advisors may direct, within said county, for range improvements and the maintenance thereof, predatory animal control, rodent control, poisonous or obnoxious weed extermination, or for the purchase or rental of facilities or lands within such county which will benefit such grazing district or the part thereof within said county."

Substantially similar statutes also have been enacted in Colorado, Idaho, New Mexico, and Wyoming. Senate Bill No. 401, Colorado, approved April 27, 1937; Chap. 28, Idaho Laws of 1937; Chap. 38, New Mexico Laws of 1937; Chap. 57, Wyoming Laws of 1937. The statute enacted in Utah likewise does not differ materially from the

one enacted in Arizona except that it vests control over the spending of the State's share of Taylor Grazing Act fee funds in the various district advisory boards without mentioning the chairmen or vice-chairmen or the regional graziers. Chap. 153, Utah Laws of 1937. The Montana statute provides that the moneys "shall be expended only for range improvements such as fences, reservoirs, wells, and for such other range improvements situated within the county or counties and district as the District Advisory Board may approve." Chap. 55, Montana Laws of 1937. In Nevada the statute provides that the money "shall be distributed to the county or counties by the State Treasurer in such manner as the Secretary of the Interior may direct. The State Treasurer shall deposit all money received to the credit of the advisory boards of the district in which the grazing fees were collected * * *. Such money shall be expended within the said county or counties for range improvements and related matters." Assembly Bill 278, 1935 Nevada Statutes, pp. 193, 194.

The Director of Grazing requests my opinion as to whether the Secretary of the Interior is authorized, under section 9 of the Taylor Grazing Act, to accept a contribution consisting of funds received by a State under section 10 of that act and by a county under the State law, when the funds are proffered to the Secretary by the district advisory board, or others having control over the expenditure of the fund, on condition that he devote it to one or more of the specific purposes enumerated in the State law.

Apart from a consideration of the particular State statutes that have been enacted, this request involves a broad inquiry into the Secretary's power, under section 9 of the Taylor Grazing Act, to accept contributions made by a State and consisting of funds received by it under section 10 of that act. I am of the opinion that the Secretary does possess this power.

Section 9 contains no express or implied restriction either as to the identity of the contributor or the source of the contributed funds. Under its provisions, a contribution from a State is no less acceptable than a contribution from anyone else; and it can make no difference whether the money was raised by taxation, or earned through some State proprietary venture, or received pursuant to section 10 as the State's share of the revenues derived under the Taylor Grazing Act. Section 10, similarly, contains no express prohibition against the use by a State of its share of those revenues as a contribution under section 9; nor can any of its provisions be held to preclude such a use by necessary implication. The mere fact that section 10 provides for payments by the United States to the States neither requires nor justifies a contraction of the all-inclusive language of section 9 by administrative or judicial interpretation so as to pro-

hibit States from making any contributions at all, or from making contributions consisting wholly or partly of the very funds received from the United States. In the absence of any language in section 9 or in section 10 affirmatively intimating the existence of any such exceptions, their interpolation can be justified, if at all, only in order to eliminate an otherwise irreconcilable inconsistency between the two sections.

No such inconsistency exists here. It is not a situation where, but for the implication of the proposed exceptions, section 10 would provide merely for the payments by the United States to the States and section 9 for the immediate repayment of the same funds by the States to the United States. The payments to the States are conditioned, not on their return to the United States, but on their use at the behest of the State legislature "for the benefit of the county or counties in which the grazing districts or the lands producing such moneys are situated." The State thus has a very wide choice both as to the method of spending the funds received from the United States and the specific purposes to which they are to be put. To say that this wide choice permits the State, if it so desires, to turn all or a part of the money, by itself or in conjunction with other funds, over to the Secretary of the Interior to be used by him for the "administration, protection, and improvement" of the various districts wherein it originally was raised is not to render section 10 meaningless nor even to impair in the slightest the sensible character of its provisions. On the contrary, to hold that the State may not do so is to refuse without reasonable basis to give full effect to the plain meaning of the statutory provision.

Section 10 does not require the State to expend the funds only on such beneficial projects as are carried on directly by the State itself. The sole restriction is that the funds be devoted to some purpose or purposes actually beneficial to the county or counties in which the money originally was raised. The State does not contravene this limitation if, instead of spending the money on some State project, it turns it over in a lump sum to some municipal, Federal, or private agency for use in connection with some appropriately beneficial activity in which that agency actually is engaged. There is no reason, therefore, why the State may not offer to turn the funds over to the Secretary of the Interior for use by him under the Taylor Grazing Act for the administration, protection, and improvement of the grazing lands in its various counties. Such a use would promote the interests of conservation and can legitimately be regarded by the State legislature as beneficial to the counties where the money originally was raised. By contributing the money raised in each county to the Secretary for such use in that county, therefore, the State

would be expending the funds received under section 10 "for the benefit of the county or counties in which the grazing districts or the lands producing such moneys are situated." This would fully meet the requirements specified in section 10; and under the broad provisions of section 9, the Secretary would be authorized to accept the offered funds as a contribution.

Such contributions, however, have not thus far been made by any of the States entitled to payments under section 10 of the Taylor Grazing Act. As has already been indicated, the States have enacted laws providing for a division of the fund among the different counties and authorizing a local group in each county to spend its share for variously designated purposes. These local groups consist of or include members of the district advisory boards set up by the Secretary of the Interior under the Taylor Grazing Act; and it is these groups who are or may be desirous of turning over to the Secretary of the Interior the funds under their control as a contribution under section 9 of that act.

The action proposed to be taken under the State laws thus requires two distinct steps, one involving the transaction whereby the State divides the fund received under section 10 among its various counties and places each county fund at the disposal of the local group designated in the State statute, the other involving the proposed payment of each county fund by the local group to the Secretary of the Interior as a contribution under section 9.

The validity of the first step is hardly open to question. Each of the State laws fully complies with the requirements of the Taylor Grazing Act both with respect to the division and the expenditure of the funds received by the State pursuant to section 10 of that act. No question at all can arise as to section 9 because the division of the State fund among the counties and the designation of the persons who shall have power in each county to spend the county's share of the money does not involve any contribution whatsoever by the State to the Secretary of the Interior. If the division of the State fund is handled in a way which results in vesting the local group with title to the local fund, then the transaction clearly involves a transfer of the money by the State to the members of the local group in trust for the purposes set forth in the State law. If title remains in the State or passes to its political subdivisions, the counties, then the members of the local group are agents, rather than trustees, with power to dispose of the fund in conformity with the provisions of the State law. In either case, the transaction does not involve any contribution by the State to the Secretary of the Interior or any question of the propriety of making or of accepting such a contribution under the Taylor Grazing Act.

These questions, together with several others not yet mentioned, all do arise, however, in connection with the second step whereby the local groups are planning to turn over the funds at their disposal to the Secretary of the Interior as a contribution under section 9. So far as the making of such contributions is concerned, the reasons already considered, which would permit the State itself to make the contributions directly to the Secretary without violating the Taylor Grazing Act, likewise enable the local groups to do so either as the authorized agents or trustees designated by the State. It is immaterial that the money being contributed under section 9 originally was received by the State under section 10. The only requirement which must be met in spending money received by a State under section 10 is that the expenditure shall be "for the benefit of the county or counties in which the grazing districts or the lands producing such moneys are situated." Each of the State laws assures full compliance with this requirement not only by providing for an appropriate division of the State fund among the counties but also by permitting the county funds to be used only for certain specified purposes whose beneficial character, within the meaning of section 10, is not open to dispute.

There remain, however, several problems not yet considered. The first is whether, under the State laws, the local groups are authorized to transfer the funds at their disposal to the Secretary of the Interior as a contribution under section 9 of the Taylor Grazing Act, or whether they themselves must disburse the local funds piecemeal for some project or projects beneficial to their respective counties and directly undertaken or controlled by them. While this is a question of State law as to which I cannot speak with authority, I personally see no room for a reasonable difference of opinion so far as concerns the statutes here under discussion. I do not believe any of those statutes can properly be held to prohibit a local group from using the funds at its disposal for the purpose of making the contribution under section 9 of the Taylor Grazing Act. The State statutes, it is true, all limit the local groups to purposes more specific than "the administration, protection, and improvement of the district." In some cases, indeed, the State law includes purposes which cannot be achieved under the Taylor Grazing Act; but it does so in a way which permits, rather than compels, the local group to devote the funds at its disposal to such purposes. (E. g., the Arizona law, quoted *supra*, which authorizes the funds to be expended, among other things, "for the purchase or rental of facilities or lands within such county which will benefit such grazing district," whereas the Attorney General has ruled, in an opinion dated May 14, 1937, that funds derived from contributions are not available for such purposes

because of section 3736 of the Revised Statutes, prohibiting the purchase of land on account of the United States "except under a law authorizing such purchase.") Each local group thus is free, without violating any trust imposed or authority conferred upon it under the State statute, to condition the contribution to the Secretary of the Interior on his use of the funds for some purpose or purposes specifically authorized by the State law and not prohibited by Federal law.

While the local groups thus may make the proposed contributions to the Secretary without violating either State or Federal law, a question still remains whether the Secretary may with equal propriety accept and use the money under section 9 of that act. Section 9 empowers the Secretary "to accept contributions toward the administration, protection, and improvement of the district" wherein the money originally was raised, and to devote the donated funds to the "payment of expenses incident to said administration, protection, and improvement * * *." Because the State laws limit the use of section 10 funds to a small list of specifically enumerated purposes, such as range improvements and maintenance, rodent control, and poisonous weed extermination, a local group could not, without exceeding its authority, make a general and unlimited contribution "toward the administration, protection, and improvement of the district." It would have to limit or condition the Secretary's power to use the contributed funds to one or more of the particular purposes specified in the State law. This raises the questions whether section 9 authorizes the Secretary to accept such limited contributions under any circumstances, and whether he may do so under the circumstances here actually presented.

There is no express prohibition in the Taylor Grazing Act against the acceptance of conditional contributions by the Secretary of the Interior. Nor is there any basis for implying any general prohibition that would preclude the Secretary from accepting funds offered for particular purposes which not only are permissible under the act but which he actually intends to achieve and for which he would have to use Federal funds if he rejected the contributions. The only reason I can perceive for any implied restriction on the Secretary's power to accept conditional contributions is in order to protect him against the necessity of devoting contributed funds to purposes that are prohibited by the act or that he may find inexpedient to fulfill after having accepted the contribution. It may be conceded that the Secretary has no authority to accept or to use contributions that are limited exclusively to a purpose or to purposes which he is not authorized to accomplish. But beyond this, no implied limitation on

his power under section 9 is necessary or desirable. Indeed, there is no reason to deny the Secretary the power to accept a contribution partly limited to illegal or unauthorized purposes so long as he is allowed a choice, under the terms of the gift, as to which of the specified purposes he shall achieve through use of the contributed funds. To hold that the Secretary is authorized to accept such contributions is not to hold that he is compelled to accept them or even to devote any part of the funds, after acceptance, to the illegal or unauthorized purposes. Similarly, to hold that the Secretary is free to accept contributions limited to particular purposes which he is authorized to achieve is not to compel him to expend the contributed funds for the specified purposes if it later proves unnecessary or inadvisable to do so. The Secretary can refrain from spending any or all of the money without violating either the conditions on which the gift was made or the provisions of section 9, which expressly authorize the refund of unexpended contributions.

On the other hand, effective administration of the Taylor Grazing Act would be hampered very seriously by a denial of the Secretary's power to accept conditional contributions. So far as private contributors are concerned, it is, of course, impossible to foretell just how many would be deterred from making any contributions at all if denied the privilege of specifying the kind of items for which their money should be spent. Yet there is, at least, a real possibility not only that very substantial amounts would thereby be lost to the United States every year, but also that those amounts would actually have been available in lieu of Federal funds for the payment of expenses necessarily incurred in any event in the administration of the Taylor Grazing Act. As for nonprivate contributors, to deny the Secretary's power to accept conditional contributions is to prevent him from receiving the very substantial sums already authorized and presently proposed to be given him under and pursuant to the laws of at least eight important States. In my opinion, section 9 cannot reasonably be held to impose this drastic and useless limitation on the Secretary's power.

The various purposes specified in the State laws all happen to be of a type which may fairly be regarded as incident to the "administration" and the "protection" and the "improvement" "of the district" within the meaning of section 9. But in my opinion it would be enough if they were incident only to one of the general purposes set forth in section 9. The vague, overlapping terms used in section 9 hardly justify an assumption that the Congress intended to preclude the acceptance of a contribution unless it could be used to serve all three purposes at once. It is even less likely that the Congress in-

tended to prohibit the Secretary from using contributed funds for the payment of expenses which are incident only to the administration of the district, or to its protection, or to its improvement. Any one of these purposes is sufficiently important and appropriate, in connection with the conservation of the range sought to be achieved under the Taylor Grazing Act, to form a legitimate subject of expenditure thereunder. There being no real reason to the contrary, I am of the opinion that a contribution for any one or more of these three general purposes, or for some particular purpose or purposes incident to one or more of them, is acceptable under section 9.

There remains only a question concerning the applicability of the following language in the Executive order of January 17, 1873:

persons holding any Federal civil office by appointment under the Constitution and laws of the United States will be expected, while holding such office, not to accept or hold any office under any State or Territorial government, or under the charter or ordinances of any municipal corporation.

Assuming that the foregoing provisions apply to the regional graziers appointed by the Secretary of the Interior under the Taylor Grazing Act, the question arises whether a modification of this Executive order is necessary before the regional graziers can function at all with respect to the expenditure of State grazing funds pursuant to State law. This question does not arise as to members of the district advisory boards, who were exempted from the application of the Executive order of January 17, 1873, on June 17, 1937, by Executive Order No. 7636, promulgated principally for the purpose of enabling State, county, and municipal officers to serve on such boards.

In my opinion, no such modification is necessary in order to permit regional graziers properly to participate in the expenditure of State grazing funds under State law. Such participation in no sense constitutes either an acceptance or a holding of an office under a State government within the meaning of the Executive order of January 17, 1873. The State laws here under consideration merely authorize certain Federal officers or employees to perform certain acts on behalf of the State. This may give rise to an agency or a trust relationship between the Federal officer and the State, but it constitutes no appointment of the Federal officer to a State office as well. The State statute creates no new State office separate and distinct from the Federal office. It merely authorizes whoever happens to be the incumbent of the Federal office to perform certain acts on behalf of the State. It gives him no separate tenure of office and no authority which is not wholly dependent on and controlled by his status as a Federal officer. It gives him his authority not as the holder of a separate office under the State but as the holder of a Federal office who conveniently can

further the interests of the State in this particular matter. There, therefore, is no need for modification of the Executive order of January 17, 1873, in order to permit the regional grazier to participate in the expenditure of State grazing funds in the manner authorized by the State laws here under consideration.

In view of the foregoing discussion, it is my opinion that the Secretary of the Interior is authorized under section 9 of the Taylor Grazing Act to accept contributions consisting of or including funds received by a State under section 10 of the act when proffered to him by the State or by those vested, under the State law, with control over the expenditure of such funds, even though the contributions are conditioned on his use of the money for a particularly specified type of expense incident to the administration, protection, or improvement of the grazing district wherein the funds originated.

Approved: October 8, 1937.

T. A. WALTERS,

First Assistant Secretary.

ALASKA PACKERS ASSOCIATION, ET AL.

Decided October 15, 1937

HOMESTEAD APPLICATION—ALASKA—SOLDIERS' ADDITIONAL ENTRY—ACT OF APRIL 13, 1926.

The act of April 13, 1926 (44 Stat. 243), entitled "an Act to authorize departure from the rectangular system of surveys of homestead claims in Alaska and for other purposes," is applicable only to homesteads requiring settlement and residence for the periods required by the homestead law and is not applicable to the location of soldiers' additional scrip.

An application for soldiers' additional entry for a tract in Alaska embracing both sides of a meandered body of water cannot be favorably considered under section 11 of the regulations (Circular 491) relating to applications for unsurveyed public lands in Alaska.

CHAPMAN, *Assistant Secretary:*

This is an appeal filed by the Alaska Packers Association from a decision of the Commissioner of the General Land Office rendered December 21, 1936, which rejected its soldiers' additional homestead application, Anchorage 08326, on the ground that the land as shown by the plat of survey thereof was not compact nor approximately rectangular in form as required by the act of April 13, 1926 (44 Stat. 243).

The plat of survey shows the boundaries as forming an elongated pentagon, but two of which boundaries are in cardinal directions and as completely surrounding a lake which the surveyor was directed to

meander by the Commissioner. The gross area is shown to be 68.19 acres, the area of the lake 35.55 acres, leaving 32.64 acres of land area.

The act of May 14, 1898 (30 Stat. 409), extended the homestead land laws, "including the right to enter surveyed or unsurveyed lands under provisions of law relating to the acquisition of title through soldiers' additional homestead rights." The act of May 3, 1903 (32 Stat. 1028), amending section 1 of the act of May 14, 1908, contains the proviso:

That every person who is qualified under existing laws to make homestead entry of the public lands of the United States who has settled upon or who shall hereafter settle upon any of the public lands of the United States situated in the district of Alaska, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall, subject to the provisions and limitations hereof, be entitled to enter three hundred and twenty acres or a less quantity of unappropriated public land in said district of Alaska. If any of the land so settled upon, or to be settled upon, is unsurveyed, then the land settled upon, or to be settled upon, must be located in a rectangular form, not more than one mile in length, and located by north and south lines run according to the true meridian; * * *

The act of July 8, 1916 (39 Stat. 352), as amended by the act of June 28, 1918 (40 Stat. 632), limited settlements with an intent to claim under the homestead laws to 160 acres, and section 2 of said act, where the surveys had not been extended to the land, provided for a survey that shall follow the general system of land surveys upon a showing of due compliance with the homestead law in the matter of residence, improvement and cultivation without expense to the entryman. Sections 1 and 2 of the act of April 13, 1926 (44 Stat. 243), entitled "An Act to authorize departure from the rectangular system of surveys of homestead claims in Alaska, and for other purposes," read as follows:

That the provisions of the Act of May 14, 1898 (Thirtieth Statutes at Large, page 409), extending the homestead laws to Alaska, and the Act of March 3, 1903 (Thirty-second Statutes at Large, page 1028), amendatory thereof, in so far as they require that the lands so settled upon, or to be settled upon, if unsurveyed, must be located in rectangular form by north and south lines running according to the true meridian, and marked upon the ground by permanent monuments at each of the four corners; and the provisions of the Act of June 28, 1918 (Fortieth Statutes at Large, page 632), in so far as they require that surveys executed thereunder, without expense to the claimant, must follow the general system of the public land surveys, shall not apply where, by reason of the local or topographic conditions, it is not feasible or economical to include in a rectangular form with cardinal boundaries the lands desired; but all such claims must be compact and approximately rectangular in form, and marked upon the ground by permanent monuments at each corner, and the entryman or claimant shall conform his boundaries

thereto. In all other respects the claims will be in conformity with the provisions of the aforesaid Acts (U. S. C., 3d supp., title 48, sec. 379).

SEC. 2. That if the rectangular system of the public land surveys has not been extended over the lands included in a soldier's additional homestead entry, authorized by the aforesaid Act of May 14, 1898, as amended by the Act of March 3, 1903, or a trade and manufacturing site authorized by section 10 of the first-named Act, the entryman or claimant may, upon the approval of the register and receiver, make application to the public survey office for an official survey of his claim, accompanied by a deposit of the estimated cost of the field and office work incident to the execution of such survey. Upon receipt of the application and its accompanying deposit the public survey office will immediately issue appropriate instructions for the survey of the lands involved, to be executed by the surveying service of the General Land Office not later than the next surveying season under the direction of the supervisor of surveys, unless by reason of the inaccessibility of the locality or other conditions the supervisor of surveys decides that it will result to the advantage of the Government or claimants to have the survey executed by a United States deputy surveyor, in which event the laws and regulations now governing the execution of the surveys by United States deputy surveyors will be observed (U. S. C., 3d supp., title 48, sec. 380).

In the Instructions issued July 31, 1926, under the act of April 13, 1926, Circular No. 1087 (51 L. D. 415), it is declared:

In locating claims under the homestead acts as applied to Alaska, where, by reason of local or topographic conditions, it is not feasible or economical to include in a rectangular form with cardinal boundaries the lands desired, the act of April 13, 1926, permits settlers to depart from such restrictions in the matter of the form of their claims and the direction of their boundaries. Under the conditions recited in the law as justifying such departure it will be sufficient that the claims shall be compact and approximately rectangular in form, and where a departure from cardinal courses in the direction of boundary lines is necessary, in order to include the lands desired, there will be no restriction as to the amount of such departure. The modifications of former practice in the matter of form and direction of boundaries is not to be construed, however, as authorizing the lines of the claims to be unduly extended in any such manner as will be productive of long, narrow strips of land departing materially from the compactness of the tract as a whole.

That part of the regulations relating to applications for unsurveyed public lands in Alaska, section 11, Circular No. 491, contains the following paragraph:

Except for the protection of preference rights acquired by actual occupancy, the land applied for must be taken by the applicant in rectangular form, and the lines must follow the true cardinal points as nearly as they may be determined, unless departure from such restrictions is authorized by the act of April 13, 1926 (44 Stat. 243), and except in cases of preference rights acquired by actual occupancy, no application under said act will be favorably considered which embraces tracts of land situate upon both sides of a salmon stream or navigable or *meanderable* body of water. The land must be nonmineral in character, and no claim whatever may include in excess of 160 acres of such land. [*Italics supplied.*]

In view of the provisions of the statutes above quoted, it seems clear that the provision of section 1 of the act of April 13, 1926, *supra*, authorizing a departure from the rectangular system of surveys, is applicable only to homesteads requiring settlement and residence for the period required by the homestead law and which, under the act of June 28, 1918, may be surveyed without expense to the entryman. In the case of *Thomas A. Cummings* (39 L. D. 93), it is said:

While a soldiers' additional right is generally classed as a homestead, it is not in fact a homestead entry. *Cornelius J. MacNamara* (33 L. D., 520); *William M. Wooldridge* (33 L. D., 525). It is a right to make private entry by a soldier who in his original entry obtained less than one hundred and sixty acres prior to passage of the act making the grant. It amounts to a scrip, or special consideration for private entry of land.

It has also been held that in the restorations of Indian reservation lands to homestead, town site, timber and stone, and mining laws (*Frederick W. McReynolds*, 40 L. D. 413); to homestead, town site, desert land and mineral land (*Milton S. Gunn*, 39 L. D. 561); to homestead and town site laws (*Newton Dexter Burch*, 40 L. D. 54); or to homestead entry only (*John Morton*, 43 L. D. 225), such lands were not subject to appropriation by location as soldiers' additional scrip.

The conclusion that the provisions in the act of April 13, 1926, authorizing a departure from the rectangular system of surveys under certain specified conditions, apply only to homesteads requiring settlement, is reinforced by the fact that section 2 of said act provides for the survey of soldiers' additional homestead entries according to rectangular system of surveys at the expense of the claimant.

It is very obvious from the plat of survey that the land was not surveyed according to the rectangular system of surveys. It seems from the affidavit of the deputy surveyor that the reason that he did not run the south line east and west, and the west line north and south was because the applicant did not need the land, a reason that does not justify a departure from the rectangular system of surveys in any circumstances. Moreover, the tract as surveyed embraces both sides of a meandered body of water, which precludes favorable consideration of the application under section 11 of Circular No. 491, *supra*. For the reasons stated, the decision of the Commissioner is affirmed.

Affirmed.

HANS SEVERSON

*Decided October 15, 1937*¹

ALASKA—SURVEY.

Section 2 of the act of July 8, 1916 (39 Stat. 352), amending the homestead law in its application to Alaska and for other purposes, providing for a free survey, is applicable only to homestead entries and to settlements made with a view to such entries on land properly subject to homestead entry.

ALASKA—HOMESTEADS.

Section 2258, Revised Statutes, inhibiting homestead entry upon lands "actually settled and occupied for the purpose of trade or business," was repealed by the act of March 3, 1891 (26 Stat. 1097, U. S. C., Title 43, sec. 161), and no similar inhibition appears in the present homestead law. Section 2290, Revised Statutes, however, requires an affidavit by an applicant for homestead entry that it is "honestly and in good faith made for the purpose of actual settlement and cultivation." The homestead law, therefore, does not contemplate that the right of entry shall be exercised by one who makes settlement primarily and chiefly for trade and business and not for agricultural purposes.

CHAPMAN, *Assistant Secretary*:

Hans Severson has appealed from a decision of the Commissioner of the General Land Office rendered January 16, 1937, which based upon a report and recommendation of a special agent, held his application for a free survey, Anchorage 08180, of a tract of 160 acres more or less of unsurveyed land on a peninsula jutting out into Iliamna Lake, Alaska, for rejection, but advising him that he might apply for a trade and manufacturer's site covering not exceeding 80 acres of the land.

It appears from the showings of the applicant that he has resided on the land since July 1925 and has a family of eight children; that he has one-half acre in cultivation and but a small part of the land is cultivable; that the improvements consist of a home, store, buildings, and several warehouses valued at \$5,000. It appears from the reports of special agents that Severson had lived on the land with his family for 10 years and maintains a trading post and conducts the post office thereon; that in addition to his residence he has a store, roadhouse, tool shop, warehouses and a dock from which he runs a freighting boat; that the applicant has a small garden but that the land is said to be unfit for cultivation; that the land is non-mineral, not occupied or improved by any Indian or Eskimo, contains no medicinal spring, is unreserved, and has no value for power purposes. The agent was further of the opinion that the restriction in the homestead law as to shore space along navigable water might be waived under the act of June 5, 1920 (41 Stat. 1059).

¹ Modified March 16, 1938, (A-20910).

Section 2 of the act of July 8, 1916 (39 Stat. 352), amending the homestead law in its application to Alaska and for other purposes, provides:

SEC. 2. That if the system of public surveys has not been extended over the land included in a homestead entry, the entryman may, after due compliance with the terms of the homestead law in the matter of residence, cultivation, and improvement, submit to the register and receiver a showing as to such compliance, duly corroborated by two witnesses, and if such evidence satisfactorily shows that the homesteader is in a position to submit acceptable final proof the surveyor general of the Territory will be so advised and will, not later than the next succeeding surveying season, issue proper instructions for the survey of the land so entered without expense to the entryman, who may thereafter submit final proof as in similar entries of surveyed lands.

So far as practicable, such survey shall follow the general system of public-land surveys, and that the entryman shall conform his boundaries thereto: *Provided*, That nothing herein shall prevent the homesteader from securing earlier action on his entry by a special survey at his own expense, if he so elects.

It is clear that the right of a free survey is applicable only to homestead entries and to settlements made with a view to such entries on lands properly subject to homestead entry. The right to a free survey, therefore, turns on the question whether the use of the land for trade and business by the applicant legally disqualifies him from making such entry.

Section 2258, Revised Statutes, inhibited homestead entry upon lands "actually settled and occupied for the purpose of trade and business" and under this statute the Department held that one who occupies and is making use of public land for business purposes, prior to entry thereof, is precluded from appropriating such land under the homestead law (*Fonts v. Thompson*, 6 L. D. 332) and on rehearing (10 L. D. 649). Section 2258 was repealed by the act of March 3, 1891 (26 Stat. 1097, U. S. C., title 43, sec. 161), and no similar inhibition appears in the present homestead law. Revised Statutes, section 2290, however, requires an affidavit by an applicant of a homestead entry that it is "honestly and in good faith made for the purpose of actual settlement and cultivation" and the Department has held in *Northern Pacific R. R. Co. et al. v. Waldon* (24 L. D. 24, 1897) that the homestead law does not contemplate that the right of entry shall be exercised by one who makes settlement primarily and chiefly for trade and business, and not for agricultural purposes. The allegations of the entryman, as well as the reports of the special agents as to the character and extent of the improvements and the use of the land, rather indicate that the purpose in occupying the land was for trade and business, and residence was merely incident to the accomplishment of that purpose. The facts related are, however, somewhat meager. The Commissioner's decision will, therefore, be affirmed without prejudice to a supplemental showing

by the applicant in accordance with section 20, Circular 491, setting forth such facts relating to his occupation of the land that will tend to show that the land was occupied for the primary purpose of home. A copy of this decision will be transmitted to the special agent in charge, Division of Investigations, San Francisco.

Affirme.

HENSHAW v. ELLMAKER

Decided October 15, 1937

PRACTICE—RES JUDICATA.

Henshaw filed a protest against a timber and stone application filed in 1933, alleging prior purchase in 1908 of the land from the State of California by his ancestor and continuous possession and use thereof since by his ancestor or his heirs for grazing, that the land had no commercial timber upon it, that the selection of the land by the State had been rejected in 1917. The Commissioner of the General Land Office dismissed the protest for the reason that the selection of the land by the State had been rejected in 1917. Protestant after due notice of this dismissal, took no action in that proceeding but thereafter filed a contest affidavit alleging substantially the same facts as alleged in the former protest, which the Commissioner dismissed on the grounds (1) that the charge stated nothing that was not known to his office and was subject to dismissal, therefore, under Rule I of Practice, and (2) that the charges in the former protest and present contest were the same.

Held: (1) That the contest affidavit did not allege causes of invalidity in the timber and stone application shown by the records, but extraneous matter, and that the first ground for dismissal was unsound;

(2) that the contest affidavit raised the same issues between the same parties concerning the same subject matter that was raised in the previous protest; and the matter was *res judicata*, although in the decision on the previous protest no consideration was given to the question of the value of the land for timber, which was not a basis of contest but of protest.

STATE SELECTION—COLOR OF TITLE.

Where the record of a State selection shows that notice of cancellation thereof was served on the Surveyor General and Register of the State Land Office, and that no action was taken by the State to substitute valid base and make good the selection, and claimant of the land under the State selection admits in his protest and subsequent contest against a later timber and stone application for the land that he knew of the cancellation and does not allege that his predecessors in title had no timely notice thereof, and official notices issued by the State Land Office show service of such notice of cancellation on his ancestor in title, those who held the asserted title from the State and their successors in interest must be charged with notice that the certificate of purchase from the State and any deeds purporting to convey rights thereunder did not convey title to the land and that henceforth occupancy of the land was without claim in good faith under such a title.

SAME—OCCUPANCY AND IMPROVEMENT.

Mere occupancy of public lands and making improvements thereon give no vested right therein against the United States or any purchaser therefrom and an occupant must show that he occupies the land under some proceeding or law that at least gives him a right of possession.

Sparks v. Pierce, 115 U. S. 408; *Keller v. Bullington* (11 L. D. 140), cited and applied.

Mere use of public land for grazing is by sufferance of the United States and not by right.

Buford v. Howitz, 133 U. S. 320; *Omaechevarria v. Idaho*, 246 U. S. 352, cited and applied.

COLOR OF TITLE—OCCUPANCY IN GOOD FAITH.

The act of December 22, 1928 (45 Stat. 1069) requires that occupancy in good faith under claim and color of title should be in good faith, and there can be no such thing as good faith in an adverse holding where the party knows that he has no title, and that, under the law, which he is presumed to know, he can acquire none by his occupation.

CHAPMAN, *Assistant Secretary*:

October 12, 1933, Florence B. Ellmaker filed timber and stone application, Sacramento 028664, for the NE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 4, T. 19 N., R. 12 W., M. D. M. Rejection of the application was affirmed by the Department for failure to show that the land was chiefly valuable for timber but without prejudice to a further showing of such value. Thereafter claimant filed supplemental showing which was held by the Department in its decision of August 13, 1935, to be sufficient to establish that the land was chiefly valuable for timber. Further proceedings ensued in which claimant made publication and was ordered to deposit the appraised price of the land. October 19, 1935, Griffith Henshaw filed what was styled a protest against the application in substance alleging purchase of the land on September 6, 1906, by Tyler Henshaw from the State of California and the issuance of a certificate of purchase by the State in April 1908. It is further averred in the protest:

* * * that the State of California selected the said tract from the United States in a selection numbered Serial 0930 San Francisco and that the said selection was on the 27th day of November, 1917, rejected by the Honorable Commissioner of the General Land Office on account of invalidity in the base lands offered.

Protestant further avers conveyance in 1909 by Tyler Henshaw to William B. Henshaw and that the latter died in 1934 leaving a will in which decedent's interest passed to protestant, his mother and sisters as coowners. Continuous possession of the land and its use for grazing purposes is alleged by Tyler Henshaw and his successors in interest; that the land has no commercial timber upon it, but trees valuable only for firewood and that its chief value is for grazing. By decision of December 10, 1936, the Commissioner of

the General Land Office dismissed the protest for the reason that State selection 0930 had been finally rejected and the case closed November 27, 1917, and that the matter of purchase from the State and the refunding of purchase price was not within his control and that such matters should be adjusted between the parties or settled in the local courts.

Due service of this decision was made on protestant's agent December 19, 1936. But no further action was taken by protestant, but on February 4, 1937, Griffith Henshaw filed a contest affidavit, charging:

That said land is, and at all times herein mentioned was, chiefly valuable for grazing and has no value for the timber thereon; that continuously since the month of September 1906, the said land has been occupied by and has been in the possession of the undersigned, or his predecessors in interest, who in the said month of September 1906, purchased the said tract from the State of California, and that undersigned and his predecessors in interest ever since have paid to the State of California all taxes on said land, and have improved the said land by removing rocks therefrom, building trails thereon, clearing brush and small trees therefrom, and in many other ways, and have continuously used the said land for grazing stock thereon.

By decision of April 2, 1937, the Commissioner held the contest for dismissal on the ground that the charge stated nothing that was not known to his office, citing Rule 1 of Practice as authority for that action. He, however, also held that the charges in the former protest and the present one were substantially the same. Henshaw has appealed to the Department from this decision.

The charge above-quoted did not allege causes of invalidity or illegality of the timber and stone application shown by the records of the Land Department, but extraneous matter which obviously the record did not show, and the reason given was not sound. The contest affidavit, however, raised the same issues between the same parties concerning the same subject matter that was raised in the previous protest and the matter was *res judicata*. It is true that in the decision of December 10, 1936, no consideration was given to the issue whether the land was chiefly valuable for timber, but the charge raising this issue was not one in which the contestant alleged a better right which would form the basis for a contest in its proper meaning, but was in the nature of a protest in the public right charging invalidity in the timber and stone application, which charge the Commissioner was free either to entertain or disregard and which, in view of the prior departmental adjudication, he did disregard. As to the distinction between a protest and a contest proceeding in the Land Department, see *Lane v. Hoglund*, 244 U. S. 174.

It has been held by the Department in cases without number that the doctrine of *res judicata* is applicable to proceedings before the Land Department in order that there may be finality of action and

to avoid further vexatious litigation, but this doctrine is not applied where the land remains within the jurisdiction of the Department and in order to promote substantial justice (*Osborn et al. v. Knight*, 23 L. D. 216), or to rectify the erroneous denial of a statutory right (*Osborn et al. v. Knight*, 22 L. D. 459) the only course is for the Secretary to exercise his supervisory power.

It is well settled that land in the actual possession and occupancy of one under claim of right or color of title in good faith is not subject to entry by another. *Burtis v. Kansas* (34 L. D. 304); *United States v. Hurliman* (51 L. D. 258); *State of New Mexico, Robert M. Wilson, Lessee v. Robert S. Shelton and John T. Williams* (54 I. D. 112); *Ben S. Miller* (55 I. D. 75), but every competent locator has the right to initiate a lawful claim to unappropriated public land by peaceable adverse entry upon it while it is in the possession of those who have no superior right to acquire the title or hold the possession. *United States v. Hurliman, supra*.

The allegations either in the former protest or present contest do not prima facie show that the land has been held under color or claim of title in good faith. The record in San Francisco 0930 shows that service of the decision of August 25, 1917, canceling that selection was made on the Surveyor General and Register of the State Land Office September 6, 1917, and no steps appear to have been taken by the State to substitute valid base and make good the selection thereafter. The protestant admitted notice of the cancelation, and it is not alleged that his predecessors did not have due and timely notice thereof. The timber and stone claimants have presented an affidavit that sets forth the contents of certain official notices issued in 1917 by the State Land Office, from which it appears that W. P. Thomas, presumably the agent of the Henshaws, was served with a copy of the letter of cancelation and that a copy was served on Tyler Henshaw and a like notice sent to the Tax Assessor of Mendocino County in which the land lies.

From the time of such notice those who then held the asserted title from the State and their successors in interest must be charged with notice that the certificate of purchase and any deed purporting to convey rights thereunder conveyed no title to the land, and henceforth occupancy of the land was without claim in good faith under such a title. Mere occupancy of public lands and making improvements thereon give no vested right therein against the United States or any purchaser therefrom; *Sparks v. Pierce*, 115 U. S. 408, and an occupant must show that he occupies the same under some proceeding or law that at least gives him a right of possession. *Keller v. Bullington* (11 L. D. 140). Mere use of land for grazing is by sufferance of the United States and not by right. *Buiford v. Houtz*, 133 U. S. 320; *Omaechevarria v. Idaho*, 246 U. S. 352. The claim of

the State is barred by laches and the intervention of an adverse claim. *Honey Lake Valley Company et al.* (48 L. D. 192). The act of December 22, 1928 (45 Stat. 1069), requires that occupancy under claim or color of title should be in good faith in order to authorize a purchase thereunder. "And there can be no such thing as good faith in an adverse holding, where the party knows that he has no title, and that, under the law, which he is presumed to know, he can acquire none by his occupation." *Deffebach v. Hawke*, 115 U. S. 392, 407; *Chicago, St. Paul, Minneapolis and Omaha Ry. Co.* (12 L. D. 259); *Dennis v. Jean*, decided July 24, 1937 (A. 20899), unreported. X X

For the reasons stated, it is believed that the decision rejecting the original protest was right, that the contest affidavit was properly rejected as the matter was *res judicata*, and no reason is seen in the showing of the contestant for reopening the matter and according him any right. The decision appealed from is, therefore, affirmed.

Affirmed.

HANS OKLAND

Opinion, October 23, 1937

DAMAGE CLAIMS—NEGLIGENCE—ATTORNEYS' FEES—ACT OF DECEMBER 28, 1922.

The act of December 28, 1922 (42 Stat. 1066), authorizing the heads of departments to consider and certify to Congress claims filed "on account of damages to or loss of privately owned property * * * caused by the negligence of any officer or employee of the Government," does not authorize the consideration of costs or attorneys' fees incident to the presentation of a claim.

DAMAGE CLAIMS—STATUTORY CONSTRUCTION—ACT OF DECEMBER 28, 1922.

The act of December 28, 1922, *supra*, should be construed so as to afford relief to a person suffering property damage by reason of the negligence of a Government employee to the same extent as if the issues were to be litigated between private individuals.

DAMAGE CLAIMS—NEGLIGENCE—LOSS OF USE OF DAMAGED PROPERTY.

The claimant rented an automobile for \$25 for the period during which his own was being repaired, it having been damaged by reason of the negligence of a Government employee, and used the rented automobile for necessary transportation. *Held*, That since it is well settled that deprivation of use of property is a proper item of damages to be recovered from the person whose negligent act necessitated its repair, the rental value of the claimant's automobile should be considered as a claim "on account of damages to or loss of privately owned property" within the meaning of the act of December 28, 1922, *supra*, and the amount so expended for rental may be regarded as the reasonable rental value of the damaged automobile.¹

¹ The Attorney General concurred in this conclusion in an opinion dated November 8, 1937, rendered at the request of the Secretary of the Interior on the merits of this claim.

DAMAGE CLAIMS—NEGLIGENCE—LOSS OF USE OF DAMAGED PROPERTY—STATUTORY CONSTRUCTION.

Any doubt as to the intent of Congress concerning payment of damages for loss of use of damaged property may be resolved by construing the statute to require certification, thereby affording an opportunity for a conclusive legislative construction.

MARGOLD, Solicitor:

Hans Okland, of Watford City, North Dakota, has filed a claim in the amount of \$189.77 against the United States as the result of a collision between his 1935 Ford sedan and a National Park Service pick-up truck operated by James F. Coleman, a foreman stationed at Civilian Conservation Corps Camp RDP-ND-12. The question whether the claim should be allowed and certified to the Congress under the act of December 28, 1922 (42 Stat. 1066), has been submitted to me for opinion. The statute, so far as material, provides:

That authority is hereby conferred upon the head of each department * * * to consider, ascertain, adjust, and determine any claim * * * on account of damages to or loss of privately owned property * * * caused by the negligence of any officer or employee of the Government acting within the scope of his employment. Such amount as may be found to be due to any claimant shall be certified to Congress as a legal claim for payment out of appropriations that may be made by Congress therefor * * *.

The collision occurred on January 22, 1937, in the intersection of State Highway No. 23 with East Third Street, in Watford City, North Dakota. The circumstances in which it occurred are not disputed and are thus described by the Government operator:

While attempting to push a Government Chevrolet pick-up backward out of a snowdrift at the intersection of East Third Street and North Dakota Highway #23 in Watford City, North Dakota, it suddenly became dislodged from the snowdrift in which it was stuck and backed onto highway #23. Due to the deep snow I could not run fast enough to jump into the pick-up and apply the brakes. As the pick-up rolled backward its rear end struck a car passing on highway #23 squarely on the side, which car continued about one hundred feet up the highway and tipped over on its side. The pick-up having grazed the other car rolled through a shallow ditch on the far side of the highway and into a field where I caught up with it and stopped it by applying the brakes. * * *.

Howard Taylor and Arthur Okland, who were passengers in the claimant's vehicle, made statements substantially to the same effect as the foregoing. It is unnecessary, however, to discuss in detail the Government employee's exercise of due care, since his own statement renders inescapable the conclusion that he was negligent. He was bound to know that his effort to push the truck out of the snowdrift might result in its backing on the highway and endangering passing traffic, otherwise there would have been no point in attempting to remove it.

A further question remains, however, concerning the amount of damages to be certified to the Congress. The amount of the claim is alleged to represent \$154.77 for parts and labor in repairing the claimant's automobile, \$10 for the services of an attorney in preparing the claim, and \$25 for the rental of an automobile while the damaged one was being repaired. The cost of repairs is supported by an itemized repair estimate notarized by the repairman and appears to be reasonable. The claim for the attorney's fee clearly must be rejected, however, since the act of December 28, 1922, *supra*, includes no provision which may be construed as authorizing the consideration of costs or attorney's fees incident to the presentation of a claim.

The specific question remaining is whether the claim for the rental of another automobile may be regarded as one "on account of damages to or loss of privately owned property" within the meaning of the statute. Informal inquiry discloses that while the construction of this provision is not uniform in the several departments and establishments, the majority have construed it as not including the loss of use of damaged property.

Assuming that such a statute is to be strictly construed because in derogation of the immunity of the sovereign, I am nevertheless of the opinion that the loss of use of damaged property should be considered in adjusting a claim under the statute. Nothing in the legislative history of the act of December 28, 1922, bears directly on the particular question now presented, but there is no reason to believe that the Congress did not intend that a person suffering property damage by reason of the negligence of a Government employee should receive relief from the Government to the same extent as if the issues were to be litigated between private individuals. This brings us to a consideration of what the extent of the claimant's recovery would be in such a suit. It is well established that deprivation of use of property is a proper item of damages recoverable from the person whose negligent act necessitated its repair. *W. B. Moses & Sons v. Lockwood*, 54 App. D. C. 115, 295 Fed. 936; *Cook v. Packard Motor Car Co. of New York*, 88 Conn. 590, 92 Atl. 413; Babbitt on Motor Vehicle Law (4th ed.), Sec. 2330. In some jurisdictions the plaintiff has been allowed to recover for the loss of use of a pleasure vehicle. *Cook v. Packard Motor Car Co. of New York*, *supra*; Babbitt, *ibid*.

In *Naughton Mulgrew Motor Co. v. Westchester Fish Co.*, 105 Misc. 595, 173 N. Y. Supp. 437, 439, the court said:

What the owner of a damaged car loses by being deprived of its use is what such a car can be rented for. What he pays for the hire of a car to take its place is probably, as a general thing, about what he could have obtained by

letting his own car out before it was damaged, although proof of his actual hiring is technically incorrect (*Murphy v. New York City R. Co.*, (1908) 58 Misc. 237, 108 N. Y. Supp. 1021), for the same reason that a complaining vendee of undelivered goods must show what he was theoretically obliged to do, and not what he actually did do.

In the instant case it appears that the repair of the claimant's automobile was not completed until March 15, about seven weeks following the collision, and that he rented an automobile from the repairman for that period for \$25, for the purpose of travelling between his home and Watford City, where he had part time employment, also for the purpose of towing a trailer used in the operation of his farm. While seven weeks seems clearly to be an unreasonably long time for making the repairs, there is no reason to believe that the amount claimed is excessive. Informal inquiry among local authorized Ford dealers indicates that the repairs made would require about 10 days and I am of the opinion that \$25 may be regarded as the reasonable rental value of the claimant's automobile, in accordance with the principles heretofore discussed, for that period.

The discussion immediately foregoing is, of course, based on a construction of the statute authorizing the consideration of deprivation of use as an item of damage. In considering the question whether this same statute authorizes the consideration of a subrogated claim presented by an insurer, the Attorney General has said (36 Ops. Atty. Gen. 553, 559):

As the ultimate question is the intention of Congress, this practical construction by the legislative body is impressive. Our objective being to ascertain the purpose of Congress in the enactment of this statute, and since no claim may be paid under the statute until it has been certified to Congress and an appropriation made for that purpose, a ready means is afforded of obtaining a final and conclusive legislative construction. By refusing certification we might obtain ultimately a judicial determination of the question through a mandamus suit brought by some claimant to compel certification of his claim, but that would involve expense and delay, and the sensible course is to have the question cleared up by legislation or by legislative action amounting to a conclusive legislative construction.

For these reasons I believe the practical course is to resolve any doubts by construing the statute to require certification, thus giving the Congress an opportunity to consider and decide whether it intended by this statute that such claims should be paid.

The claim accordingly should be allowed and certified to the Congress for payment in the amount of \$179.77.

Approved: November 15, 1937.

OSCAR L. CHAPMAN,

Assistant Secretary.

FULLER v. GEYER*Decided November 10, 1937***PRACTICE—CONTINUANCE.**

Contestant appealed from the dismissal by the register of his contest. Contestee's motion to vacate dismissal and set case for hearing was granted. Contestant moved to vacate the order for hearing and filed motion for continuance on account of his absence from the State. Contestee admitted that contestant would testify as stated in his motion and continuance was denied. Contestant appeared specially on the date set for hearing and elected to abide by his motion to vacate the order for hearing and motion for continuance and offered no evidence. Evidence was thereupon adduced that by the action of the register in vacating his previous ruling dismissing the contest and permitting the contest to proceed, the contestant gained all that would have been accorded him by a successful appeal.

Held: There was no irregularity in the procedure that required reversal; that by the action of the register in vacating his previous ruling dismissing the contest and permitting the contest to proceed, the contestant gained all that would have been accorded him by a successful appeal.

A contestant, knowing that he has a contest pending which may be set for hearing at any time, cannot insist as a matter of right that he is entitled to a continuance because he voluntarily absents himself from the State and finds it inconvenient to be in attendance on the day for trial.

WALTERS, *First Assistant Secretary:*

April 3, 1936, Alexander F. Fuller filed application to contest the stockraising homestead entry of Alice C. Geyer, deceased, Phoenix 065337, charging that the entrywoman failed to establish residence during her life and that the heirs abandoned the land after her death. May 13, 1936, the register dismissed the contest on motion of contestee on the ground it did not disclose the ages of the heirs as provided by Rules of Practice. June 16, 1936, the contestant appealed from the action dismissing the contest. June 22, 1936, contestee filed a motion to vacate dismissal of the contest and asked that the case be set for trial, whereupon the register set the case for hearing before a notary public at Tucson on June 22, 1936. The contestant moved to vacate the order for hearing, and also filed an application for continuance on the ground of the absence of the contestant who was engaged in undergraduate study in New Hampshire. The affidavit of continuance contained a statement of the facts to which the contestant would testify. The contestee resisted the application for continuance and admitted that the contestant would testify as stated in his application therefor. July 13, 1936, the register overruled the motion for continuance. On the day set for trial counsel for contestant appeared specially and elected to abide by the motion to vacate the hearing for want of jurisdiction and motion for continuance, and offered no evidence, whereupon evidence was taken in behalf of the contestee. By decision of March 22, 1937, the Commissioner of the General Land Office affirmed the register in dismissing

the contest on the ground that contestant had failed to proceed, and to prove the charges. Contestant has appealed.

The Department fails to perceive any irregularity in the procedure that requires reversal. By the register's action in effect vacating his previous ruling dismissing the contest, and permitting the contest to proceed, the contestant gained all that would have been accorded him by a successful appeal.

As contestee admitted that contestant, on account of whose absence continuance was sought, would, if present, testify as stated in the application for continuance, no continuance was justified in his character as a witness (Rule 19 of Practice). While it has been held that the personal attendance of a contestant at a hearing is presumptively essential to the proper presentation of his case, yet it is a matter within the discretion of the register to judge of the ability of the contestant to attend under the circumstances. The right to a continuance is dependent upon the facts of each case. In one case the Department reinstated a contest where a motion for continuance was denied showing sickness and other unavoidable circumstances that prevented attendance of the contestant. *Cope v. Dockery* (48 L. D. 415).

A contestant, however, as in this case, who knowing that he has a contest pending which may be set for hearing at any time, cannot insist as a matter of right that he is entitled to a continuance because he voluntarily absents himself from the State, and finds it inconvenient to be in attendance on the day for trial.

Decision affirmed.

Affirmed.

OZAN-GRAYSONIA LUMBER COMPANY

Opinion, December 1, 1937

DAMAGE CLAIMS—NEGLIGENCE—ERRONEOUS ALLOWANCE OF HOMESTEAD ENTRY— RES IPSA LOQUITUR.

The act of December 28, 1922 (42 Stat. 1066) authorizes the heads of departments to consider and certify to Congress claims filed "on account of damages to or loss of privately owned property * * * caused by the negligence of any officer or employee of the Government * * *". By error the General Land Office allowed homestead entry of certain land already patented and the entryman sold the standing timber, which was cut and removed. The claimant company, in which title had vested through mesne conveyances, filed a claim for the loss of the timber. *Held*, That under the doctrine of *res ipsa loquitur* the erroneous allowance of the homestead entry was an act of negligence by a Government employee.

DAMAGE CLAIMS—NEGLIGENCE—EFFECT OF CANCELATION OF HOMESTEAD ENTRY.

A holding that an erroneous allowance of a homestead entry is an act of negligence and that the United States is liable for damage resulting there-

from is not inconsistent with the familiar principle that upon the cancellation of a void entry the land is to be regarded as if no entry had been made.

DAMAGE CLAIMS—NEGLIGENCE—PROXIMATE CAUSE.

The erroneous allowance of a homestead entry on land already patented *held* under the circumstances to be the proximate cause of damage to the lawful owner of the property, since the cutting of standing timber is, in a timber country, a natural and foreseeable consequence of the Government's allowing the entryman to go upon the land.

MEASURE OF DAMAGES.

Following the sale by the entryman of the standing timber for the sum of \$125, the purchaser sold and delivered 41,702 feet of timber before discovery by the claimant. Thereafter 34,530 feet were sold and delivered, for which the claimant received payment at the rate of \$3 per thousand feet. The claim is allowed for the 41,702 feet of timber, for which the claimant has not received payment, at \$3 per thousand feet, the valuation made by the claimant and supported by other evidence in the record.

MARGOLD, *Solicitor*:

On May 26, 1936, the Ozan-Graysonia Lumber Company, of Prescott, Arkansas, filed a claim in the amount of \$367.87 against the United States for compensation for timber removed by one Warren J. Fox from land owned by it after Fox, through an error in the General Land Office, had been permitted to make entry of the land. The question whether the claim should be allowed and certified to the Congress for payment under the act of December 28, 1922 (42 Stat. 1066), has been submitted to me for opinion.

From the record submitted it appears that the N $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 5, T. 6 S., R. 24 W., 5th P. M., Arkansas, containing 38.78 acres, was patented to Solomon Morphew on January 15, 1883, and that through mesne conveyances the title became vested in the claimant company. On October 17, 1934, Fox filed application to make homestead entry of the land and on March 15, 1935, through an error the nature of which is not disclosed by the record, the entry was allowed by the General Land Office. On February 4, 1936, the existence of the patent to Morphew having been discovered, the entry was held for cancellation. Meanwhile Fox, in order to secure funds for making improvements, had sold the standing pine timber on the land to one Charles R. Dunlap, who cut and sold it to the Caddo River Lumber Company, of Rosboro, Arkansas.

The act of December 28, 1922, *supra*, so far as material here, provides:

That authority is hereby conferred upon the head of each department * * * to consider, ascertain, adjust, and determine any claim * * * on account of damages to or loss of privately owned property * * * caused by the negligence of any officer or employee of the Government acting within the scope of his employment. Such amount as may be found to be due to any

claimant shall be certified to Congress as a legal claim for payment out of appropriations that may be made by Congress therefor * * *.

The claimant unquestionably has suffered a "loss of privately owned property," but it remains to be determined whether it was "caused by the negligence of any officer or employee of the Government." This involves two questions: (1) whether the erroneous allowance of Fox's entry by the General Land Office constituted an act of negligence, and (2) if so, whether that negligence was the proximate cause of the claimant's loss.

It is my opinion, for the reasons set forth in the discussion to follow, that both questions must be answered in the affirmative. While the exact nature of the error is not disclosed by the record, some one or more employees of the General Land Office must have been guilty of an oversight, else the entry of land already patented would not have been allowed. The instance appears to be a proper one for the application of the doctrine of *res ipsa loquitur*, which is to the effect that whenever the force producing an injury is shown to have been under the control and management of the defendant, and the occurrence is such as in the ordinary course of events does not happen if due care has been exercised, the fact of injury itself affords sufficient evidence, in the absence of an explanation by the defendant, to support a recovery. *Graham v. Badger*, 164 Mass. 42, 41 N. E. 61 (1895); *Sylvia v. Newport Gaslight Co.*, 45 R. I. 515, 124 Atl. 289 (1924); 2 Cooley on Torts (3d ed.) 1424. Cf. *Sweeney v. Erving*, 228 U. S. 233 (1913); Wigmore on Evidence (2d. ed.), Sec. 2509.

It may be suggested that the doctrine of *res ipsa loquitur* is confined in its application to cases involving direct physical injury to person or property by an instrumentality under the control of the defendant. It is true that the usual expression of the doctrine is found in such cases. I am unable, however, to see any sound reason for distinguishing such a case from the instant one. One of the earliest expressions of the doctrine is found in *Scott v. London & St. K. Docks Co.*, 3 Hurlst. & C. 596 (1865), in which the court said: There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

And in *Sweeney v. Erving*, *supra*, Mr. Justice Pitney, speaking for the Court, said (pp. 238-239) :

The general rule in actions of negligence is that the mere proof of an "accident" (using the word in the loose and popular sense) does not raise any presumption of negligence; but in the application of this rule, it is recognized

that there is a class of cases where *the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed, by the party charged with care in the premises, the thing that happened amiss would not have happened.* In such cases it is said, *res ipsa loquitur*—the thing speaks for itself; that is to say, if there is nothing to explain or rebut the inference that arises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence. [Italics supplied.]

It appears, therefore, that the doctrine is dependent for its application, not on the type of injury, but rather on the circumstances in which it occurred. In this instance the records of the General Land Office showed or should have shown that the tract of land in question had been patented for more than fifty years. Due care required that upon receipt of Fox's application for entry reference to these records be made to determine the status of the land. Ordinarily, such a reference would have disclosed its true status and the entry immediately would have been held for cancelation. In this instance, however, the entry was allowed and pursuant thereto the entryman caused the timber belonging to the claimant to be cut and removed. Certainly without further explanation, and none has been offered, there is "ground for a reasonable inference" that "the thing that happened amiss" would not have happened if due care had been employed by the person or persons in the General Land Office whose duty it was to ascertain the status of the land before acting on the application for entry.

Before concluding on this point I should state that I do not regard what has been said as in conflict with the familiar principle that upon the cancelation of a void entry the land is to be regarded as if no entry had been made. *McCarthy v. Mann*, 19 Wall. 20 (1873). To say that for purposes of acquiring an interest in real property nothing has occurred is not necessarily to say that for purposes of considering a claim sounding in tort the physical act from which in fact other consequences flowed may be blindly ignored.

It is further my opinion that the negligence of the Government employees should be regarded as the proximate cause of the claimant's property loss, notwithstanding that the actual cutting and removal of the timber was done by third persons. This aspect of the claim is sufficiently novel, however, to merit some discussion of it in the light of available authority. The extent of one's liability for what may in fact be regarded as the consequences of his own negligent act has been and continues to be one of the most perplexing problems in the law of negligence. It has well been said that each case (as a practical matter) is decided on its own particular facts.

A comparatively recent case in which two very comprehensive opinions were written is *Palsgraf v. Long Island R. R.*, 218 N. Y.,

339, 162 N. E. 99, 59 A. L. R. 1265 (1928). One of the defendant's guards undertook to assist a passenger aboard a moving train by pushing him from behind. In this act, a small package which the passenger was carrying fell to the ground. It contained fireworks which exploded, the shock of the explosion knocking down some scales at the opposite end of the platform. The scales struck the plaintiff, who thereupon sued the railroad for her injuries. The trial court refused to instruct the jury that the plaintiff's injuries were not the proximate result of the defendant's negligence and the jury returned a verdict for the plaintiff, which was affirmed by the Appellate Division by a divided court (222 App. Div. 166, 225 N. Y. S. 412). The defendant appealed to the Court of Appeals, which reversed the judgment, three justices dissenting. The majority opinion was written by Mr. Justice Cardozo, who said in part (162 N. E. at 101):

Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right, in this case, we are told, the right to be protected against interference with one's bodily security. But bodily security is protected, not against all forms of interference or aggression, but only against some. One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended. * * * The victim does not sue derivatively, or by right of subrogation, to vindicate an interest invaded in the person of another. Thus to view his cause of action is to ignore the fundamental difference between tort and crime. Holland, Jurisprudence (12th Ed.) p. 328. He sues for breach of a duty owing to himself.

The law of causation, remote or proximate, is thus foreign to the case before us. The question of liability is always anterior to the question of the measure of the consequences that go with liability. If there is no tort to be redressed, there is no occasion to consider what damage might be recovered if there were a finding of a tort. We may assume, without deciding, that negligence, not at large or in the abstract, but in relation to the plaintiff, would entail liability for any and all consequences, however novel or extraordinary.

The minority opinion, written by Judge Andrews, includes the following language (162 N. E. at 103, 104):

The proposition is this: Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone. There needs be duty due the one complaining, but this is not a duty to a particular individual because as to him harm might be expected. Harm to some one being the natural result of the act, not only that one alone, but all those in fact injured may complain. We have never, I think, held otherwise. * * * Unreasonable risk being taken, its consequences are not confined to those who might probably be hurt.

If this be so, we do not have a plaintiff suing by "derivation or succession." Her action is original and primary. Her claim is for a breach of duty to

herself—not that she is subrogated to any right of action of the owner of the parcel or of a passenger standing at the scene of the explosion.

* * * when injuries do result from our unlawful act, we are liable for the consequences. It does not matter that they are unusual, unexpected, unforeseen, and unforeseeable. But there is one limitation. The damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former.

These two words have never been given an inclusive definition. What is a cause in a legal sense, still more what is a proximate cause, depend in each case upon many considerations, as does the existence of negligence itself. Any philosophical doctrine of causation does not help us. * * *

Should analogy be thought helpful, however, I prefer that of a stream. The spring, starting on its journey, is joined by tributary after tributary. The river, reaching the ocean, comes from a hundred sources. No man may say whence any drop of water is derived. Yet for a time distinction may be possible. Into the clear creek, brown swamp water flows from the left. Later, from the right comes water stained by its clay bed. The three may remain for a space, sharply divided. But at last inevitably no trace of separation remains. They are so commingled that all distinction is lost.

As we have said, we cannot trace the effect of any act to the end, if end there is. Again, however, we may trace it part of the way. A murder at Serajevo may be the necessary antecedent to an assassination in London twenty years hence. An overturned lantern may burn all Chicago. We may follow the fire from the shed to the last building. We rightly say the fire started by the lantern caused its destruction.

A cause, but not the proximate cause. What we do mean by the word "proximate" is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics. * * *

It is all a question of expediency. There are no fixed rules to govern our judgment. There are simply matters of which we may take account. We have in a somewhat different connection spoken of "the stream of events." We have asked whether that stream was deflected—whether it was forced into new and unexpected channels. This is rather rhetoric than law. There is in truth little to guide us other than common sense.

There are some hints that may help us. The proximate cause, involved as it may be with many other causes, must be, at the least, something without which the event would not happen. The court must ask itself whether there was a natural and continuous sequence between cause and effect. Was the one a substantial factor in producing the other? Was there a direct connection between them, without too many intervening causes? Is the effect of cause on result not too attenuated? Is the cause likely, in the usual judgment of mankind, to produce the result? Or, by the exercise of prudent foresight, could the result be foreseen? Is the result too remote from the cause, and here we consider remoteness in time and space?

In *The Glendola* (C. C. A. 2d, 1931), 47 F. (2d) 206, 207, Judge Learned Hand, by what appears to be a dictum, commented on the decision in the *Palsgraf* case:

However, there is much uncertainty in the books as to whether liability should be extended to remote consequences once the actor is shown to have been at fault. On the one hand are the greater number of decisions, of which *In re Polemis*, [1921] L. R. 3 K. B. 560, is an extreme instance, in which,

because the omission was in any case likely to cause some damage, liability is extended to injuries for which the defendant would not have been responsible if they alone were to be apprehended. The wrong, once established, involves the wrongdoer in all its consequences. On the other hand are those decisions which treat remote consequences as though the wrong consisted in causing these alone, and which hold the actor only for such as he should have foretold. * * * The distinction is acutely presented when the actor has committed a wrong to one person, which in a train of unpredictable events involves another. In *Palsgraf v. Long Island R. R. Co.*, 248 N. Y. 339, 162 N. E. 99, 59 A. L. R. 1253, the court held that the defendant was not liable to the second person. If not, it is hard to see why it should make a difference that a single person is twice injured, once in a way that entails liability, and second, in such a way, as standing alone would be too remote. If he is so liable, a difference in ownership of the two pieces of property, successively injured, might exonerate a wrongdoer as to that injured last, though he would be liable, had both been owned by a single person—scarcely a relevant distinction.

See also Torts Restatement (Am. L. Inst., 1934), Secs. 440-442. I have quoted at some length from the opinions in the *Palsgraf* case, not in an effort further to confound what already is a perplexing problem, but rather to set forth the recent declarations of two able justices on the subject. Certainly, under the theory of the minority, at least, the lumber company's loss in the instant case was proximately caused by a negligent act of a Government employee. And I am not prepared to say that under the theory of the majority there should be no recovery. Indeed, while the two opinions differ flatly in result, a careful reading indicates that the difference between the analyses is less substantial. Thus, in the majority opinion it is said, to quote again a portion of what is quoted above:

One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not willful, *he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended.* [Italics supplied.]

Does not the showing that "the act as to him had possibilities of danger so many and apparent," etc., differ but little from finding that there was "a direct connection between" the cause and the effect, that the cause was "likely, in the usual judgment of mankind, to produce the result," or that "by the exercise of prudent foresight," the result could be foreseen, all of which are considerations stated by Judge Andrews? In some cases, as in the *Palsgraf* case, the result admittedly will differ, but the difference between the analyses is essentially one in degree; in the instant case it is my opinion that the claim should be allowed for the reason that even under the theory of the majority opinion the act of the Government in erroneously allowing the land to be entered had, as to the *claimant*, "possibilities of danger so many and apparent as to entitle him to be protected

against the doing of it though the harm was unintended." The Government cannot now say to the claimant in effect: "Yes, Fox was told that he might go upon the land and that upon the completion of certain requirements, he might obtain title to it, but there was no reason to believe that he would cause the timber to be cut." It is reasonable to believe that the cutting of the timber was not only a natural and probable consequence but, in a timber country, a virtually inevitable consequence.

For the reasons set forth in the foregoing discussion, it is my opinion that the claim should be allowed and certified to the Congress for payment. Only the amount remains to be determined. To revert to the exact arrangements made between the several parties to the transactions which attended the cutting of the timber, it appears that Fox sold the standing pine timber to Dunlap for the sum of \$125. Dunlap was engaged in delivering the cut timber to the Caddo River Lumber Company at agreed prices of \$8 and \$10 per thousand board feet when the matter came to the attention of the claimant and deliveries were stopped. It appears that 41,702 feet had been delivered at this time. Shortly thereafter, the remaining 34,530 feet were delivered under an arrangement suggested by the claimant company whereby the Caddo Company withheld \$3 per thousand feet for the claimant, remitting \$7 per thousand to Dunlap. While claim is made for 73,574 feet, having an alleged value of \$5 per thousand feet, it appears that the claimant subsequently received payment from the Caddo Company in the amount of \$103.59 for the 34,530 feet. The damage presently to be considered, therefore, is confined to 41,702 feet.

The following is quoted from the report of the special agent of the Division of Investigations who investigated the incident:

While the Ouachita National Forest has a minimum price of \$5.00 per thousand for pine stumpage, nevertheless, timber of this character in the vicinity of the lands involved has been sold during the last three years at from \$2.00 to \$3.00 per thousand and that is the price that has been paid for timber of the same character by the Caddo River Lumber Company when the tracts are located within a radius of fifteen miles of their mills at Rosboro, Arkansas and Glenwood, Arkansas. The company has paid \$2.00 per thousand when the timber was within a radius of five to ten miles of their mills and \$3.00 per thousand within a distance of fifteen miles (Exhibit 3).

It is significant to note that when Fox sold the timber to Dunlap for a flat price of \$125.00 he estimated that there was from sixty to seventy thousand feet of merchantable timber on the land and was using the figure of \$2.00 per thousand in basing his calculation (Exhibit 1).

Charles R. Dunlap alleged that at the time he contracted for the purchase of the timber he estimated that there were about fifty thousand feet of timber on the land and figured its value at \$2.50 per thousand. He stated that he had cut approximately 73,700 feet of timber from the land, but the records

of the company where the timber was sold showed that 76,232 feet had actually been removed from the tract (Exhibit 2).

J. V. Pennington, timber cruiser and buyer for the Caddo River Lumber Company, alleged that he was familiar with the tract of timber in question and that in his judgment the timber had a value of \$4.00 per thousand stumpage (Exhibit 3).

The record as a whole, including not only the foregoing statement but the fact that the claimant itself has placed a stumpage value of \$3 per thousand on the timber, as evidenced by its arrangement with Dunlap and the Caddo Company, warrants the conclusion that the claim should be allowed in the amount of \$125.11, representing the value of 41,702 board feet of timber at the rate of \$3 per thousand feet.

Approved: December 1, 1937.

OSCAR L. CHAPMAN,
Assistant Secretary.

JOHN A. TRACE

Opinion, December 20, 1937

CLAIMS—DAMAGE TO PRIVATE PROPERTY—ACT OF JUNE 28, 1937—NEGLIGENCE.

Claim for damage to private property under the act of June 28, 1937 (50 Stat. 321), denied, irrespective of negligence on the part of Government employee, where evidence indicates negligence by claimant's own operator.

CLAIMS—DAMAGE TO PRIVATE PROPERTY—SUBROGATED CLAIMS.

The right of an insurance company to present a subrogated claim for damages to private property must be based, so far as the Government is concerned, on actual payment to the assured. The mere existence of a policy or a statement of what the assured is willing to accept is insufficient to subrogate the insurance company to the assured's rights.

CLAIMS—DAMAGE TO PRIVATE PROPERTY—EVIDENCE.

A claim against the Government for damage to private property must be accompanied by evidence of the actual damage sustained.

MARGOLD, *Solicitor:*

John A. Trace, of Waynesboro, Pennsylvania, and the General Exchange Insurance Corporation, as his subrogee, have filed claims totaling \$856 against the United States for compensation for personal injuries and damage to Trace's 1937 Chevrolet truck as the result of a collision with a National Park Service truck operated by Richard H. Blizzard, an enrollee in the Civilian Conservation Corps. The question whether the claims should be paid under the act of June 28, 1937 (50 Stat. 321), has been submitted to me for opinion.

Trace's claim is in the amount of \$250, representing \$100 for property damage and \$150 for personal injuries, while the insurance com-

pany claims \$606 as the amount alleged to have been paid under a deductible collision insurance policy. While there is no reason to doubt this payment the record includes no evidence of it, as will be pointed out later.

The collision occurred on August 19, 1937, at the junction of State Highway No. 233 and a dirt road at a point near Caledonia State Park, Pennsylvania. Trace states merely that "C. C. C. truck approached from our left and turned directly into our path taking our right of way from us." No statement by Norman F. Trace, the operator of the claimant's truck, has been presented. The following is the statement of the Government operator:

When entering the highway from the Sand Pit Road the truck was running in second gear and I was venturing onto the highway cautiously. The truck was out on the road about half way when I noticed a truck coming from the north on the Pine Grove Furnace road, towards me at a great rate of speed. I stopped immediately and was at a standstill when the swerving truck collided into my truck. There was enough room to pass by on the left side of the highway between the berm and the truck I was driving, if the driver of the other truck was going at a moderate rate of speed and had his vehicle under control. * * *

The foregoing is substantially corroborated by Enrollees Thomas B. Mahek and Kyle Huffer, who state that the claimant's truck "was coming at a high rate of speed and swayed into the truck we were riding on." In addition, Edward S. Kelly and Andrew Hamilton, who are stated to have met the truck shortly before the collision, both state that it was traveling "very fast," although loaded with coal.

The foregoing is the extent of the evidence available from witnesses present at the scene at or near the time of the collision. The record includes a copy of a State police report, bearing the signature R. M. King. The following, in which "car #1" refers to the Government truck and "car #2" to the claimant's truck, are excerpts from the narrative portion of the report:

4. This accident occurred on Pa. Route #233 approximately 1½ miles North of Caledonia State Park. The highway at this point is of macadam construction and is 16 feet in width. There is a dirt road on the west side of this highway and intersecting with it. The macadam highway is an approximate straight stretch at this point and goes into a gentle curve about 125 yards on either side of the point of collision. This highway runs approximately North and South. There were marks on the highway 8½ feet from the west side where the front wheels of car #1 was struck and swung around. There were no visible skid marks made by car #2 prior to the time of collision. There is a 4-foot berm on both sides of the highway, then a shallow drop-off of about 2½ feet. After the collision, car #2 went 52 feet and struck a tree head-on. Car #1 was swung around and came to rest 49 feet from the point of collision.

* * * * *

7. Operator of car #2 stated that he was traveling South on route #233 at a speed of about 30 or 35 miles per hour and suddenly he saw the car load of

men pull out of the side road directly in front of him without making an attempt to stop. Then he applied his brakes and twisted the wheel to turn left but he was too close to avoid a collision.

John A. Trace was an occupant of car #2 and was sitting beside the operator. He said he cautioned the operator to go slow because he knew the C. C. workers were going back to camp. He corroborated the statement of operator #1 except that he fixed the speed of the car he was riding in at about 20 miles per hour.

* * * * *

9. It is the opinion of the investigating officer that both operators are at fault. Operator of car #1 should have made sure that the macadam highway was clear of all traffic before attempting to pull out and make his left hand turn. Operator of car #2 was probably going at a rate of speed too fast for conditions, due to the load he was carrying.

10. No arrests will be made because I feel that one is no more guilty than the other.

The Pennsylvania speed statute fixes a sliding speed limit for trucks, depending on chassis weights and types of tires. Purdon's Penna. Stats. (Perm. ed.), Tit. 75, Sec. 501. It is not possible to determine the chassis weight of the claimant's truck from the record, but in any event the maximum limit for the lightest commercial vehicle is 35 miles per hour. These provisions, moreover, are expressly subject to paragraph (a) of the statute cited, which provides:

Any person driving a vehicle on a highway shall drive the same at a careful and prudent speed, not greater than nor less than is reasonable and proper, having due regard to the traffic, surface and width of the highway, *and of any other restrictions or conditions then and there existing*; and no person shall drive any vehicle upon a highway at such a speed as to endanger the life, limb, or property of any person, nor at a speed greater than will permit him to bring the vehicle to a stop within the assured clear distance ahead. * * *
[Italics supplied.]

One of the "conditions then and there existing" in the instant case was the fact that the claimant's truck was loaded with four tons of coal, according to the State police officer. When this fact is considered together with the statement ascribed by him to the claimant's operator, to the effect that he was traveling "at a speed of about 30 or 35 miles per hour," the statement that "there were no visible skid marks made by car #2 prior to the time of collision," the statement that following the collision "car #2 went 52 feet and struck a tree head-on" and the statement that "car #1 (which appears to have been virtually at a standstill), was swung around and came to rest 49 feet from the point of collision," the conclusion that the claimant's operator either was traveling at a rate of speed excessive in the circumstances or failed to make any effort to avoid the collision is inescapable. All of the statements quoted immediately above, it is to be noted, are from a source which, so far as the record discloses, is open to no objection on the ground of prejudice. In addition they tend to

substantiate the statements of the Government's witnesses. It is my opinion, therefore, that the claims should be rejected because the property damage was caused at least in part by the negligence of the claimants' own operator.

While they are not essential to the determination of the claims, I am constrained to make several observations concerning the manner of their presentation. From the record submitted it appears that the insurance company on September 17 transmitted to the project superintendent four copies of a so-called "Loss and/or Damage Agreement" in support of its subrogated claim. This transmittal purports to be in pursuance of a letter of September 15 from the project superintendent. These papers thereupon were referred to the Washington office of the National Park Service by the regional director with a letter dated September 27. On October 13 the National Park Service advised the insurance company:

In the event the claimant is covered in whole or in part by insurance and the insurance company is desirous of being reimbursed for the amount paid the claimant under the policy, the procedure of this Service requires that such claim be filed separately by the insurance company under its own name. The claimant must also file a separate claim for the amount that he expended and which was not covered by the insurance policy. Therefore, in the event your company desires to submit a claim for any amount paid in connection with the accident in question, it is requested that you have the enclosed form filled out and executed in the presence of a notary public. The claim must be returned to this office substantiated by a receipted bill or notarized invoice covering the cost of repairs to the property. An additional form is also enclosed for the use of Mr. Trace in the event he desires to file a claim in the amount he personally expended in connection with the repairs to his property. Upon receipt of this information, the claim or claims will be submitted to the Solicitor of the Department for consideration.

Notwithstanding the foregoing express instructions, the insurance company has presented Standard Form No. 28 with the space for the claimant's (i. e., the insurance company's) signature blank, with a purported signature by an agent of the company in the space provided for that of the official administering the oath and with no notarization whatever. The form is accompanied by another copy of the "Loss and/or Damage Agreement," signed by John Trace and including the following provisions:

The undersigned hereby expressly agrees that the total loss and/or damage, occurring on or about the 19th day of August 1937, for which claim is made, as set forth in the undersigned's signed Statement of Loss, dated August 25, 1937, to automobile covered by Policy No. HS 47275, is \$606.00.

The sole purpose of this instrument is to fix and evidence the total amount for which claim is made. This instrument is, and is intended to be binding as to the total amount of loss and/or damage said to have occurred under the Policy. This instrument is not an acceptance of liability by the Corporation, does not commit the Corporation to payment of said claim and does

not in any sense waive any of the conditions or provisions of the policy of said Corporation.

The second paragraph, it may be noted without further comment, appears in the form in very fine print as contrasted with the first one. While it is not my function to pass on the legal effect of this ingeniously drafted unilateral instrument as between the company and its assured, it must be manifest to anyone having even a rudimentary familiarity with routine commercial practices that neither the Government nor anyone else is prepared to pay out \$606 or any other substantial amount to a subrogee on nothing more than its carelessly executed and unsworn statement coupled with what purports to be an instrument of subrogation, but in which it is expressly stated that it "does not commit the Corporation to payment of said claim." The subrogated claim of an insurance company is based, so far as the Government is concerned, not on the existence of a policy, nor on what the assured is willing to accept, but on actual payment to the assured. This is best evidenced by the original or a photostatic copy of its draft of payment. This is not the first claim by this insurance company which the Department has had occasion to consider and the requirements are not novel.

Before concluding, an observation in the same vein may be made concerning the claim of John A. Trace. While he claims \$150 for personal injuries, allowance of which under the statute in any event would be limited to actual medical and hospital expenses, the record is wholly innocent of any showing whatever concerning the justification for this item and Trace has declined to answer the question of "method by which damage is established" on Standard Form No. 28. His claim for \$100 for property damage likewise is unsupported by any evidence other than the inference that the insurance policy was a \$100 deductible one, in which event his statement that the truck "was sold for \$25.00" is inconsistent with the amount of his claim.

The comments immediately foregoing, as already stated, are not essential to the disposition of the claims and are offered with a view to the guidance of the insurance company and to field officers of the National Park Service in the future. For the reasons already discussed, the claims should be rejected on their merits. This conclusion, it must be emphasized, is made necessary apart from the question of negligence on the part of the enrollee in the Civilian Conservation Corps.

Approved: December 20, 1937.

OSCAR L. CHAPMAN,
Assistant Secretary.

**TITLE TO PUBLIC LANDS IN THE TERRITORY OF HAWAII—
LIMITATIONS ON THE AUTHORITY OF THE SECRETARY OF THE
INTERIOR OVER GRAZING IN HAWAII NATIONAL PARK**

Opinion, February 21, 1938

REPUBLIC OF HAWAII—ANNEXATION TO THE UNITED STATES—"CROWN, GOVERNMENT, AND PUBLIC LANDS"—LAWS APPLICABLE.

Under the Congressional Joint Resolution of July 7, 1898, accepting from the Republic of Hawaii sovereignty over the Hawaiian Islands and the absolute fee and ownership of all public properties therein, Hawaiian lands known as "crown, government, or public lands" are public lands of the United States, controlled not by the general public land laws but by special enactments.

TERRITORY OF HAWAII CREATED—HAWAIIAN ORGANIC ACT—PUBLIC LANDS—SEVERANCE OF TITLE AND USE—JOINDER THEREOF.

Section 91 of the Hawaiian Organic Act creating the Territory of Hawaii gives to the Territorial Government possession, use, and control of public lands in Hawaii but retains the fee thereof in the United States, providing specific methods however for joinder of title and use at the will of the Federal Government. *Held*, That in the absence of formal transfer of title in any such lands by the Government of the United States to that of the Territory the latter has no estate therein and no interest which it can convey or reserve.

HAWAII NATIONAL PARK—STATUTORY CONSTRUCTION—PUBLIC LANDS—WHEN TAKING FOR FEDERAL USE EFFECTED AND TERRITORIAL PRIVILEGES TERMINATED—TERRITORIAL DEED, RESERVATION AND ASSIGNMENT CONSTRUED.

The act of August 1, 1916 (39 Stat. 432) terminates Territorial privileges on public lands taken thereby for a national park. As to lands to be delimited by the Secretary of the Interior, the Secretary's approval of the survey and blueprint thereof restores to the Federal Government full dominion thereover and makes applicable thereto all statutes and rules governing national parks. *Held*, 1. That a deed whereby the Territory of Hawaii attempts to convey to the United States portions of the "Government" lands of Kapapala and Humuula for Hawaii National Park is unnecessary and void, the absolute fee to said lands having been vested in the United States of America by cession from the *Republic* of Hawaii and never since having been transferred by the United States to the *Territory* of Hawaii. 2. That a clause in such deed attempting to reserve to the Territory perpetual grazing rights on such lands is void and inoperative, the Territorial Government having no estate therein to reserve. 3. That an assignment or lease of grazing rights on park lands made by the Territorial Government in exercise of its presumed right under such reservation is ineffective and void and gives no rights on park lands to the Hawaiian Agricultural Company as assignee or lessee thereunder.

HAWAII—PUBLIC LANDS—NATIONAL PARK—LIMITED AUTHORITY OF SECRETARY OF THE INTERIOR—BENEFICIAL CONTROL OF GRAZING RIGHTS—STATUTORY CONSTRUCTION.

No power to divest the Federal Government of any estate in such lands by any means whatever is conferred on the Secretary of the Interior by the acts of August 1, 1916 (39 Stat. 432), August 25, 1916 (39 Stat. 535), and

April 19, 1930 (46 Stat. 227). Neither the act of August 25, 1916, nor any subsequent legislation empowers the Secretary to grant to the Territorial Government or to any other exterior agency exclusive beneficial control of grazing rights in any national park, whether in perpetuity or for a limited period. Such powers still remain in the Congress. *Held*, That approval by the Secretary of the Interior of the reservation of perpetual grazing rights to the Territory in said Territorial deed is *ultra vires* and inoperative even if the reservation be construed as a mere request.

HAWAII NATIONAL PARK—STATUTORY ADMINISTRATIVE POLICY—LIMITED AUTHORITY OF THE SECRETARY OF THE INTERIOR—CLEARING OPERATIONS FOR GRAZING USES.

The statutory administrative policy provided for Hawaii National Park by the three acts above cited requiring the natural condition of the park to be preserved, making willful damage to growing things a crime, permitting tree cutting and plant destruction for no purpose other than to conserve the park and to check the ravages of nature, and allowing the issuance of grazing permits only when grazing is not detrimental to the primary purpose of the park, conditions the administrative authority of the Secretary of the Interior conferred by said acts. *Held*, That the Secretary of the Interior has no authority to permit in Hawaii National Park the felling of trees, the eradication of vegetation and shrubbery or any other clearing operations for the adaptation of park lands to Hawaiian grazing uses.

NATIONAL PARKS AND MONUMENTS—ACCEPTANCE OF LANDS BY THE SECRETARY OF THE INTERIOR—STATUTORY CONSTRUCTION.

The procedure of "acceptance" by the Secretary of the Interior of certain properties within national parks, authorized by the act of June 5, 1920 (41 Stat. 917), relates to conveyances of private properties, rights, and moneys to the Federal Government and is inapplicable to transactions concerning public lands.

MARGOLD, Solicitor:

At the suggestion of the Second Deputy Attorney General of the Territory of Hawaii and at the request of the Commissioner of Public Lands, also of that Territory, you have asked my opinion as to the construction to be placed on a deed dated March 30, 1927, from the Territory of Hawaii, purporting to convey to the United States of America certain Government lands for national park purposes, and the interpretation to be given to a reservation therein worded as follows:

Reserving, however, to the Territory of Hawaii, its successors and assigns, a perpetual right to at any time graze livestock on any portion or the whole of the lands therein conveyed.

Particular questions raised are:

1. Whether or not the term "right to graze livestock" should be defined to include as incidental and essential thereto the right to eradicate from park lands vegetation regarded as plant pests noxious to grazing and generally to adapt such lands to grazing purposes in conformity with Hawaiian connotations, which differ widely from those of the term in the continental United States.

2. Whether or not the Secretary of the Interior has authority to forbid such clearing operations on national park lands as being destructive of shrubbery, timber, natural objects, or scenery and thus violative of certain acts of Congress, viz, August 1, 1916 (39 Stat. 432); August 25, 1916 (39 Stat. 535); April 19, 1930 (46 Stat. 227) for the government of national park lands and of the Secretary's rules and regulations executory thereof.

The inquiry is made because of objections by the Superintendent of Hawaii National Park to clearing operations on certain lands within the park boundaries by the Hawaiian Agricultural Company, which claims a right to perform such acts under a certain so-called lease from the Territory of Hawaii, dated April 16, 1928, and described as "General Lease 1920." This instrument, executed by the Commissioner of Public Lands for the Government of the Territory of Hawaii, purported to lease to the Hawaiian Agricultural Company for 21 years, from July 1, 1929, to July 1, 1950, a total of 50,535 acres described by metes and bounds, comprising two tracts of land, the first, 44,117 acres of "Government lands" in the District of Kau, said acreage, all of it, exterior to Hawaii National Park and not involved in the instant case; and the second, 6,418 acres, Kapapala lands likewise in the District of Kau but also national park lands lying wholly within the park and referred to in the lease as "Addition to Hawaii National Park." It is as to this second tract that the Secretary's authority is disputed by the Hawaiian Agricultural Company.

Of this lease certain provisions seem to indicate that the instrument although called a "lease" of both tracts of land was intended to convey as to the second tract "no right or privilege other than grazing rights." Whether certain other provisions in the instrument conflicted with this intention and attempted to grant more than grazing rights need not be examined at this point. It is enough now to note that the Territory of Hawaii intended to assign at least the right to graze livestock on 6,418 acres of Kapapala lands within Hawaii National Park, using as means thereto not an instrument of simple assignment nor an ordinary grazing permit such as is used by the Department of the Interior but an instrument having the color of a long-term lease of these as well as of the other lands.

This act of assignment of grazing rights, whatever may be said of the method chosen to accomplish it, was performed by the Territory by virtue of the right presumed to be reserved to it by the language of the deed quoted in the first paragraph of this opinion. This deed, running from the Territory of Hawaii to the United States of America, purported to convey for the consideration of one dollar

all that certain parcel of land *belonging to it*, situate at Kau and North Hilo, County and Territory of Hawaii, being *portions of the Government lands of Kapapala and Humuula*, consisting of a strip of land connecting the Kilauea

and Mauna Loa Sections of the Hawaii National Park and more particularly described as follows:

[A description by metes and bounds follows:]

Containing an area of 46,050—00/100 acres.

Reserving, however, to the Territory of Hawaii, its successors and assigns, a perpetual right to at any time graze livestock on any portion or the whole of the lands conveyed. [Italics throughout supplied.]

TO HAVE AND TO HOLD the same with all the rights, privileges and appurtenances thereunto belonging or in any wise appertaining unto the United States of America, its successors and assigns forever, subject to the reservation hereinabove cited.

The Governor of Hawaii, enclosing this deed to the Secretary in a letter dated April 12, 1927, wrote as follows:

I transmit to you deed from the Territory of Hawaii to the United States of America, covering 46,050 acres, being *portions of the public lands of Kapapala and Humuila* * * *. No Abstract of title is submitted as the area conveyed has always been *Government land.* [Italics supplied.]

The Department raised no question as to the ownership of the lands and on recommendation of the National Park Service the Assistant Secretary of the Interior on May 4, 1927, accepted the deed as a conveyance of "Government lands" subject to the reservation to the Territory.

Since the present inquiry directs attention to the deed, there at once occur questions as to its validity, effectiveness, and propriety. The occasion for the making of this alleged conveyance of March 30, 1927, arose out of the establishment of Hawaii National Park and requirements therefor made by act of Congress approved August 1, 1916 (39 Stat. 432), in the fulfillment of which the Territory was zealously cooperating. The act provided that—

* * * the tracts of land on the Island of Hawaii and on the Island of Maui, in the Territory of Hawaii, hereinafter described, shall be perpetually dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States, to be known as "Hawaii National Park."

The tract on the Island of Maui is not involved in this case. Of the two tracts on the Island of Hawaii described by metes and bounds, the first contained the volcano of Kilauea and the second the crater of Mauna Loa. They were not contiguous but were to be connected by a third tract, described not by metes and bounds but as follows:

Third. A strip of land of sufficient width for a road to connect the two tracts of land on the Island of Hawaii above described, *the width and location of which shall be determined by the Secretary of the Interior.* [Section 1, italics supplied.]

The Kilauea and Mauna Loa tracts each contained two classes of lands, those privately owned and those referred to by the Territory without distinction as "government" lands and "public" lands. The third tract or connecting strip contained no private lands but consisted entirely of lands of the second class. Of the two categories only the "government" or "public" lands were to be dedicated to park uses, at no cost to the Federal Government, according to both the act creating the park and the debate in Congress at the time of its passage (Cong. Rec., 64th Cong. 1st sess., vol. 53, pt. 7, p. 6322, and pt. 9, p. 9253). As a result however of further legislation (acts of February 27 and June 5, 1920, 41 Stat. 452 and 917) and of procedures which need not concern us here, all of the lands of the Kilauea and Mauna Loa sections came under the jurisdiction and control of the Secretary of the Interior on September 27, 1922.

As to the third tract, nothing had at this date been done to choose, survey, and delimit the connecting strip for the road. In 1926 and 1927, however, final action proceeded as indicated in the following excerpts from the files:

1. *On November 26, 1926*, the Governor of Hawaii wrote to Representative Louis C. Cramton:

We have completed the surveys so that an Executive Order may be issued setting aside a sufficient area to connect the Mauna Loa section with the Kilauea section * * *.

2. *On December 23, 1926*, the Governor of Hawaii wrote to the Director of the National Park Service:

We have the surveys completed so that the stretch connecting Mauna Loa with Kilauea can be deeded by the Territorial Government to the National Park Bureau.

3. *On January 4, 1927*, the Commissioner of Public Lands of Hawaii wrote to the Governor of Hawaii:

I am submitting herewith description of survey and blueprint, * * * of a portion of the Government land of Kapapala. The survey * * * has been made in such a manner * * * as to furnish ample width for the location of any road which may be built to connect these two sections of the Park.

* * * this section of land will become part of the Hawaii National Park, if and when approved by the Secretary of the Interior.

As this land is of value to the Park only as a right of way for road and as a connecting link between the Kilauea and Mauna Loa Sections, and as a portion of same is excellent grazing land and a source of income to the Territory, I respectfully suggest that if possible and proper, the acceptance by the Secretary of the Interior be made subject to the reservation to the Territory of Hawaii of perpetual grazing rights.

4. *On February 19, 1927*, in a memorandum to the Assistant Secretary of the Interior, the Acting Director of the National Park

Service recommended that the survey and blueprint be approved. He also stated:

the Service sees no objection to the reservation of these rights in the deeds * * * when tendered * * * and it is therefore recommended that the reservation of such rights by the Territory be approved.

5. *On the same day, February 19, 1927*, the approval of the Assistant Secretary of the Interior was endorsed on the memorandum.

6. *On February 24, 1927*, the Director of the National Park Service wrote to the Governor of Hawaii:

The Department has just approved the survey and blueprint and reservation. * * * It is understood in the Service that the transfer will be accomplished by the issuance of an appropriate Executive Order.

7. *On April 12, 1927*, when sending the deed of March 30, 1927, the Governor of Hawaii wrote to the Secretary of the Interior:

I transmit herewith deed from the Territory of Hawaii to the United States of America, covering 46,050 acres, being portions of the public lands of Kapapala and Humuula and forming a connecting link between the Mauna Loa and Kilauea sections of the National Park. No abstract of title is submitted as the area conveyed has always been Government land.

8. *On May 3, 1927*, the Acting Director of the National Park Service in a memorandum to the Secretary of the Interior recommended acceptance of the deed.

9. *On May 4, 1927*, the memorandum was endorsed by the Assistant Secretary "Deed accepted and all papers returned herewith to NPS." Further, a formal certificate of acceptance of the deed subject to the reservation was executed by the Assistant Secretary and attached to the deed. Through a clerical error, this was dated the 4th day of April instead of May.

The language of the deed and of these letters shows agreement by the territorial authorities that the Kapapala and Humuula lands selected for the connecting strip were "government" or "public" lands but also an assumption on the part of some advisor to the Governor that the government owning the lands was the territorial government.

The fact was quite otherwise and was recognized by the Second Deputy Attorney General of Hawaii in his opinion of November 28, 1936, regarding this case, although he therein refrained from questioning the effectiveness of the deed. His statement was as follows:

The deed of March 30, 1927, is obviously a conveyance of the third tract mentioned in the Act of August 1, 1916. It is not clear to us why it was felt necessary for the Territory to convey the portions of Kapapala and Humuula by deed to the United States for the reason that as former Crown Lands (see Act of June 7, 1848, of the Legislative Council of the Hawaiian Islands) the same were ceded and transferred to the United States by the Joint Resolution of July 7, 1898. Under section 91 of the Organic Act the strip in question could

have been taken from the "possession, use, and control of the government of the Territory of Hawaii" by a subsequent Act of Congress, or it could have been taken for the uses and purposes for [sic] the United States by direction of the President or the Governor of Hawaii.

However, since the transfer was made by a deed executed by the proper officers of the Territory, with the approval of the Director of the National Park Service, there is no reason to question the effectiveness of the deed or any of the provisions thereof. [Italics supplied.]

Despite the Attorney General's acknowledgement of United States title to these lands it is advisable in the absence of an abstract of title to sketch briefly their statutory history. By act of the Legislative Council of Hawaii approved by King Kamehameha III on June 7, 1848, the Kapapala and Humuula lands together with numerous others were reserved as Crown Lands, the *king's* private property; in 1865 were made an appanage of the *office* of the Crown rather than of the monarch as an individual; in 1893, upon the overthrow of the monarchy, became part of the public domain under the Provisional Government; in 1894 were declared by Article 95 of the Constitution of the Republic of Hawaii to be the property of the Hawaiian Government (confirmed by the Organic Act, sec. 99, April 30, 1900, 31 Stat. 141); in 1895 were defined by the Land Act, 1895, as "public lands"; and on August 12, 1898, the date of effective annexation of the Hawaiian Islands to the United States of America, were ceded to the United States in absolute fee. In March 1908, the court in *Territory of Hawaii v. Kapiolani*, 18 Haw. R. 418, took judicial notice that the title to the former Crown lands of the Hawaiian Government was in the United States of America and held that the title cannot be disputed in the courts.

Rev. Laws of Haw., 1905, pp. 1197, *et seq.*, p. 1226;

45 C. Clms. R. 418;

Civil Laws of Haw., 1897, pp. 44 and 103;

Treaty of Annexation, Art. II, Rev. Laws of Haw. 1935, p. 34A;

Joint Resolution, Preamble and paragraphs 1 and 2, *id.*, p. 32.

Since the establishment of the territorial government the chief relevant provisions of law controlling the public property ceded and the relations of the Federal and territorial governments in regard thereto have been the following:

1. Article II of the Treaty of Annexation, the substance of which is repeated in the Joint Resolution of ratification:

The Republic of Hawaii cedes and transfers to the United States the absolute fee and ownership of all public, government or crown lands, public buildings or edifices, ports, harbors, military equipments, and all other public property of every kind and description belonging to the government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining.

The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition.

2. Section 91 of the Hawaiian Organic Act, as amended by the act of May 27, 1910, providing:

That, *except as otherwise provided*, the public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July seventh, eighteen hundred and ninety-eight, shall be and remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the Governor of Hawaii. [Excerpt A; italics supplied.]

And such public property so taken for the uses and purposes of the United States may be restored to its previous status by direction of the President; (Excerpt B).

and the title to any such public property in the possession and use of the Territory for the purposes of water, sewer, electric, and other public works, penal, charitable, scientific and educational institutions, cemeteries, hospitals, parks, highways, wharves, landings, harbor improvements, public buildings, or other public purposes, or required for any such purposes, may be transferred to the Territory by direction of the President, and the title to any property so transferred to the Territory may thereafter be transferred to any city, county, or other political subdivision thereof by direction of the Governor when thereunto authorized by the legislature; * * * (Rev. Laws of Hawaii, 1925, p. 105) (Excerpt C).

(NOTE.—The italicized phrase in Excerpt A and the provisions of Excerpts B and C are additions by the act of May 27, 1910.)

3. Section 73, Hawaiian Organic Act, as amended by the act of May 27, 1910, which in part provides:

(a) (3) The term "public lands" includes all lands in the Territory of Hawaii classed as government or crown lands previous to August 15, 1895, and * * *. (The date given was the date of the Land Act referred to above.)

(q) All lands in the possession, use, and control of the Territory shall hereafter be managed by the commissioner [of public lands].

From these provisions it appears therefore that while the fee and the ownership of the lands in question passed to the United States on August 12, 1898, and the power to manage and dispose of them thereafter lay in Congress alone, the possession, use, and control of them were to remain in the Territorial government under the management of the Commissioner of Public Lands at the will of the Federal Government. In the absence of the contingencies envisaged in Section 91, Excerpt C, *supra*, the Territory's permission to possess, use, and control was to continue only so long as the Federal Government should not require the lands for its own uses. It was to terminate upon expression of the Federal will in either of two ways:

1. by definitive action by Congress providing for other management and disposition of the property; or
2. by interim executive action either by the President or by the Governor of Hawaii, acting as a Federal officer,

in the form of a proclamation taking, setting aside, or reserving the property for specified Federal uses until the Congress of the United States should otherwise direct.

If however the Territory were to use these lands or require to use them for any of the public purposes specified in Excerpt C of Section 91 and thus give rise to one of the contingencies therein contemplated, it would be possible for the Territory to acquire title thereto upon direction of the President.

It is clear therefore that since title to the Crown lands of Kapapala and Humuula passed to the United States upon annexation, there could subsequently have been no title in the Territorial government unless the President should have directed its restoration to the Territory. An examination of the Presidential proclamations making such transfers of title shows that no transfer made has included the Kapapala and Humuula lands. It is established therefore, in the absence of an abstract, that the title to these lands, with all the incident rights of ownership, has remained in the Federal Government continuously since annexation.

It follows that the territorial government had no power to make the deed of March 30, 1927, and could convey no estate in these lands. Nor could it, an impotent grantor, reserve to itself by a deed part of an estate which it did not have. The possession, use, and control of the public property of the United States in Hawaii as permitted to the territorial government under the Organic Act constituted no estate in lands. The privilege accorded was peculiar and exceedingly broad but in essence it was in the nature of a tenancy at will, or even a license not coupled with an interest, terminable or revocable at the will of the Federal Government when expressed in the ways specified above. Never did it include any power of disposition nor yet any power of choice or discretion as to the degree of possession, use, or control which the Territory should relinquish when its temporary privileges should be withdrawn.

This limited right of the territorial government to occupy, enjoy, and manage the lands in question continued undisturbed until Congress established Hawaii National Park. In the passage of the act of August 1, 1916, creating the park, arose the contingency contemplated by section 91 of the Hawaiian Organic Act, i. e., Congress provided definitively for *Federal* use of the lands within the boundaries described, a use wholly incompatible with continued possession and use, management, and maintenance by the Territory. By dedicating the lands perpetually to public park uses by the people of the whole Nation, by placing in the Secretary of the Interior executive control of the park, its care, management, and government, and by providing for its maintenance by Federal funds, Congress gave

notice that it intended to terminate all of the Territory's privileges and duties and at a determinable date to place in the Federal Government full and exclusive dominion, possession, use, and control of the park lands. By no part of the act did Congress leave in the Territory any portion of its former powers and responsibilities as to these lands; and in no part of the act is there found any authority for unilateral retention by the territorial government of any right whatsoever regarding them.

Nor did this act or any subsequent legislation give power express or implied to the Secretary or to any other official to divest the Federal Government of such a right as the Territory sought to create in itself by the reservation of the deed of March 30, 1927. Such discretionary powers as the act creating the park gave to the Secretary in connection with his administration of the park were all for specified purposes, to be exercised within fairly narrow limits, thus becoming practically ministerial. Similarly, section 3 in empowering the Secretary to determine the width and location of the strip connecting the Kilauea and Mauna Loa sections of the park gave him no power other than the power to decide on the boundaries best suited to the purposes of the strip. The sole intent of the provision was to enable the Secretary through his engineers and surveyors to choose from the extensive public domain lying between the two craters those lands best adapted to the building of a road which would have to negotiate within a comparatively short distance over difficult terrain a climb of approximately 9,000 feet. There was here, therefore, no discretion in the Secretary as to whether he might leave in the Territory any degree of control whatever over the strip.

As to grazing privileges, the act of August 1, 1916, creating the park, was silent; but the act of August 25, 1916 (39 Stat. 535), creating in the Department of the Interior under the direction of the Secretary the National Park Service, conferred on the Secretary power to grant grazing privileges in any national park except Yellowstone National Park. The Secretary therefore received power to grant grazing privileges in Hawaii National Park on the conditions and within the limitations prescribed in section 3, which was as follows:

Provided, however, That the Secretary of the Interior may, under such rules and regulations and on such terms as he may prescribe, grant the privilege to graze live stock within any national park, monument, or reservation herein referred to when in his judgment such use is not detrimental to the primary purpose for which such park, monument, or reservation was created, except that this provision shall not apply to the Yellowstone National Park.

The power herein conferred was a limited power, one simply to administer the issuance of grazing permits, with discretion and on terms impliedly beneficial to the Federal Government. It was to be

exercised by the Secretary through a designated administrative agency, the newly created National Park Service, and its director. Quite different and far larger would be a power to farm out to an agency undesignated by statute, exterior to both the National Park Service and the Department, for the benefit of that exterior agency, the whole and exclusive body of powers over grazing permits in any national park, whether in perpetuity or for a limited period only. Yet such would be the power involved in a grant of the right sought by the Territory. To invest the Secretary with such a power, other legislation by Congress would be required. In the absence of such legislation any attempt by the Secretary to exercise such a power would be *ultra vires* and of no effect. There has been no enactment conferring on him such a power. There was, therefore, no power in the Department of the Interior to grant to the Territory by any instrument or other means the perpetual grazing rights which it sought by the deed of March 30, 1927, and no effect can be given to the Assistant Secretary's approval of the reservation either as a reservation or as a mere request.

The procedure of "acceptance" by the Secretary of the Interior of certain properties within national parks, authorized by the act of June 5, 1920, cited above, relates to conveyances of private lands to the Federal Government. It is inapplicable to transactions concerning public lands owned by the United States. In the instant case, the will of Congress in regard to the third tract in the park was accomplished, in my opinion, on February 19, 1927, when the Assistant Secretary approved the survey and the blueprint of the lands to be taken for the road, thereby determining the width and location of the strip as section 3 directed him to do. Nothing further seems to have been requisite under either section 91 of the Organic Act or the act of August 1, 1916, to bring the lands of the strip under the exclusive dominion and control of the Federal Government and to make applicable thereto all statutes, rules, and regulations governing national parks.

In the relevant statutes, namely, the act creating the National Park Service and two acts relating solely to Hawaii National Park, *infra*, Congress has laid down no uncertain directives for the management of national parks in general and of Hawaii National Park in particular. The regulations formulated by the Secretary only implement the congressional will. The statutory provisions are as follows:

1. The act of August 1, 1916 (39 Stat. 432), creating the park, *requires* the Secretary's regulations to

Provide for *the preservation* from the injury of all timber * * * and natural curiosities or wonders within said park, *and their retention in their natural condition as nearly as possible.*

2. The act of April 19, 1930 (46 Stat. 227), after empowering the Secretary to make general rules for the care of the park, redirects him in terms (sec. 4) to make regulations

especially for the preservation from injury or spoilation of all timber, natural curiosities, or wonderful objects within said park;

and, particularizing, makes explicit provision that any person

who shall within said park willfully commit any damage, injury, or spoilation to or upon any * * * tree, wood, underwood * * * vegetables, plants, * * * natural curiosities or other matter or thing growing or being thereon or situated therein, shall be deemed guilty of a misdemeanor * * *.

3. The act of August 25, 1916 (39 Stat. 535), creating the National Park Service, by Sec. 3 empowers the Secretary *to cut timber*

in those cases where in his judgment the cutting of such timber is *required in order to control the attacks of insects or diseases or otherwise conserve the scenery or the natural or historic objects in any such park, monument or reservation.*

It also permits him to

provide in his discretion for the *destruction * * * of such plant life as may be detrimental* to the use of any of said parks, monuments, or reservations.

Finally, as previously stated herein, it authorizes him to permit grazing in parks, providing

That the Secretary of the Interior may, under such rules and regulations and on such terms as he may prescribe, grant *the privilege to graze livestock within any national park, monument or reservation herein referred to when in his judgment such use is not detrimental to the primary purpose for which such park, monument, or reservation was created*, except that this provision shall not apply to the Yellowstone National Park. [Italics throughout supplied.]

Together, these directives constitute a statutory administrative policy for Hawaii National Park, definite and coherent, and it is within the framework of this policy that Congress requires the Secretary to exercise such discretion as it confers upon him in these matters. Its cardinal purpose quite clearly is to preserve from change or destruction the natural condition of the park, viz, its scenery, its historic objects and the whole range of its natural features, from the general of timber to the particular of tree and even underwood and plant. Willful damage or injury to any growing thing is made a crime. The Secretary himself may neither cut down nor pull up except to conserve the park and check such ravages of nature as might hurt the whole. Grazing he may not permit unless it shall in no way tend to change or destroy the natural condition of the park. From the operation of these principles no part of any park is excepted nor is the Secretary authorized to alter them or to do other than apply them.

This synthesis makes immediately obvious that to fell trees, uproot shrubbery, eradicate plants and generally to clear any park lands of

their underwood in order to adapt them for grazing would violate every one of the prescribed principles. Each of these acts would by itself be a misdemeanor. Nor would systematized, large-scale commission of them for the object stated make them lawful, for that object itself would be unlawful. The sole purpose for which the statute allows tree-cutting and plant destruction is that of checking the spread of disease and other plagues or of otherwise conserving the whole natural life of the park, its historic objects and scenery. To this no other purpose may be added. *Expressio unius est exclusio alterius*. Finally, grazing such as to require clearing operations and thus some degree of change and destruction of the natural condition of any part of the park could not be other than "detrimental to the primary purpose for which the park was created" and for that reason of a character which the statute forbids the Secretary to permit. It follows therefore that the Secretary has *no* authority *not* to prohibit such clearing operations as were undertaken by the Hawaiian Agricultural Company and every authority to refuse to issue permits for such grazing as would demand adaptation of Hawaii park lands to the needs of cattle raising.

In summary, then, it appears that the territorial government labored under a misunderstanding as to its ownership of the park lands in question, possibly because of long undisturbed occupancy of them; that the absolute fee thereto has been continuously in the United States Government since August 12, 1898, the date of effective annexation of the Hawaiian Islands to the United States; that the Territory has at no time had any estate therein and that under the act of August 1, 1916, creating Hawaii National Park the Territory's privilege of possession, use and control thereof was effectively terminated on February 19, 1927, by the Assistant Secretary's approval of the blueprint and the survey of the strip.

Accordingly, for all of the above considerations I am of opinion, first, that the deed of March 30, 1927, was unnecessary, void and of no effect; second, that the reservation to the Territory of perpetual grazing rights on these park lands was equally void and ineffective as such; third, that power to grant such a right to the Territory lies in Congress alone and is not within the authority conferred upon the Secretary of the Interior by any existing legislation; fourth, that the Assistant Secretary's approval of the reservation, whether that be construed as a reservation or as a mere request, was *ultra vires* and inoperative; fifth, that General Lease 1920, issued by the territorial government in exercise of its presumed right, was void and ineffective both as a lease and as a grazing permit insofar as it related to the lands of the second tract, namely, those lying within the park; sixth, that the Hawaiian Agricultural Company acquired no rights on park lands thereunder; and seventh, that the Secretary

of the Interior is by statute specifically charged not to permit grazing of a character destructive of objects which Congress directs to be preserved.

Any adjustments necessitated by these conclusions should be made by the administrative departments concerned.

Approved: February 21, 1938.

OSCAR L. CHAPMAN,
Assistant Secretary.

A. L. McINTYRE

Decided March 14, 1938

SURVEY—BOUNDARIES—MEANDER LINES.

The official plat of the survey of the Rancho La Bolsa Chica, made in 1858, approved January 14, 1861, upon which patent issued May 7, 1874, indicated that the actual shore of the Pacific Ocean was a boundary of the rancho, and the call in the grant was to the beach. Any lands lying between the meander line as delineated on the official plat and the actual shore must be considered as part of the land confirmed by the grant, inasmuch as the call was to the tidewater as a boundary and the area surveyed together with that omitted was less than the confirmee was entitled to under the grant.

The cases in the Department and in the courts are numerous where title to land meandered along a nonnavigable body of water has been held to extend to such waters.

SWAMP LANDS—STATE'S FAILURE TO CLAIM—APPLICATION FOR SURVEY.

If the natural object meandered is a marsh or swamp land, and the State has never claimed it as such under the swamp land grant, an applicant for survey of such land, who claims no rights under the State, is not in a position to ask for a survey on the ground the land is swamp land.

PRACTICE—PARTIES—NOTICE OF APPEAL.

Where a protest against an application was not allowed, no hearing directed on a controverted issue of fact, and the application was not denied upon any disputed question of fact but solely upon the applicant's showings, the protestant is not a party within the meaning of the rules of practice which require that notice of appeal should be served on the opposite party.

PUBLIC LANDS—STIPULATIONS BETWEEN PARTIES—ESTOPPEL.

Stipulation between parties as to what land is tideland and what land is public land does not bind the United States, and an applicant for survey of a tract as public land, who has stipulated that the land is tideland, is not estopped by the stipulation from showing that the land is public land.

CHAPMAN, Assistant Secretary:

A. L. McIntyre has appealed from a decision of the Commissioner of the General Land Office rendered July 10, 1936, which denied his application for the survey of certain lands in Secs. 19, 20, 29, and 30, T. 5 S., R. 11 W., S. B. M.

The diagram accompanying the application depicts an area of 74 acres situated between the meanders of what is termed an inlet on the official plat of the survey of the Rancho La Bolsa Chica, approved January 14, 1861, upon which patent issued May 7, 1874. The plat of the official survey made in 1858 indicates that the actual shore of an inlet of the Pacific Ocean is the boundary of the ranch so far as it affects the area in question. The area confirmed as Rancho La Bolsa Chica is described in the patent as follows:

* * * The lands of which confirmation hereby made are those known as La Bolsa Chica situate in Los Angeles County, to the extent of two square leagues and no more, within the boundaries described in the grant in this case, and in the map referred to in said grant, a certified copy of which map is also filed in this case to wit: On the East by the Tulares and Cienegas lying toward the low hills; On the West by other Tulares and Cienegas; On the North by some willow trees (sauces); and on the South by the beach (playa) provided that should the quantity of land within said boundaries be less than two square leagues, then confirmation is hereby made of such less quantity. * * *

The area within the exterior lines of the rancho is stated as containing 8,107.46 acres, which appears to be 770.54 acres less than two square leagues allowable under the confirmatory decree. The applicant alleged that the land for which survey was sought was above the ordinary high water mark of the ocean and that he believed from its appearance that such was its condition in 1850. Affidavits from three persons in support of his application alleged, in substance, that part was low bottom and part high tablelands, and that the elevation of the land varies from 10 to 60 feet; that bottom land was alkaline, the high land fertile containing certain plants and weeds and large eucalyptus trees 30 years or more old.

Gibson, Dunn, and Crutcher, in behalf of the Lomita Land and Water Company and the Bolsa Land Company, filed protest against the allowance of the application claiming protestants were owners of the land under a tideland patent issued by California in 1903 and as subsequent grantees under the patent to the rancho. They filed certain maps and diagrams, among them, Exhibit A, which purports to show the location of the boundaries of the rancho and the boundaries of land in the tideland patent within the meander lines of the rancho. Two parcels of land, one elongated and another more compact, between the meanders of the rancho and the boundaries of the tideland patent containing respectively about 19 and 7 acres are colored blue, the lands in the tideland patent so far as affected by the application, containing about 47 acres, are colored pink and orange, that east of a dike being colored pink and west of it orange. The applicant does not dispute but impliedly has admitted that the areas so colored are the areas he asserts to be

public lands and that the boundaries shown of the rancho and tideland patent are correct. Protestants filed a contour map (Exhibit B) prepared by engineers which shows elevations above tidewater in the areas colored blue, and admit as the contour map shows that in the blue area the land between the shore line and the meander line rises in the northerly parcel to 36 feet, and in the southerly parcel to 47 feet; they however contend that the pink and orange areas are tidelands.

Protestants also filed a stipulation between the former attorney for petitioner and attorneys for protestant that the pink and orange area on said Exhibit A is within the ordinary ebb and flow of the tides.

Mentioning the familiar principles that the beds of navigable waters, including tidelands, vest in a State upon its admission; that the official plat and field notes become a part of the grant or deed by which the lands are conveyed; that bodies of water are meandered for the purpose of ascertaining the quantities of land in the fractional sections and not as boundary lines; that the official plat represents the meander line as the border line of a meandered body of water and shows to a demonstration that the actual shore line and not the meander line is the boundary of fractional lots; that the disposal of land by the United States bounded by a meandered body of water under ordinary conditions conveys to the patentee title to the actual shore line; and the decision in *United States v. Lane*, 260 U. S. 662, upholding an old survey as reasonably accurate which had omitted 97.64 acres along the shore of a lake, the Commissioner found and held that—

This office is of the opinion that the area involved in the application for survey submitted by A. L. McIntyre is not of sufficient size and extent to constitute gross error or fraud in the original survey. Such being the case, the area is not considered unsurveyed public land to which title has not passed from the Government. Furthermore, since the south boundary of Rancho La Bolsa Chica is described as "and on the South by the beach (playa)," and as the total area of the private land grant is less than "two square leagues," it is apparent, even if the survey of the south boundary of the rancho is erroneous to the extent to constitute gross error or fraud within the meaning of the law, that any lands lying between the position for the record south boundary and the actual shore would have to be considered as part of the area confirmed, at least up to the maximum two square leagues.

Applicant filed what he termed a protest against the Commissioner's order, which the Commissioner treated as an appeal. This so-called protest is accompanied by a number of documents and references to the Department's action in other cases in which surveys were ordered which are made the foundation for objections to the Commissioner's conclusions, and an affidavit by applicant in which he repudiates the stipulation made by his attorney that the land marked

pink on Exhibit A was affected by the tides of the ocean, on the ground of lack of authority to make the stipulation, and for the further reason that applicant was a witness to the opening of the sluice gate in the bulkhead in the dike between the pink and orange area, and the water spread only 40 feet from the gate on the pink area (an operation that the attorney also witnessed before he made the stipulation).

Protestants have filed a motion to dismiss the appeal and motion to strike the supporting exhibits on the grounds that no service of notice of appeal was ever served on them and that specifications of error and argument were not filed in time as required by the Rules of Practice, which require service on the opposite party of notice of appeal and copies of the specifications of error and briefs in support thereof. It seems, however, that protestants were not *parties* in the sense used in the Rules of Practice. Their protest was not allowed, and no hearing was directed as to any controverted question of fact. The Commissioner, though he referred to and was perhaps aided in his decision by the reference in the protest to matters of record of which judicial notice could be taken and by presentation of authorities, did not deny the application on any disputed question of fact, but solely on the applicant's showings and facts admitted by him and the law he considered applicable to the case. The motions are therefore overruled.

As to the stipulation, whatever binding force it has between the parties it is clear it does not bind the United States, and it therefore cannot be considered conclusive as to whether the land is public land of the United States or tidelands that passed to the State upon its admission. The applicant therefore is not estopped by the stipulation from showing as a fact that the pink area is upland and not tideland. It seems he has admitted that the orange area is tideland.

The principal contentions of the applicant seem to be that the line represented as a meander line on the official plat is a boundary and not a meander line for the reason that (1) there was no body of water to meander, (2) that the water was not navigable, and (3) that the land within the meander lines was marshland or swamp, and if the latter the State never selected it and therefore its rights thereto are lost.

The applicants contend that the facts in the instant case bring it within the rule in *Lee Wilson & Co. v. United States*, 245 U. S. 24, and those there cited and followed, that:

* * * 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 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 and cause it to be lawfully surveyed and to lawfully dispose of it.

As to this contention, it is sufficient to say that the official plat of survey of the rancho purports to show that an inlet of the Pacific Ocean was meandered; that the applicant admits that the orange area is covered by tidewaters. There was, therefore, a body of water to meander on part of the land in question, although the meanders may not have conformed approximately to the actual border of the tideland.

As to the question whether the water was navigable, the applicant contends that in the case of *Bolsa Land Company v. Burdick*, 151 Cal. 254, 90 Pac. 532, in which one of the protestants was a party, the Supreme Court of the State held that the waters on the very land in question were not navigable. As the Department understands the opinion, it held merely that an irrigation ditch by which defendants sought access to the waters on the land for the purpose of hunting and fishing was not navigable water. In this connection, it may be stated that the court in its recital of facts said:

* * * plaintiffs showed that the lands were part of a rancho to which patent had been issued by the United States. The plaintiffs' (Bolsa Land Company) title was derived by mesne conveyances through the holders of the patented title. The lands comprised many hundreds of acres of uplands as well as marshlands, with an ocean frontage. An estuary from the ocean projected into these lands, the waters in which estuary, with its tributary sloughs, were affected by the flow of the tides. To the lands covered by all these waters, the plaintiffs had acquired title by patent from the State of California under an act to provide for the management and sale of lands belonging to the State.

But assuming that the waters on the land in controversy were not navigable, at the time of survey, there is no merit in the argument that the meanders of such water is a boundary for the reason that the waters are not tidal waters or that the lands and water within the meanders are held under tideland patent. The cases in courts and the Department are numerous where title to lands meandered along a nonnavigable body of water have been held to extend to the shores of such waters. Such was the case in *French Glenn Live Stock Co. v. Marshall* (28 L. D. 444); *Hardin v. Jordan*, 140 U. S. 371; *Mitchell v. Smale*, 140 U. S. 406, and many others unnecessary to cite.

Assuming further that the natural object meandered was a marsh or swamp, so as to make applicable the rule in *Niles v. Cedar Point Club*, 175 U. S. 300, and *French Glenn Live Stock Co. v. Springer*, 185 U. S. 47, wherein the meander line was held to be a boundary, then in such a case it would appear that the land was of the character that passed to the State under the swamp land grants (Revised Statutes, sections 2479 to 2490, inclusive), and would be subject to

application for survey and selection by the State. The failure of the State to make the selection within the time named in the grant does not defeat its title to lands of the character contemplated by said grant (*Marquam v. Suomela*, 21 L. D. 279), except where the land has been returned as agricultural and there has intervened a bona fide adverse claim (*State of Minnesota v. Craig*, 23 L. D. 305). The State has never claimed the land as swamp land, and the applicant who claims no rights under the State is not in a position to ask for a survey on the ground that the land is swamp.

The applicant has presented nothing that persuades the Department that the meander line was anything else than what it appears to be, a meander line of an estuary of the Pacific Ocean. Following the reasoning in *United States v. Lane*, 260 U. S. 662, quoted by the Commissioner, the omission of about 26 acres depicted in blue on Exhibit A does not disclose any gross error that would justify any correction of the survey made 80 years ago. Furthermore, if it appeared that there was such a gross error, the Department is inclined to the view that any lands lying between the meander line as delineated on the official plat and the actual shore must be considered as part of the land confirmed by the grant, inasmuch as (1) the south boundary of the rancho is described as "and on the South by the beach (playa)," that is, the call is to the tidewater as a boundary, and (2) the area surveyed together with that claimed by the applicant as unsurveyed is less than the "two square leagues," the maximum area to which confirmee was entitled under the terms of the grant.

For the reasons above stated, the decision of the Commissioner is affirmed.

Affirmed.

JAMES C. FORSLING

Decided March 16, 1938

BOARD OF EQUITABLE ADJUDICATION—JURISDICTION—STATUTORY CONSTRUCTION.

The Revised Statutes, sections 2450, 2451, 2456, and 2457, authorize the Board of Equitable Adjudication to apply the principles of equity in the decision of cases involving suspended preemption claims and suspended entries ready to pass to patent except for curable defects arising from applicable ignorance, accident, or mistake. *Held*, That the board has no jurisdiction over a mere rejected application to make entry.

PUBLIC LANDS—NOTICE OF STATUS—MAINTENANCE OF PUBLIC RECORDS—DUTY OF APPLICANTS.

Government maintenance in every land district of public records of material facts as to the status of public lands constitutes notice of their content. *Held*, That one buying a relinquishment of a stock-raising homestead entry

is chargeable with knowledge of the status of the lands and of the law as to relinquishment and is not entitled to equitable consideration of a rejected application on the plea of ignorance and lack of notice.

STOCK-RAISING HOMESTEAD ENTRY—RELINQUISHMENT—CANCELLATION OF DESIGNATION BEFORE RELINQUISHMENT—EFFECTS OF FILING.

A purchase of a relinquishment of public lands is a valid contract, conferring rights against the vendor but none against the United States, a relinquishment not being a quitclaim but a release running to the Government and to it surrendering all rights in the lands.

The filing of a relinquishment of a homestead entry operates *eo instanti* not only to restore its lands to the Government reservoir of public lands but to affect them with whatever burdens or status would previously have attached to them save for the life of the entry. *Held*, 1. That when the designation of lands including those of a stock-raising homestead entry is canceled during the life of said entry, the lands thereof assume the status of undesignated lands immediately upon their restoration to the Government through the filing of a relinquishment and are again subject to stock-raising homestead entry only in the event of redesignation. 2. That a purchaser of a relinquishment of such lands has no preferred status as against the Government but only that of an ordinary applicant.

STOCK-RAISING HOMESTEAD—APPLICATION—DESIGNATION—FUTURE AND EXISTING RIGHTS—WITHDRAWALS—ATTACHMENT.

The rights initiated by a stock-raising homestead application for undesignated lands, being only *future* rights contingent in part upon designation, are not *present* rights within the meaning of the term "existing valid rights" in the saving clause of the withdrawal order of November 26, 1934, and cannot prevent such withdrawal from attaching to the lands sought if they be undesignated at the date of the order.

CHAPMAN, *Assistant Secretary*:

On July 23, 1934, James C. Forsling, Box 876, Caspar, Wyoming, filed original stock-raising homestead application, Cheyenne 057717, for 200 acres as follows: N $\frac{1}{2}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 21; W $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 22, T. 32 N., R. 79 W., 6th P. M. He also filed a so-called "Affidavit for Designation of Homestead" stating that the described lands were "such lands as were intended by the Act of Congress of December 20th [sic], 1916, as subject to entry under the Stock Raising Law." Although this affidavit did not state that the lands were undesignated or pray that they be designated, and although it was incompletely made on an unusual printed form relating to an additional rather than an original homestead, it seems to have been regarded by appellant and by the General Land Office as a petition for designation of these lands as stock-raising. It would also appear that appellant paid fees to the amount of \$17.50.

Simultaneously, on July 23, 1934, having previously purchased on a date not stated from one Charles Bradley for the alleged sum of \$400, Bradley's relinquishment of these same lands under stock-raising homestead entry No. 051675 and improvements thereof, Forsling filed

said relinquishment, dated June 27, 1934, to the United States of all Bradley's right, title, and interest in said entry, applied for and allowed on August 4, 1930, and seemingly maintained until the sale or the filing of the relinquishment.

On October 3, 1934, the Geological Survey reported to the Commissioner of the General Land Office with reference to Forsling's application:

The records of the Geological Survey indicate that the value of the listed land for grazing purposes is inadequate to provide a livelihood for a family on a 640-acre homestead unit. Favorable action in the case therefore cannot be properly recommended.

The lands were therefore not designated.

On November 26, 1934, the President by Executive order temporarily withdrew from all forms of disposition under the public land laws all public lands, vacant, unappropriated, and unreserved, in Wyoming and certain other States, *subject to existing valid rights*. On July 25, 1935, the Commissioner of the General Land Office by Circular 1362 instructed all land office registers to reject subject to appeal all suspended stock-raising homestead applications relating to lands which were undesignated on the date of the withdrawal order. On August 2, 1935, in pursuance of this order the Cheyenne register rejected Forsling's application, the lands having been undesignated. On appeal, this rejection was affirmed by the Assistant Commissioner of the General Land Office on April 18, 1936. Forsling has appealed from this decision and petitioned that his case be laid before the Board of Equitable Adjudication.

The following supplementary facts are to be noted: 1. These lands had previously been designated as stock-raising by Orders 608 and 635, effective respectively on September 8, 1926, and April 21, 1927. 2. Later, however, on May 10, 1934, the Geological Survey wrote the Secretary of the Interior that these and certain other lands in Wyoming appeared to have been erroneously designated as stock-raising, being of such poor character that a living for a family could not be provided by stock-raising from 640 acres, and recommended that the designation orders be canceled. 3. Accordingly, Stock-raising Homestead Cancellation No. 126 covering these lands was approved May 14, 1934, and promulgated on May 29, 1934, specifying, however, that this cancellation should not affect any *entry* for the lands covered which might have been allowed prior to notation of this order upon the records of the local land office so long as such entry was lawfully maintained. 4. This order was received by the Cheyenne register on June 1, 1934, and was noted on the land office books effective as of June 20, 1934. 5. None of the lands in question is in any grazing district created under the Taylor Grazing Act. 6. These same lands

had on December 3, 1909, been designated under the enlarged homestead act but this designation also was canceled by Order No. 198 on May 14, 1934. 7. There is no allegation of settlement or improvement of the lands by appellant. 8. There is no adverse claim.

On appeal Forsling by his attorney says:

We do not contend that a literal application of the law would entitle the appellant to any right to this land, but we do contend that under the principles of equity this appellant is entitled to an order allowing his homestead entry and reversing the decision of the Honorable Register and Honorable Commissioner;

and he petitions that the case be referred to the Board of Equitable Adjudication for review.

In support of this plea he alleges that his purchase of Bradley's relinquishment was made in complete good faith on the assumption that his application, being exactly similar to Bradley's, was certain of allowance and his investment in the improvements secure. But now, he states, the improvements can be salvaged only at prohibitive cost and he, a laborer, will suffer a loss of their purchase price of \$400 if the rejection stand. The point that his purchase and his application were made prior to the withdrawal order he emphasizes as a fact that should entitle him to equitable consideration and to an opportunity to obtain an order designating the lands and he observes that withdrawal of them will serve no useful purpose since they are almost completely surrounded by tracts otherwise taken up. Throughout, as a principal reason for equitable consideration he stresses his ignorance of the law, rulings and orders applicable to these lands and his lack of notice of any change in their status.

Appellant's request for reference of this case to the Board of Equitable Adjudication cannot be granted, the board having jurisdiction only over certain classes of *entries* and preemption claims and none over mere *applications* to make entry. The governing law is found in Revised Statutes, sections 2450-2457, as amended by the act of September 20, 1922 (42 Stat. 857). Section 2450 is as follows:

That the Commissioner of the General Land Office is authorized to decide upon principles of equity and justice, as recognized in courts of equity, and in accordance with regulations to be approved by the Secretary of the Interior, consistently with such principles, all cases of suspended *entries* of public lands and of suspended preemption land claims, and to adjudge in what cases patents shall issue upon the same. [Italics supplied.]

Section 2457 provides that sections 2450-2456, inclusive, shall apply to cases of suspended *entries* * * *; where the law has been substantially complied with, and the error or informality arose from ignorance, accident, or mistake which is satisfactorily explained; and where the rights of no other claimant or pre-emptor are prejudiced, or where there is no adverse claim. [Italics supplied.]

Instructions as to the board were issued by the Secretary on October 17, 1922, and September 29, 1927 (Circulars and Regulations of the General Land Office, pp. 311, 312; also in 49 L. D. 323 and 52 L. D. 207).

The purpose of this legislation, as explained in the case of *Hawley v. Diller*, 178 U. S. 476, 494, was to supplement the general legal jurisdiction of the land officers with an equitable jurisdiction authorizing them to apply the principles of equity to sustain irregular *entries* which under existing land laws they would be compelled to reject. Where the irregularity of the entry lay in errors or informalities arising from ignorance, accident or mistake which could be satisfactorily explained and thus be excused by a court of equity, subject to the concomitancy of the other specified factors, the Board of Equitable Adjudication was to have the same power as the court to overlook the error and confirm the entry. As it was phrased by Acting Secretary of the Interior Chandler with the approval of the Attorney General in the cases of *James H. Taylor* (9 L. D. 230, 231) and *Elizabeth Richter* (25 L. D. 1, 2) the province of the Board of Equitable Adjudication "is confined to *entries* so far complete in themselves, that, when the defects on which they are submitted have been cured by its action, they pass at once to patent." [Italics supplied.] See also *Ben McLendon* (On Petition) (49 L. D. 561).

The foregoing interpretations of the functions and jurisdiction of the Board of Equitable Adjudication make clear that petitioner's case, involving as it does neither an entry, ready except for a curable irregularity to pass to patent, nor a preemption claim but a mere application to make entry, which has been actually rejected, does not fall within the purview of the controlling act or the jurisdiction of the board. Accordingly, the *Larsen* case (3 L. D. 190) relied on by appellant, is not in point, concerned as it was with an entry and held to fall within the statute. Accordingly, too, it would be superfluous to discuss in relation to these provisions petitioner's plea of ignorance of the law, orders and rules as to the lands sought. It is enough to remark that the ignorance which he alleges is wholly irrelevant to the sections just examined.

Nor is that ignorance a sound plea otherwise. In the circumstances of this case it neither helps appellant in equity nor excuses him at law. One failing to inspect public records concerning lands, private or public, in which he is financially interested is negligent at his peril. He is chargeable with knowledge of the law affecting the land sought and of the record of its status as well, and must suffer the consequences of any lack of diligence in regard thereto. The United States Government is at great pains to put at the disposal of the public all material facts as to the public lands and not only in

the General Land Office at Washington but in every land district of the country maintains a local land office and an elaborate registry system of township plats, entry and tract books posted to date for the express purpose of making available and conveniently accessible to all comers the essential facts, not merely past but current, concerning every tract in the district. Such maintenance of such records constitutes notice of their content and charges the public therewith. In this case petitioner's plight is directly traceable to his omission to concern himself with the legal effects of relinquishment and with the status of the desired tract at the time of the filing of the relinquishment. He had no right to act upon mere assumptions but was under a duty to make inquiry of the designated authority by mail, in person or by agent. *Krueger v. United States*, 246 U. S. 69, 78, and cases cited, including *Brush v. Ware*, 15 Pet. 93, 110, 111. See Revised Statutes, sec. 2295, U. S. C., Title 43, sec. 163; Circulars and Regulations of the General Land Office, No. 616 pp. 48-123, sec. 60, p. 63 (46 L. D. 513); No. 1197, pp. 1139, 1140; No. 915, p. 1281 (50 L. D. 299); No. 375, p. 1277.

It is well settled law that while a sale of improvements and of relinquishment of an entry is a valid contract as between the parties and conveys valuable rights to the vendee, it gives him no rights against the United States. A relinquishment is not in effect a quitclaim from vendor to vendee, as is sometimes contended, but is a release running to the United States, of no effect while withheld in private possession but of instant effect at the moment of filing in the local land office, operating at once to release the land from the entry, to restore it to the Government's reservoir of vacant, unappropriated public lands from which it had been drawn by the entry and to open it to settlement and entry by the next qualified applicant without further action on the part of the Commissioner of the General Land Office. *Keane v. Brygger*, 160 U. S. 276; *Fain v. United States*, 209 Fed. Rep. 525; *St. Paul, Minneapolis and Manitoba Railway Co. v. Donohue*, 210 U. S. 21, 40; *Wilson v. Holmes* (38 L. D. 475, 479); *Whitford v. Kenton* (3 L. D. 343); Circular No. 1264, March 3, 1932 (54 L. D. 127, 131); act of May 14, 1880, sec. 1 (21 Stat. 140) as amended by act of March 3, 1891, c. 561, sec. 4 (26 Stat. 1097) and by act of March 3, 1893, c. 208 (27 Stat. 593); U. S. C. A., Title 43, sec. 202.

But as a result of its reversion to the public domain the land immediately becomes subject to and affected by such relevant lawful burdens, claims, or rights arising during the entry as the life of the entry may have prevented from attaching and a change in its status thus occurring may operate to restrict, render contingent or wholly bar the right sought in an application made subsequently to the filing of a relinquishment or even simultaneously therewith. *Fosgate v.*

Bell (14 L. D. 439); *Neil v. Southward* (16 L. D. 386); *Musolf v. Cowgill* (49 L. D. 186); *Walter R. Freitag* (52 L. D. 199); Circular No. 1264, March 3, 1932 (54 L. D. 127, 131), sec. 28.

Forsling's filing of Bradley's relinquishment on July 23, 1934, accomplished the instant return of Bradley's lands to the public domain. Instantly, too, their status changed from designated to undesignated. For Cancellation Order No. 126, promulgated May 29, 1934, and on June 1 noted on the books of the Cheyenne land office to become effective on June 20, while not operative upon these lands during Bradley's maintenance of his entry, took instant effect upon them at the termination of the entry through the filing of the relinquishment. Such cancelation of a designation which had stood for seven years was, especially in view of the reasons that were assigned for it, a circumstance of a nature to put a prudent man upon notice not merely of the uncertainty but of the unlikelihood of the redesignation of any of the lands covered by the order and of the unwisdom of any investment therein in advance of action on a petition and an application.

With knowledge of these facts and their import Forsling was chargeable. In *Smith v. Woodford* (41 L. D. 606) the Department held "grossly negligent" the purchaser of a relinquishment who failed to inspect the records and discover an affidavit of contest which had been filed only 24 hours before his purchase. Forsling is even more culpable. For 25 days before the signing of the relinquishment and 52 days before its filing, the Cheyenne land office had put significant information at Forsling's disposal. By failing to consult the records and take account of the law, appellant failed to use due diligence in the protection of his interests. From such negligence no rights accrue.

In consequence, appellant has no status other than that of the ordinary applicant under the stock-raising homestead act. The opportunity to obtain an order of designation, which his appeal curiously requests, he has already had, and there is no occasion to renew it. The refusal of the Geological Survey to designate the lands practically ensured the ultimate rejection of the application whenever it should be reached for examination. Had its turn come during the seven weeks between the Survey's disapproval and November 26, 1934, it would doubtless have been rejected forthwith. The intervention of the withdrawal on that date accordingly provided not so much the cause of the rejection as an additional reason for it.

Nevertheless, despite the unfavorable action of the Geological Survey, had any immediate valid rights or equities in the land been initiated by the application prior to the withdrawal, the language of the order was such as to exempt such rights from the force of the

withdrawal. The stock-raising application however initiates no such rights. In public land law the stock-raising homestead act is in a class by itself, deliberately drawn so as to condition the accrual of every right against the Government upon the designation of the desired lands as stock-raising and to prevent any right or equity against the Government from arising prior thereto. By the terms of the act undesignated lands are not subject to entry. Hence no immediate or present rights in, on, or to the land arise from the mere filing of an application to enter, petition for designation and payment of fees. The application remains incomplete until it becomes susceptible of allowance, which in turn cannot be made until designation occur. Such rights as the act contemplates for the applicant are prospective merely, all contingent upon various events uncertain to occur, the first and most important being designation. *John F. Silver* (52 L. D. 499).

Accordingly, the lands in the instant case having been undesignated and thus not subject to entry on November 26, 1934, appellant did not have on that day any *existing* valid rights to be saved by the saving clause of the Executive order of withdrawal. The lands were therefore duly withdrawn and the decision of the Land Commissioner rejecting the application was correct.

Appellant makes no allegation of personal residence or other acts of settlement on these lands since July 23, 1934. Such acts, while not susceptible of ripening into a right to a *stock-raising homestead unit* of 640 acres, would, however, upon a change of application, sanctioned by the act, and upon compliance with conditions specified therein, have initiated an immediate right to 160 acres, which, being in existence on November 26, 1934, would have been saved from the force of the order. In the absence of such settlement appellant is not possessed of that right.

In consideration of the fact that the lands involved are not included in a grazing district, appellant's attention is directed to section 15 of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269), as amended by act of June 26, 1936 (49 Stat. 1976). Under this provision he might apply for a grazing lease of these lands, should he be of the opinion that a lease would be of advantage and give him the use of the improvements which he says he cannot salvage. It is to be noted that on November 9, 1934, an application was filed under said section 15 for a grazing lease of SW $\frac{1}{4}$ Sec. 22. That application, including W $\frac{1}{2}$ SW $\frac{1}{4}$ sought by appellant, is still pending. Should further applications be made for said land, adjudication would be made by the General Land Office.

The decision is affirmed.

Affirmed.

FELIX BRUNO

Decided March 16, 1938

GRAZING LANDS—LEASE APPLICATION—ELIMINATION OF LAND FROM GRAZING DISTRICT.

It is discretionary with the Secretary of the Interior whether or not to issue a grazing lease under section 15 of the Taylor Grazing Act, as amended.

Land included in a grazing district established prior to the filing of a grazing lease application and which cannot be eliminated from the grazing district without detriment, will not be leased.

CHAPMAN, Assistant Secretary:

By decision of August 5, 1936, the Commissioner of the General Land Office rejected the grazing lease application of Felix Bruno, filed on March 14, 1936, under section 15 of the Taylor Grazing Act, for about 1,500 acres in Secs. 18 and 19, T. 13 S., R. 14 E., Secs. 12, 13, 14, and 24, T. 13 S., R. 13 E., S. L. M., Utah, on the ground that all the land applied for was included in Utah Grazing District No. 7, established on May 7, 1935.

The applicant appealed, stating that his application was intended as a petition for elimination of the land from the grazing district; that said land consisted of small isolated tracts within his summer grazing unit; that there was no water on any part of said land, so that a grazing permit for another could not be used without trespass on his, the applicant's, set-up; that if it should be excluded from the grazing district he could erect drift fences and protect this sheep area from drift cattle; that any appropriated land included in the application could be eliminated from the application; that prior to filing his application he served notice upon all adjoining landowners, but there had been no response or objection; and that he therefore wished to have an investigation of the area made.

The appeal was referred to the Division of Grazing and in a letter dated January 15, 1938, the Director states:

A report by the regional grazier in Utah indicates that the elimination of this land from the grazing district would seriously interfere with its administration in that it would necessitate the cancelation of licenses issued to a number of stockmen who own property in the vicinity and are entitled to grazing privileges.

Accordingly, favorable action on the elimination cannot be properly recommended.

It is discretionary with the Secretary of the Interior whether he shall issue a grazing lease for public land. As the land in question is included in a grazing district which was established prior to the filing of the lease application and as said land cannot without detriment be eliminated from the grazing district the grazing lease application must be and is hereby rejected.

The decision appealed from is affirmed.

Affirmed.

IDA PURDY RICE ET AL.

Decided March 16, 1938

GRAZING LEASE—GROUNDS FOR APPEAL—FINAL DETERMINATION.

Where a grazing lease under section 15 of the Taylor Grazing Act, as amended, has been offered, after examination in the field and report, and has been accepted by the lease applicant, the Department may, upon appeal by the lease applicant from the rejection of the lease application in part by the Commissioner on account of lease applications of other qualified persons, execute the lease and declare the Commissioner's decision final, the determination apparently being as fair and just as possible.

CHAPMAN, *Assistant Secretary*:

By decision of November 16, 1937, the Commissioner of the General Land Office held for rejection in part the grazing lease application of Ida Purdy Rice and William B. Dickey and at the same time offered them a five-year lease for the E $\frac{1}{2}$ NE $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 7, NE $\frac{1}{4}$, E $\frac{1}{2}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ NW $\frac{1}{4}$, S $\frac{1}{2}$ S $\frac{1}{2}$ Sec. 8, T. 12 N., R. 76 W., 6th P. M., Wyoming. The grounds of rejection were that there were conflicting applications; that investigation in the field had been made; and that the persons making conflicting applications had preference rights under the Taylor Grazing Act, while these applicants had preference as to the lands above described.

The applicants accepted the offer of a lease for the land above described and a lease therefor has been completed, but they also appealed from the rejection of their application in part. Their attorney states that all the land applied for is necessary for them; that they are equitably and legally entitled to all; that to grant a lease to some other person for any part of the land applied for would be unjust and would work an irreparable injury to the applicants, causing them to expend unnecessary money in fencing to protect their rights against neighbors; and that the conflicting applicants have large holdings and do not need the land, while it is needed by these applicants for carrying on their ranch operations.

As hereinbefore stated, an investigation in the field was made. A special agent of the Division of Investigations made a report on the claims and rights of the conflicting applicants. The report and the records of the Land Department were carefully considered in connection with the conflicting applications, and as fair and just a determination as possible was reached.

The grounds of appeal are general and rather indefinite in character. There is no showing that any conflicting applicant was given notice of the appeal. It is not apparent that the applicants have not been justly and fairly treated.

The decision appealed from is affirmed. The rejection in part is declared final and the case on appeal is closed, the record being returned to the General Land Office.

Affirmed.

THE DESTRUCTION OF MONUMENT OF OFFICIAL MINERAL SURVEY

Opinion March 22, 1938

MINERAL SURVEY—DESTRUCTION OF MONUMENTS—FEDERAL PENAL CODE.

Willful destruction of monuments and corners of an official mineral survey duly authorized under the mining laws and mineral regulations is within the purview of Section 57 of the Federal Penal Code, section 111, title 18, U. S. C.

KIRGIS, Acting Solicitor:

The Director of Investigations has transmitted a copy of a letter from Gertrude S. George, who complains of the destruction of survey corners and monuments, established by a United States mineral surveyor in connection with a completed mineral survey, No. 6102, of six mining locations in Kern County, California, executed preparatory to application for patent to the lands involved, and who asks protection from such depredations.

The Director requests my opinion as to whether Section 57 of the Federal Penal Code (section 111, title 18, U. S. C.) applies to the destruction of such corners.

Section 57 reads as follows:

Whoever shall willfully destroy, deface, change, or remove to another place any section corner, quarter-section corner, or meander post, on any Government line of survey, or shall willfully cut down any witness tree or any tree blazed to mark the line of a Government survey or shall willfully deface, change, or remove any monument, or bench mark of any Government survey, shall be fined not more than two hundred and fifty dollars, or imprisoned not more than six months, or both.

It seems that the question to be determined is whether the willful destruction of the monuments established by a duly authorized deputy mineral surveyor in the execution of an official mineral survey of mining claims is within the purview of that part of the statute quoted which reads, "or shall willfully deface, change, or remove any monument or bench mark of any Government survey," or to put it more tersely, is an official mineral survey of mining claims a Government survey within the meaning of this act.

Under the provisions of section 39, title 30, U. S. C., the United States supervisor of surveys "may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims"; the applicant for survey must bear the expense of the survey, and he is at liberty to employ any United States deputy surveyor to make the survey; the Commissioner of the General Land Office has the power to fix the maximum charges for survey and publication of notices; the applicant is required to file a sworn statement of all charges and fees paid by him with the local office for transmission to the Commissioner. The sur-

veyors act instead of the supervisor of surveys and in that sense they are his deputies; they are required to take an oath and to execute a bond to the United States as are many public officers. *Waskey v. Hammer*, 223 U. S. 85. In this case the Court said:

The work which they do is the work of the Government, and the surveys which they make are its surveys. The right performance of their duties is of real concern, not merely to those at whose solicitation they act, but also to the owners of adjacent and conflicting claims and to the Government (Page 92).

The applicably pertinent part of section 29, title 30, U. S. C., provides that:

Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States supervisor of surveys, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat, previous to the filing of the application for a patent, * * *.

By section 2, title 43, U. S. C., full jurisdiction over the survey of public lands of the United States is vested in the Commissioner of the General Land Office, subject to the direction of the Secretary of the Interior.

In *United States v. Fickett*, 205 Fed. 134, the question was whether the defendant, who was charged in an indictment with preventing by force and threats the survey of six unpatented mining claims by a deputy mineral surveyor acting in conformity with the instructions of the Commissioner of the General Land Office, was amenable to prosecution and punishment under section 112, title 18, U. S. C., which reads:

Whoever in any manner, by threats or force, shall interrupt, hinder, or prevent the surveying of the public lands, or of any private land claim which has been or may be confirmed by the United States, by the persons authorized to survey the same, in conformity with the instructions of the Commissioner of the General Land Office, shall be fined not more than \$3,000 and imprisoned not more than three years.

It was contended for the defendant that the land being appropriated under the mining laws and thus reserved from sale was not public land within the meaning of the act, but the Court said that the real question was, were the lands so far public lands of the United States, though claimed by a private corporation, that the Commissioner of the General Land Office may continue to exercise over them power and duties vested in him by Congress. The Court said:

Section 2412 of the Revised Statutes (section 112, title 18, U. S. C.); under which the indictment was filed, is but one of the safeguards which Congress has enacted for the purpose of enabling the Commissioner of the General Land Office to more effectually carry out and perform the powers, authorities, and duties vested in him relating to the public lands of the United States, one of which is the power, authority, and duty to enter upon the public lands for the purpose of making survey thereof. This power, authority, and duty is in no respect restricted or limited by the fact that the land upon which the survey is to be made has been located and claimed under the laws of the United States applicable to such locations or claims.

In view of the provisions of the statutes and expression of the courts noticed above, I entertain no doubt that the willful destruction of monuments and corners of an official mineral survey duly authorized under the mining laws and mineral regulations is within the purview of Section 57 of the Penal Code, and that any person guilty of such acts is subject to prosecution and punishment under its provisions.

Approved: March 22, 1938.

OSCAR L. CHAPMAN,
Assistant Secretary.

RUTH E. McCORMICK

Decided March 25, 1938

OIL AND GAS LEASE APPLICATION—EVIDENCE OF OIL AND GAS DEPOSITS.

Under section 17 of the Mineral Leasing Act, as amended by the act of August 21, 1935, the Secretary of the Interior has the authority to reject applications for oil and gas leases of lands which cannot reasonably be regarded as having any value for oil or gas.

CHAPMAN, Assistant Secretary:

By decision of February 25, 1937, the Commissioner of the General Land Office rejected the oil and gas lease application of Ruth E. McCormick, filed June 5, 1935, for the NE $\frac{1}{4}$ Sec. 10, T. 10 N., R. 5 W., S. B. M., California, on the ground that the Geological Survey had on October 22, 1936, reported that available evidence indicated that none of the land could reasonably be considered valuable for oil or gas.

The applicant appealed and submitted in connection with her appeal the report of a geologist. The entire record was referred to the Geological Survey. On February 10, 1938, the Acting Director made a report as follows:

The Geological Survey has considered the showing filed by the oil and gas applicant, together with the evidence at hand, and finds no geologic basis for modification or reversal of its report of October 22, 1936, to the Commissioner, that none of the land applied for may reasonably be considered as valuable for oil and gas.

Available evidence shows that the geology of the area under consideration involves a basement complex of granite, gneiss, schist, crystalline limestone and other metamorphic rocks overlain unconformably by a considerable thickness of coarse Tertiary sediments of lake or land origin alternating with lava flows and tuffs, succeeded in places by Quaternary basalt flows, and in greater part buried beneath varying thicknesses of recent, flat-lying, unconsolidated sands, gravels and clays constituting the desert floor and the surface rocks of the land applied for and adjacent tracts. Organic sediments from which oil or gas might be derived are essentially absent in this succession and structural conditions favorable to oil and gas accumulation therein are likewise wanting. As the geologic conditions are wholly adverse to oil or gas occurrence expenditures of time and capital in drilling therefor on the land listed are unwarranted.

Tests heretofore drilled to conclusive depths in the vicinity of this land corroborate fully the conclusion expressed above regardless of the fact that unconfirmed rumors of oil discovery therein circulated widely whenever funds for additional drilling were needed.

In section 17 of the amendatory act of August 21, 1935 (49 Stat. 674), it is provided that the Secretary of the Interior may lease lands which are known or believed to contain oil or gas deposits. If lands are known to contain such deposits they are leased by competitive bidding to the highest responsible qualified bidder. If the lands are not within any known geologic structure of a producing oil or gas field, they may be leased to the first qualified applicant if they are believed to contain oil or gas deposits.

The Department has construed the law so that prospecting leases will not be issued for lands which cannot reasonably be regarded as having any value for oil or gas. In the present case it is clear that the land involved has no value whatever, actual or prospective, for oil or gas.

The appellant alleged that a well was being drilled on the NW $\frac{1}{4}$ Sec. 11, T. 10 N., R. 5 W., by the Equitable Petroleum Company; that good showings had been encountered; that said well would probably be completed within two months; and that she wished at an early date to file with the Department the result of such drilling.

The appeal was filed April 6, 1937, but no information has been received in connection with this case regarding the above-mentioned well. And manifestly the Geological Survey has had no information of any successful drilling.

The decision appealed from is affirmed.

Affirmed.

ROBERT FISK LYMAN

Decided March 28, 1938.

STOCK-RAISING HOMESTEAD ACT—CONSTRUCTION—LEGISLATIVE HISTORY—RIGHTS AND EQUITIES—CONTINGENCY—WARNING.

Both the terms of the stock-raising homestead act and its legislative history manifest the intent of the Congress to prevent accrual of any present right or equity against the Government before the happening of the specified contingency of designation and to warn applicants against acts of settlement in advance thereof.

STOCK-RAISING HOMESTEAD—APPLICATION—WHEN COMPLETE—RIGHTS INITIATED.

A stock-raising homestead application to enter undesignated lands initiates in the applicant no present rights against the Government but only a prospect of future rights of uncertain existence and remains incomplete until susceptible of allowance.

STOCK-RAISING HOMESTEAD LAW—UNDESIGNATED LANDS—ACTS OF SETTLEMENT—RIGHTS INITIATED—ADDITIONAL HOMESTEAD APPLICANT.

Under section 2, of the act of Dec. 29, 1916 (39 Stat. 862), as amended, the stock-raising homestead act, acts of settlement performed on lands undesignated as stock raising do not initiate in anyone any right to a stock-raising homestead and confer no homestead rights of any sort whatever upon an entryman seeking *additional* stock-raising homestead entry. *Held*, That where an entryman desiring additional stock-raising homestead entry brings his contest of an enlarged homestead entry to successful termination on November 23, 1934, three days before the issuance of the withdrawal order of November 26, 1934, he acquires no rights of any sort from acts of settlement performed on said lands prior to November 23, 1934, the lands not then having been open to entry or settlement; and no rights from those acts performed between November 23 and November 26, 1934, when the lands were open to entry or settlement, first, because as one already a stock-raising homestead entryman of 320 acres he is not qualified to make either ordinary or enlarged homestead entry, and second, because the lands were not designated as stock raising and the statute prohibits settlement on undesignated lands from initiating rights to a stock-raising homestead.

CANCELLATION OF ENTRY—RESTORATION OF LANDS—WITHDRAWAL.

The lands of an enlarged homestead entry which is free of all claims are automatically restored by cancellation of the entry to the Government reservoir of "vacant, unreserved, and unappropriated public land" and as part thereof are affected by the withdrawal of November 26, 1934.

STOCK-RAISING HOMESTEAD—WITHDRAWAL—JURISDICTION TO DESIGNATE.

Lands withdrawn by competent authority from settlement or entry are not open to either. *Held*, That a stock-raising homestead application for such lands filed subsequently to the withdrawal order of November 26, 1934, issued in aid of the Taylor Grazing Act, may be rejected without action on the accompanying petition for designation.

CONTEST—RESULTANT RIGHTS—PROCEDURAL OF SUBSTANTIVE—THIRD PARTIES.

Successful contest of an entry confers upon the successful contestant as against the Government no substantive right to enter lands not subject to entry but only a procedural right of priority over third parties when lands become subject to entry.

TAYLOR GRAZING ACT—PUBLIC SALE OF PUBLIC LANDS—PROPRIETY—DISCRETION OF THE SECRETARY.

The right to apply for public sale of public lands as conferred by section 14 of the Taylor Grazing Act is not a right to such sale, the propriety thereof being discretionary with the Secretary of the Interior.

CHAPMAN, *Assistant Secretary*:

Robert Fisk Lyman of Spearfish, South Dakota, has appealed to the Secretary from the decision of the Assistant Commissioner affirming that of the register holding his application for additional stock-raising homestead entry for rejection as adversely affected by the Executive order of withdrawal of November 26, 1934.

On January 4, 1935, Lyman filed Billings 035399 "C" for S $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 7, NW $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 18, T. 1 N., R. 62 E., M. P. M., comprising 320 acres, and on February 14, 1935, petitioned for designation thereof, making the application in attempted exercise of a preference right earned through successful contest of the enlarged homestead entry of George M. Mahoney, canceled on November 23, 1934. On October 22, 1935, the register rejected the application under General Land Office instructions in Circular No. 1362 directing rejection of stock-raising homestead applications for lands which on November 26, 1934, the date of the withdrawal order, were not designated as stock raising; there not having been acquired under such applications any existing rights to such lands preventing the withdrawal order from attaching thereto, as provided by the saving clause thereof. This action was sustained by the Assistant Commissioner's decision of March 13, 1937, appeal from which is now under consideration.

Additional facts to be noted are that contest of the Mahoney entry was first initiated not by appellant but by his brother, Richard E. Lyman, although inferentially in appellant's interest, and that this was abated as defective under rules 8 and 10, with a consequent loss of ten months to appellant, later to have grave effect upon his interests.

Lyman's appeal by an agent alleges his long-standing intention to acquire these lands as soon as the cancelation of the entry of George M. Mahoney might be obtained, his occupancy and use of the lands almost continuously from October 1931 on and the expenditure of considerable sums as well as of much hard hand labor on the making of numerous permanent improvements on the lands of both his entry and his application. Despite indefiniteness as to the specific location of most of these improvements and the times when they were made, it would appear that, although not until November 23, 1934, the lands sought were released from the Mahoney entry, for a considerable period prior thereto appellant, apparently on the advice of his agent, acted in regard to the lands sought as if the Mahoney entry had actually been canceled and the lands thereof already designated and al-

lowed to appellant. These investments of labor and money made in the utmost good faith both before and since November 26, 1934, appellant avers, gave him rights and equities in the land of which no withdrawal order can in justice deprive him.

These assertions, unfortunately, fail to take account of long-standing applicable public land law, with knowledge of which appellant is chargeable. "Ignorance of the law excuses no man" may seem a hard rule but it is basic in the American legal system. Failure to inform oneself as to the law affecting one's interests and as to the legal consequences of acts and omissions is failure to use due diligence in the protection of one's interests. It is negligence, from which no rights accrue and misfortune frequently results, responsibility for which cannot be shifted. Of equal hardship at times is the rule that the acts and omissions of an agent acting within the scope of his authority become those of his principal. It is one of the tragedies of the law when a citizen of the good faith and industriousness here displayed comes to grief because of too great reliance upon one neither sufficiently informed as to the law nor sufficiently sensible of the necessity for full and prompt compliance with it.

Lyman's appeal does not set forth any new facts or point out any right or equity as against the Government existing in appellant on November 26, 1934, which could have exempted his application from the force of the withdrawal. Its argument, moreover, discloses numerous misconceptions of the stock-raising homestead act and of the legal relations between applicants for land and its owner, the Government, leading to wholly erroneous conclusions as to applicant's rights. In addition, the course pursued by appellant in occupying and improving the land at stake exemplifies the very conduct against which the Congress by certain very specific provisions of the law tried to put the homesteader on guard.

In public land law the stock-raising homestead act (act of Dec. 29, 1916, 31 Stat. 862) is *sui generis*, initiating in an applicant no immediate rights but only contingent rights of uncertain, future existence. Both the act itself and its legislative history show that in enacting it 21 years ago the Congress deliberately drew it so as to condition the accrual of every right against the owner, the Government, upon the designation of the desired lands as stock raising and to prevent any right or equity against the Government from arising prior thereto.

Sections 1 and 2 of the act both make clear that undesignated lands are not subject to entry. It being long-settled law that application to enter land not subject to entry at the date of application confers no rights on the applicant as against the Government, it follows that if lands are undesignated when application is made the mere filing

of an application with petition for designation and payment of fees does not bring into existence any immediate or present right to the land. The application remains incomplete until it becomes susceptible of allowance. That in turn cannot occur until the lands are made subject to entry through the act of designation. If this contingency of designation happen, then, and then alone, there springs into immediate existence in the applicant a valid present right in the lands applied for as distinguished from a merely prospective right of uncertain, future existence. *Hall v. Stone*, 1893 (16 L. D. 199); *John F. Silver* (52 L. D. 500, 501).

As for settlement, it is well-settled law that acts of settlement on lands not open to settlement confer on the settler no rights against the owner, the Government. As to this, section 2 specifically declares:

no right to occupy such lands shall be acquired by reason of such application *until* such lands have been *designated* as stock-raising lands. [Italics supplied.]

This provision is not a prohibition of residence on the lands or of improvement of them prior to designation but it is a specific warning that any such act of settlement prior to designation will be at the peril of the applicant and will not create as against the owner, the Government, any right capable of maturing into a stock-raising homestead.

By all of these restrictions the Congress sought to protect the applicant against himself and the Government against the applicant. It wished *the law itself* both to advise prospective homesteaders against advance outlay of time and money on lands which might never be designated and to protect the Congress against a multiplicity of claims for relief by homesteaders hoping for designation and taking a gambler's chance on it only ultimately to lose through non-designation their entire premature investment in lands which could never be theirs. Unless and until the contingencies should occur, advance settlement was to remain an abortive enterprise productive of neither rights nor equities insofar as a stock-raising homestead was concerned.

Senator Thomas of Colorado made this clear in the Senate debate on December 21, 1916, when in reference to advance occupation he said:

The amendment * * * simply provides that * * * this procedure shall confer upon the locator *no right whatever* until the land has been properly designated. In other words he acquires *no equities* by such occupation which can under any circumstances be used against the Government, but after the land has been so designated then his rights as a locator begin. (Cong. Rec., Vol. 54, Pt. I, p. 642.) See also remarks of Senator Reed Smoot of Utah, *id.*, p. 644. [Italics supplied.]

Act of December 29, 1916 (39 Stat. 862), as amended by the act of October 25, 1918 (40 Stat. 1016), the act of September 29, 1919 (41 Stat. 287), the act of June 6, 1924 (43 Stat. 469), and the act of June 9, 1933 (48 Stat. 119).

It follows therefore that even if appellant's application had been filed prior to November 26, 1934, his occupancy and improvement of these lands would not have earned for him any immediate or present right in them under the law in question *so long as the lands remained undesignated*. The filing of his application before the withdrawal having been prevented by the existence of the Mahoney entry, was appellant as a settler and a successful contestant, although only a would-be applicant, in any better case?

Had appellant been seeking an original, ordinary homestead on undesignated lands, his acts of settlement on the Mahoney entry would immediately upon the cancellation thereof have created in him a present right to the land against the Government, a right which being *in existence* on November 26, 1934, would have prevented the withdrawal order from attaching. But appellant was not qualified to apply for an ordinary homestead. He was already an entryman, seeking an additional stock-raising homestead, to which designation of the lands sought was a condition precedent. His settlement on undesignated lands was therefore settlement on lands not open to settlement productive of a right to a stock-raising homestead and can earn for him no rights.

Nor can Lyman's successful contest of the Mahoney entry give him any present help. That earned for him a preference right of "thirty days from date of notice to enter said lands." But it is long-settled law, restated on May 29, 1912, in the case of *Henry Sanders* (41 L. D. 71, 72), that—

the preference right of entry awarded to a successful contestant is not an absolute and unconditional right to make entry *regardless of the status of the land* at the time of cancellation of the contested entry. It is only the preferred right, *to the exclusion of other applicants*, which entitles the contestant within the preference right period to make entry *if the land be subject to entry under such application as he shall present*, * * * he can only make such entry as may be appropriate, consideration being given to the status of the land at the time he tenders the application. [Italics supplied.]

Accordingly, designation not having occurred, the lands were not subject to application for entry as stock-raising lands and the preferred right had no potency to effect entry. Unfortunately, therefore, neither on November 23, 1934, nor on November 26, 1934, did appellant hold against the Government any rights or equities whatever, existing or future.

In consequence, the Mahoney lands upon cancellation of the entry, being free and clear of any claims whatever, were automatically restored to the public domain. Therein, accordingly, these lands as part of the "vacant, unreserved and unappropriated public land" in Montana were affected by the Executive order of November 26, 1934, issued in aid of the purposes of the Taylor Grazing Act of June

28, 1934, and were withdrawn from settlement, location, sale, or entry. They were therefore not subject to entry when appellant applied for them in January 1935 and there was no occasion for the Secretary to act in any way upon appellant's petition for their designation, filed subsequently to the withdrawal. The register and the Assistant Commissioner were therefore correct in rejecting the application without requesting action on the petition for designation.

Appellant is not, however, without possibility of remedy. Under section 14 of the Taylor Grazing Act he may apply for sale at public auction of these lands or an acreage not exceeding 760 acres if the tract be vacant and isolated, i. e., surrounded by lands that have been entered or otherwise appropriated. Should sale thereof be ordered, applicant would have the opportunity of buying the offered lands at the highest bid price, unless an owner or owners in fee of contiguous lands should choose to exercise the 30-day preference right allowed to such owners by the first proviso of the section. Further, appellant as holder of a valid entry as well as any owner in fee may apply for the sale at public auction of any legal subdivision of the public land adjoining his land which is mountainous or too rough for cultivation and does not exceed 160 acres, even though such land may not be isolated or disconnected. These rights however are all contingent upon the Secretary's judgment that such sale would be proper. See acts of June 28, 1934 (48 Stat. 1269), and June 26, 1936 (49 Stat. 1976); also Circular of the General Land Office 684, approved November 23, 1934.

The decision is affirmed.

Affirmed.

MYRTLE WHITE

Decided March 28, 1938

PUBLIC LANDS—ACCRETION.

Evidence held sufficient to show that land along the Missouri River was formed by accretion and not avulsion. Lands along the north bank of the Missouri River in North Dakota, held under patent to a railroad company, are riparian in character and the south boundary thereof is the river and not the meander line. The owner of such land under the laws of North Dakota is the owner of the accretions in front of his lots to the present north bank of the river.

MILITARY RESERVATION—ACCRETION.

The War Department acquires jurisdiction to all lands formed by accretion in front of a lot theretofore set aside as a military reservation, whether riparian rights are governed by the common law or the laws of the State in which the land is situated, and such lands are not public land subject to homestead entry.

PUBLIC LANDS—ACCRETION—ENTRYMAN CHARGED WITH KNOWLEDGE.

Though the lands entered appeared subject to entry upon the official records, and were represented as lots bordering the south bank of the Missouri River, entryman must be charged with knowledge at the time of entry that the river was then south of the lots, which put her on inquiry as to the status of the land.

CHAPMAN, *Assistant Secretary*:

Myrtle White has appealed from a decision of the Commissioner of the General Land Office rendered August 30, 1937, which canceled her homestead entry made March 17, 1933, under section 2289, Revised Statutes, for lots 8 and 9 Sec. 9, lots 5, 6, and 7 Sec. 10, T. 137 N., R. 80 W., 5th P. M., North Dakota.

The lots above described are shown on the official plat of survey of June 6, 1894, as bordering the south bank of the Missouri River, which was meandered. Alexander Asbridge protested against the disposal of the land embraced in the entry, claiming ownership by purchase of lots 1, 2, 3 and 4, NE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 9, in said township and range, which are shown by the record to have been patented to the Northern Pacific Railroad Company March 20, 1899, and which according to the official plat of survey approved December 1, 1892, border the north bank of the Missouri River opposite lots 8 and 9 Sec. 9. In substance he alleged that during the past 20 or 30 years the Missouri River has gradually moved to the south and washed away the lands in the homestead entry and added to his property by process of accretion, and that under the statutes and decisions of the courts in South Dakota he acquired a good title to the land embraced in the homestead entry and to all land formed by accretion to the north boundary of the river.

Upon order of the Commissioner, the Associate Supervisor of Surveys made field examination of the matter and on January 26, 1935, reported thereon. The report was to the effect that there is a plain bank remaining along the record position of the left (north) bank indicating the survey was properly executed; that there had been a gradual change in the course of the river which moved southward, evidenced by younger timber growth south of the original bank, the largest trees being cottonwoods not over 20 years old; that when the lands on the left bank were patented or reserved for military purposes they had a water boundary and that a gradual change in the river took place after such lands were patented and reserved; that Apple Creek (which enters the river from the north) has formed a channel across the area in Sec. 10 instead of following the old course of the river, which it would not have done had there been a change by avulsion; that old residents stated that the change in the position of the river had been gradual. Entrywoman responded with affi-

davit, stating among other things that she had made valuable improvements on the land to the value of \$1,000; that there were trees on her entry over 60 years old; that the old bed of the river was still well defined; that since the land was plotted and surveyed the river changed its course from a point and direction north of her entry to a point south thereof, and that the change was not gradual but sudden, and left islands in the river, and that if a new survey was made it would show that there had been no reliction from the land covered by her entry, but that the same had at all times been complete and intact. By letter of December 14, 1936, the Commissioner ordered a hearing for the purpose of determining the controversy.

By Executive order of January 17, 1907, lots 2, 3, and 4 Sec. 10 opposite lots 5, 6, and 7 in said section were reserved from sale and set apart for military purposes as an addition to the Military Reservation of Fort Lincoln. July 15, 1935, the Department at the request of the War Department authorized a survey of the accreted land appurtenant to lots 2, 3, and 4 to the then actual north bank of the river. In said letter it was held that the Department would not claim as public land areas formed by accretion in front of the patented subdivisions on the north bank of the river, although the accretion area occupies the record position for certain subdivisions, title to which had not passed from the Government; that the War Department by the reservation of lots 2, 3, and 4 had the same right of accretion as would a private owner of such lots and its jurisdiction would extend over the accreted land to the present north bank of the river. Plat of survey of the accretions appurtenant to said lots containing 257.22 acres was accepted June 11, 1936, and covers about one-half of lot 5 and all of lots 6 and 7, Sec: 10.

Hearing was held August 20, 1936. Upon review of the evidence taken at the hearing and the facts shown by the record, the Commissioner in the decision assailed found and held as follows:

It appears conclusively from the testimony taken at the hearing that the Missouri River has changed its course by the process of erosion and accretion since the original survey was executed and that the land included in the homestead entry shown by the official plat as bordering on the south bank of the Missouri River has been completely washed away by a gradual change in the channel of the river and that the area claimed by the entrywoman on the north side of the river has been formed by accretion and is attached to the patented subdivisions shown by the official plat as being on the north side of the river. The hearing verifies the facts as set forth in the report of the examination made by this office.

It appears to be the law in North Dakota that a riparian owner bordering upon a navigable stream owns the areas formed by accretion in front of his property (*Roberts vs. Taylor*, 181 N. W. 622).

The Supreme Court in the case of *Nebraska vs. Iowa*, 143 U. S. 359, held that when grants of land border on running water and the banks are changed

by the gradual process known as accretion, the riparian owner's boundary line still remains the stream, but when the boundary stream suddenly abandons its old bed and seeks a new course by the process known as avulsion, the boundary remains as it was in the center of the old channel.

This office, as stated in office letter dated June 28, 1935, approved by the First Assistant Secretary on July 15, is prepared to follow the doctrine set forth in the above decision and, accordingly, will not claim the area formed by accretion in front of the patented subdivisions on the north bank of the river although the accretion area occupies the record position of the lands included in the homestead entry by Myrtle White.

In view of the foregoing, homestead entry Bismarck 024214 is hereby canceled subject to the usual right of appeal to the Department within 30 days from the receipt of notice. Appropriate notations will be made upon the records here to show that the lands included in the homestead entry are not considered public land subject to disposal. A notation should also be placed upon your tract books.

Upon review of the record, the Department is of the view that protestant established by a clear preponderance of evidence that the change in the position of the river from north to south of the entry has been gradual and occurred before the entry was made; that the land between the bed of the river as it existed at the time of survey and its present north bank has been formed by accretion, and that the testimony confirms the conclusions of the Associate Supervisor of Surveys.

The direct evidence of long-time residents of the locality that the lands have been formed gradually by accretion is strongly supported by the mute evidence that the trees growing on the land become smaller as one approaches the present position of the river, and that the bed of Apple Creek traverses the land depicted as an accretion and not the old bed of the river. It is not at all probable that if the change in the position of the river from one-half to three-quarters of a mile was avulsive and not gradual, that Apple Creek would have forced its way through the high and dry land to the place where it now debouches into the river instead of following the old bed of the river. Evidence that there are cottonwood trees 30 or more inches in diameter near the old south bank of the river on the land in question does not, in view of the testimony respecting their rapid growth, justify the inference that the life of these trees began before the river moved south of them.

The lots on the north bank of the river claimed by protestant and passing under the patent to the railroad company as well as the lots set apart as a military reservation were riparian in character, and the south boundary thereof, under well settled rules, is the river and not the meander line. Under the laws of North Dakota, protestant is the owner of the accretion in front of his lots to the present north bank

of the river. The War Department likewise acquired by accretion, and has jurisdiction over, the land in front of the lots in Sec. 10, set apart for its use by the Executive order, to the present north bank of the river, whether the riparian rights thereto are governed by the common law or the laws of the State. See *Towl et al. v. Kelly and Blankenship* (54 I. D. 455). It follows that at the time this entry was made the lots entered had been reserved from disposition or had been disposed of and were not subject to homestead entry and the Department cannot do otherwise than affirm the cancellation of the entry.

The letters of the entrywoman of February 23, 1938, and October 29, 1937, in support of her appeal, are in substance complaints against the actions of the protestant and those in charge of the military reservation in taking possession of, and encroaching upon, the land she has occupied under the entry and thus curtailing her opportunities of conducting a farm and making a living, complaints as to the use the War Department is making of the land and as to the hardships that will result if she loses the land, and inquiry is made as to rights of protestant and the War Department to disturb her possession before the matter is settled by departmental decision.

The decision of the Department is merely a recognition of the previously acquired title or possessory rights of opposing claimants. It is very much regretted that this entry was allowed and that the entrywoman must be deprived of the results of her labors and improvements. The land, however, was so far as the official records disclosed subject to entry, and there was nothing to put the officials of the local land office on notice of the contrary. The entrywoman must however be charged with the knowledge which the official plat of the land disclosed that the lots she entered were represented thereon as bordering the south bank of the Missouri River, and also of knowledge, as she is required to examine the land before entry, that the river was actually south of such lots at the time of entry, a discordance which should have put her on inquiry as to the status of the land. Moreover, she admits that Asbridge, the protestant, started giving her trouble when her father started to build the cabin, from which it may be inferred that she has had knowledge of a hostile claim since her occupation was begun.

For the reasons stated, the decision of the Commissioner must be and is hereby affirmed.

Affirmed.

JOSEPH F. LIVINGSTON ET AL.

*Decided April 23, 1938*¹

TAYLOR GRAZING ACT—DEPARTMENTAL RULES—GRAZING LICENSES—PRIORITY OF USE.

The Department promulgated Rules for Administration of Grazing Districts under the Taylor Grazing Act (act of June 28, 1934, as amended by act of June 26, 1936, 48 Stat. 1269, 49 Stat. 1976). They provide for the order of preference in which grazing licenses are to be issued until the carrying capacity of the range is exhausted. When the available range is insufficient to meet the requirements of all in the preferred class, then those who have dependent commensurate property which has been used in connection with the public range for one full grazing season during the five-year period immediately preceding the passage of the original statute or the amendment thereto, are to be preferred. The rules further provide that under special circumstances a different period of use can be established for any grazing district by special rule approved by the Secretary of the Interior. Such a special rule for Colorado Grazing District No. 6 was approved by the Secretary. As a result, in that district, the order of preference in which licenses were to be issued until the carrying capacity of the range was exhausted, was as follows: Class 1. Qualified applicants of the preferred class who have dependent commensurate property which has been used in connection with the public range for *two* full consecutive grazing seasons during the five-year period immediately preceding the passage of the Taylor Grazing Act. Class 2. Qualified applicants of the preferred class who have dependent commensurate property which has not been so used. Class 3. Qualified applicants who are not in the preferred class. *Held*: The Division of Grazing examiner properly determined that no license should be issued to the appellants because their properties were not in Class 1 as defined in the special rule, and Class 1 more than exhausted the carrying capacity of the range.

TAYLOR GRAZING ACT—DEPARTMENTAL RULES—GRAZING LICENSES—COMMENSURABILITY.

The Rules for Administration of Grazing Districts provide that property is "commensurate for a license for a certain number of livestock if such property provided proper protection according to local custom for said livestock during the period for which the public range is inadequate." In issuing licenses in Colorado Grazing District No. 6, it was assumed for purposes of computing commensurability that licensees used their private lands for 2½ months. According to the record in this case, there are two grazing seasons on the public range in that district, winter and summer, each lasting six months. *Held*: (1) The "period during which the public range is inadequate" in Colorado Grazing District No. 6 is six months. Hence, licensees should receive licenses for six months on the public domain for the number and kind of animals which the forage produced on the private lands can properly support for six months. (2) The use of the 2½-month commensurability standard was unauthorized.

¹ See *Joseph F. Livingston et al.* (56 I. D. 92), decided March 29, 1937.

TAYLOR GRAZING ACT—DEPARTMENTAL RULES—GRAZING LICENSES—COMMENSURABILITY—APPEALS.

An analysis of available data is convincing that even if a six-month commensurability standard had been accurately applied to all licensees in Colorado Grazing District No. 6, no Class 2 applicants would have been entitled to a license. The appellants are Class 2 applicants. *Held*: The use of the 2½-month standard, though unauthorized, did not prejudice the appellants and hence is not reversible error.

ICKES, *Secretary*:

This appeal is from a decision of an examiner of the Division of Grazing who on September 22, 1937, affirmed a decision of a regional grazer denying the application of Joseph F. Livingston and Glade Cook for the privilege of grazing 9,000 sheep and 20 horses in Colorado Grazing District No. 6 for the winter season of six months from November 1, 1937, to May 1, 1938. The application was made pursuant to the provisions of the Taylor Grazing Act, Act of June 28, 1934 (48 Stat. 1269) as amended by act of June 26, 1936 (49 Stat. 1976).

Grazing licenses may be granted as provided in the Rules of the Administration of Grazing Districts promulgated by the Department. Rules approved March 2, 1936, amended *inter alia*, January 28, 1937, combined June 14, 1937. The relevant portions of the rules are these:

A qualified applicant will be considered in a preferred classification if he is a member of any one of the following four classes: 1. Landowners engaged in the live-stock business. 2. Bona fide occupants. 3. Bona fide settlers. 4. Owners of water or water rights.

* * * * *

Issuance of licenses.—After residents within or immediately adjacent to a grazing district having dependent commensurate property are provided with range for not to exceed ten (10) head of work or milch stock kept for domestic purposes, the following-named classes, in the order named, will be considered for licenses: 1. Qualified applicants of the preferred class who have prior use. 2. Qualified applicants of the preferred class who do not have such prior use. 3. Qualified applicants who are not in the preferred class. Licenses will be issued in the above-named order of classes until the carrying capacity of the public range shall be attained. * * *

* * * * *

When the available range is insufficient to meet the requirements of all in the preferred class, such class will be divided into two groups, as follows: 1. Those who have dependent commensurate property which has been used in connection with the public range for a full grazing season during the 5-year period immediately preceding the passage of the act or its amendment (under whichever the district was created). In any district in which the regional grazer is convinced that the establishment of groups according to the above rule is unsuited to local conditions and will not permit an effective and orderly administration of the act in that particular district, he may recommend a different period of use as a standard for the establishment of groups in such dis-

tract, provided that such proposed new rule shall not be operative until approved by the Secretary of the Interior. 2. Those who do not have such prior use.

On April 5, 1937, the Department approved a special rule for Colorado Grazing District No. 6 as follows:

A proper showing having been made and it having been found that the available public land is insufficient in Colorado Grazing District No. 6 to meet the requirements of all in the preferred class and that the general rule set forth in the Amendment to the Rules for Administration of Grazing Districts approved January 28, 1937, as unsuited to local conditions and will not permit an effective and orderly administration of the act in that particular district, the preferred class will be divided for that district into two groups as follows: 1. Those who have dependent commensurate property which has been used in connection with the public range for two full consecutive grazing seasons during the 5-year period immediately preceding the passage of the Taylor Grazing Act. 2. Those who do not have such prior use.

As a result of the adoption of this special rule, in District No. 6, the order of preference in which licenses were to be issued until the carrying capacity of the range was exhausted, was as follows: Class 1. Qualified applicants of the preferred class who have dependent commensurate property which has been used in connection with the public range for two full consecutive grazing seasons during the 5-year period immediately preceding the passage of the Taylor Grazing Act. Class 2. Qualified applicants of the preferred class who have dependent commensurate property which has not been so used. Class 3. Qualified applicants who are not in the preferred class.

The Division of Grazing examiner held that no license for the current season should be issued to the appellants because their properties were not in Class 1 as defined in the special rule, and Class 1 more than exhausted the carrying capacity of the range.

In the area involved there are two grazing seasons on the public range, winter and summer. According to the record, the winter season begins November 1 and ends April 30, the summer season begins May 1 and ends October 31. Private lands may qualify for either a winter or summer license, dependent on whether they are used for grazing during the opposite season.

The rules provide that property is "commensurate for a license for a certain number of livestock if such property provided proper protection according to local custom for said livestock during the period for which the public range is inadequate." In District No. 6 "the period for which the public range is inadequate" is six months with regard to both winter and summer range. Consequently, licensees should receive licenses for six months on the public domain for the number and kind of animals which the forage produced on the private lands can properly support for six months.

In District No. 6, however, the regional grazier determined that "each licensee shall be required to care for his licensed livestock at

least 75 days on his commensurate property." It was assumed for the purposes of computing commensurability that the licensees used their private lands for 75 days or 2½ months. This may have resulted in the grant of excessive licenses to some class 1 licensees. It does not necessarily follow, however, that the appellants were entitled to a license.

In seeking to determine whether, if a 6-month rather than a 2½-month commensurability standard had been applied, the appellants as class 2 applicants should have received a license, two groups of data may be used. First, there are the data in the record upon the basis of which licenses appear to have been issued. Second, there are those now available in the form of a "final determination" of the carrying capacity of public and private lands, completed by the Division of Grazing since the decision of the examiner. A careful analysis and computation of both groups of data is convincing that even if a 6-month standard had been accurately applied to *all* licensees, on the basis of either group of data, no class 2 applicants would have been entitled to receive a license. The appellants were class 2 applicants and so it follows that they were not prejudiced by the use of a 2½-month standard.

The decision of the examiner is affirmed. This decision is without prejudice to the disposition of future applications consistent with facts then proven and applicable statutes and rules then in force.

Affirmed.

RIGHTS OF PUEBLOS AND MEMBERS OF PUEBLO TRIBES UNDER THE TAYLOR GRAZING ACT

Opinion, May 14, 1938

PUBLIC LANDS—GRAZING PRIVILEGES—PUEBLOS.

A Pueblo is a corporation, and is a "stock owner" within the meaning of the Taylor Grazing Act and the Federal Range Code, and, if it possesses base property, it can file an application for a grazing license or permit in its own name, regardless of the fact that the livestock which it owns are under the control of particular members of the Pueblo who are designated by the governing body to carry on the function of livestock raising.

PUBLIC LANDS—GRAZING PRIVILEGES—APPLICATIONS OF INDIVIDUAL MEMBERS OF PUEBLO TRIBES.

In filing the application, the individual Indians who have been designated to carry on the function of livestock raising need not join with the Pueblo in the application, although it would be proper for such joint applications to be filed, or for individual Indians to file applications, and such applications would be entitled to favorable consideration in the same manner as if filed in the name of the Pueblo alone.

An individual member of a Pueblo may show such a right to possession or right to the use of base property as will amount to "control" of the property and entitle him to receive grazing privileges, although the ultimate title to such property is in the Pueblo and not in the individual; but such property could not be used as a base to the full extent of its rating for more than one license or permit.

PUBLIC LANDS—GRAZING LICENSES AND PERMITS—COMPLIANCE WITH STATE BRAND AND SANITARY LAWS.

The question of whether or not a showing of compliance with the State brand and sanitary laws should be made a condition precedent to the issuance of a license or permit to graze on lands of the United States is a matter of policy. In the absence of a departmental rule requiring compliance with such laws, the satisfaction of such a requirement cannot be made a condition precedent to the issuance of such license or permit.

COHEN, Acting Solicitor:

At the request of the Commissioner of Indian Affairs certain questions concerning the rights of individual members of the Pueblo tribes and of the Pueblos, as such, under the Taylor Grazing Act (act of June 28, 1934, 48 Stat. 1269), as amended by the act of June 26, 1936 (49 Stat. 1976), and the regulations promulgated thereunder, have been submitted to me for opinion.

The following are the Commissioner's questions:

1. Is a Pueblo eligible to file one application, in its own name, for a regular grazing license or permit in an established grazing district, provided it show the base properties owned or controlled by it, and if so, may it thereupon receive one regular license or permit issued in its own name?

2. If the answer to question 1 is in the affirmative, need the individual Indians whom the governing body of the Pueblo has designated to carry on the function of livestock raising in the community join with the Pueblo in the application?

3. If the answer to question 1 is in the negative and it should be held that applications by individual Indians who are members of the Pueblo are necessary, what showing of control of base property would be necessary under the grazing rules?

4. Is compliance by the applicant with the State brand and sanitary laws a condition precedent to the granting of a grazing license or permit?

Before proceeding to a discussion of these questions it will be well to outline briefly their factual background. It appears that applications for licenses to graze for the current season in New Mexico Grazing District No. 2-A were filed some time ago by or on behalf of certain of the Pueblos, as such. The district advisory board made an adverse recommendation on the applications, however, for the fol-

lowing reasons, as quoted from a letter dated March 8, from the board to Regional Grazier C. F. Dierking:

We believe, under the rules that are laid down for the adjudication of the public range, that it is impossible for us to allot any grazing privileges to a community without *individual* responsibility. In other words, it is necessary under the rules that an *individual* show base property which he owns or controls to substantiate his rights for grazing privileges on the public range.

We feel that one of the great difficulties of the grazing problem in the various pueblos is caused by the fact that they have no grazing regulations on the pueblo-owned lands. Upon the appearance of the heads of the various pueblos before the Advisory Board, they testified that the War Chief was responsible for all the livestock, but made no regulations or allotments inside the reservation-owned lands for individual range; that the land is owned by the community, but the livestock is owned by the individual; and that, in most cases, very few Indians owned a great majority of the livestock. These few individuals who own the majority of the livestock, who wish to graze on the public range, should show to this Board a lease or allotment for certain areas by the pueblo and their responsibility for the use of the public range by complying with the State Cattle Sanitary and Brand laws and by an individual allotment to them for a definite number of livestock on the public range so that any violation of the Taylor Grazing Law can be charged individually to the owner of the livestock.

We fully realize that the Federal Government has purchased a large amount of checkerboard land through the Resettlement Service for the Indians. The public domain included in the area will not be allotted until such time as proper applications are made to this Board. We feel that we would completely fail in the trust bestowed upon us if we should allot the public range *under the present application* and feel that we are doing a service, not only to the Indians, but to the conservation of the range as a whole. [Italics supplied.]

Thereupon, following a protest made on behalf of the Pueblos, it appears that certain new applications were filed either in the names of individual Indians or in the joint names of the Pueblos and the individual Indians. The following is quoted from a letter dated March 31, from the Regional Grazier in Charge of Hearings to the Director of Grazing:

It does not appear to the board or to Mr. Dierking, and I am inclined to concur with them, that the applications as now made meet the requirements of the Federal Range Code of March 16, 1938, unless the Indian can show that he has a certain amount of animal unit months of feed that he can use on the Pueblo lands, and that the water base offered by him for grazing privileges is located on a definitely described piece of property. This situation arises because the property is owned by the Pueblos while the stock is owned by the individual Indians.

It is my belief that the advisory board will deny the applications for the reason that the Indian Office cannot make a showing to them that certain lands within the Pueblo are reserved or set aside for the use of the individual applicant. In all likelihood this action will be sustained by the regional grazier on the grounds that the applicant is not qualified for the reason that he merely owns stock and he has failed to make a showing to the Division that he can care for his livestock with a certain number of animal unit months of feed while not on the public domain, and for the further reason that it is impossible to rate his watering

facilities as base property in the absence of a definite location of the watering facilities. This difficulty would be eliminated if the Pueblo as a Pueblo owned the livestock.

It thus is apparent that the requirements which are sought to be imposed result in a dilemma: The application of a Pueblo, as such, is subject to rejection because it is not regarded as an owner of livestock and the application of an individual member of a Pueblo, who presumably is regarded as the owner of livestock, is subject to rejection because he is unable to show the exclusive control of definitely described base property. Such a conclusion of course is clearly inequitable and for the reasons set forth in the following separate discussion of the questions raised it is my opinion that it also is literally unjustified under the Taylor Act and the grazing rules.

QUESTION 1

It is my opinion that this question clearly is to be answered in the affirmative. Section 3 of the Taylor Act provides in part:

That the Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time: *Provided*, That grazing permits shall be issued only to citizens of the United States or to those who have filed the necessary declarations of intention to become such, as required by the naturalization laws and to groups, associations, or corporations authorized to conduct business under the laws of the State in which the grazing district is located. Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water, or water rights owned, occupied, or leased by them, * * *.

Pursuant to the foregoing, section 3 of the Federal Range Code, approved March 16, 1938, provides:

Personal Qualifications of Applicants.—An applicant for a grazing license or permit is qualified if he owns livestock and is—

(a) A citizen of the United States or one who has filed his declaration of intention to become such, or

(b) A group, association, or corporation authorized to conduct business under the laws of the State in which the grazing district or any part thereof in which the applicant's license or permit is to be effective is located.

Laying aside for the moment the question of ownership of livestock within the meaning of the act and the rule, there can be no question that a Pueblo is personally qualified as an applicant for a grazing license or permit. This already has been definitely settled by the Department's approval, on February 15, 1937, of an opinion of the Solicitor (56 I. D. 79) on certain questions raised by the Acting

Director of Grazing and the Superintendent of the United Pueblos Agency. The following is quoted from the opinion:

The final question relates to the eligibility of a Pueblo as such to receive grazing privileges. Under the above-quoted section 3 of the act and the Regulations of the Department, a Pueblo would be a qualified applicant for a permit if it itself was a stock owner, since a Pueblo falls within the second requisite for being a qualified applicant, namely, "a group, association, or corporation authorized to conduct business under the laws of the State." A Pueblo is a corporation under the laws of New Mexico and as a corporation of New Mexico is authorized to carry on its business and affairs in accordance with State law. The fact that a Pueblo is a corporation under the laws of New Mexico has received most decisive statement in the Supreme Court in the cases of *Lane v. The Pueblo of Santa Rosa*, 249 U. S. 110; *United States v. Candelaria*, 271 U. S. 432; and *Pueblo of Santa Rosa v. Lane*, 49 App. D. C. 411. The law of New Mexico on this subject appears in section 2784 of the 1915 compilation of Statutes of New Mexico, and reads as follows: [quoting.]

The particular "Regulations of the Department," to which reference is made in the above excerpt from the opinion, now appear in substance in section 3 of the Federal Range Code, already quoted, and the same reasoning is applicable.

Before concluding the discussion of this point it may be observed parenthetically that the reasons advanced by the advisory board for its adverse recommendation on the Pueblo's applications would, if carried to their logical conclusion, have a curious effect. In the board's letter of March 8 to the regional grazer, signed by its chairman, it is stated that "it is impossible for us to allot any grazing privileges to a community without *individual* responsibility" and that "it is necessary under the rules that an *individual* show base property * * *" [Italics supplied.] The "community" in this instance is a corporation, and the rules provide that a corporation may be a qualified applicant for a grazing license or permit. Many of the holders of grazing privileges under the Taylor Act are corporations, and if a requirement of "individual" responsibility rather than corporate responsibility were to be applied uniformly to applications made by corporations controlled by whites as well as to those of corporations controlled by Indians, none of them, including the one with which the chairman of the advisory board is himself identified, would be eligible to receive a grazing license or permit.

A Pueblo being personally qualified as an applicant in the respects discussed it remains to be determined only whether it "owns livestock" and whether it "owns or controls" land or water within one of the three classes of base property defined in section 4, paragraph *a*, of the Federal Range Code. It is my opinion, from the information submitted by the Commissioner of Indian Affairs, that a Pueblo is a "stock owner" within the meaning of the Taylor Act and the Federal Range Code. It should first be stated that it scarcely can have been

the legislative intent to require that a successful applicant have the full legal and beneficial title to the livestock proposed to be grazed on the public domain, else the security transactions which are both necessary and common in the livestock industry, as in any other, would be impossible. It would appear rather that "stock owner" should be construed as synonymous with "in the livestock business" in the popular sense and I therefore should regard it as sufficient that the applicant have *some* substantial interest in the livestock to be grazed. In determining whether a Pueblo does have such an interest it becomes necessary to consider the nature of the relation between the Pueblo and its individual members insofar as property rights are concerned and, as will be shown, this relation is one which is determined by the tribe itself. In considering the derivation and scope of Indian tribal powers the Solicitor, in an opinion approved October 25, 1934 (55 I. D. 14) stated, pp. 19-20:

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. * * *

In a 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 discussion of these principles is in the opinion of the Court in *Worcester v. Georgia*, cited in the quotation. It was there held that the imprisonment, by the State of Georgia, of a white man living among the Cherokees was in violation of the Constitution 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 consistent with Federal law. In delivering the opinion of the Court Mr. Chief Justice Marshall said (pp. 559, 561):

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: * * *

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 Court relied on *Worcester v. Georgia* in *Talton v. Mayes*, 163 U. S. 376, in holding that the Fifth Amendment did not operate as a limitation on the legislation of the Cherokee Nation, and quoted the following language from the opinion in *Kagama v United States*, 118 U. S. 375, 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 reside. [Italics supplied.]

To the same effect is *In re Sah Quah*, 31 Fed. 327, 329, in which the court said:

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. * * * [Italics supplied.]

The following is quoted from the Solicitor's opinion of October 25, 1934, *supra* (p. 27):

The sympathy of the courts toward 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. 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."

In considering the tribal powers over property in the same opinion of the Solicitor, it was said (pp. 52, 53, 54):

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

* * * * *
 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 [citing U. S. Code, title 43, Sec. 189], and to children of white men and Indian women, under certain circumstances [citing U. S. Code, title 25, Sec. 184], 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 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*. [Italics supplied.]

The foregoing statements are supported by a number of cases cited and discussed in the opinion, including *Crabtree v. Madden*, 54 Fed. 426; *In re Sah Quah*, *supra*; *Whitmire v. Cherokee Nation*, 30 Ct. Cls. 138; *Hamilton v. United States*, 42 Ct. Cls. 282; *Myers v. Mathis*, 2 Ind. T. 3, 46 S. W. 178; *McCurtain v. Grady*, 1 Ind. T. 107, 38 S. W. 65; *Application of Parker*, 237 N. Y. Supp. 135; *Terrance v. Gray*, 156 N. Y. Supp. 916; *Jones v. Laney*, 2 Tex. 342. It is sufficient here to refer briefly to two of these cases, in which the holdings are particularly significant to the problem presented. In *Jones v. Laney*, the question presented was whether a deed of manumission freeing a Negro slave, executed by an Indian within the territorial limits of the Cherokee Nation, was valid. The trial court had instructed the jury that the Chickasaw "laws and customs and usages, within the limits defined to them, governed all property belonging to any one domesticated and living with them." In approving this instruction the appellate court said (p. 348):

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.

In *Hamilton v. United States*, 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 (p. 287):

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.

In concluding that portion of the opinion dealing with tribal powers over property, the Solicitor said:

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. [Italics supplied.]

It thus is clear that a determination whether a Pueblo is a "stock owner" within the meaning of the Taylor Act and the Federal Range Code must be made by reference to the internal structure of the community and to its laws and customs. In his request for an opinion, the Commissioner states:

It is impossible, realistically or pragmatically, to apply either to Pueblo livestock or to Pueblo range or water, concepts of ownership familiar in white life; the only way that realism can be achieved is by a concept treating all of these properties as properties of the community, whose keeping is vested by formal or informal community and/or religious decree in an individual or family.

It appears that the custom is that certain individuals are designated by the governing body of the Pueblo to carry on the function of livestock raising. While in a limited sense and for certain purposes the livestock may be regarded as the personal property of these individuals, the livestock are subject to call by either the secular community, through the Governor and Council, the religious community, or the khiva or secret society organizations, indicating that the ultimate responsibility of the individuals is to the community and that the ultimate interest is that of the community. The individuals' rights are basically usufructuary and always subject to the higher demand of the community itself. In these circumstances I am unable to see that any violence is done Anglo-Saxon legal concepts in holding that a Pueblo is an owner of livestock within the meaning of the Taylor Act and the Federal Range Code.

At the outset of the discussion of this particular question, I stated it to be my opinion that the words "stock owner" should be construed as synonymous with "in the livestock business" in the popular sense. It may be observed that this conclusion is not only supported by the discussion immediately foregoing but is consistent with that reached by the Solicitor of the Department of Agriculture in construing the range provisions of the 1937 Agricultural Conservation Program, formulated pursuant to section 8 of the Soil Conservation and Domestic Allotment Act (act of April 27, 1935, 49 Stat. 163), as amended by the act of February 29, 1936 (49 Stat. 1148). In a memorandum opinion dated February 17, 1937, concerning the eligibility of Indian lands to participate in the program, he stated:

A member of the tribe carries on grazing operations on tribal lands ordinarily in conjunction with other members of the tribe, the livestock of all such members being intermingled over the extent of the grazing land. The beneficial use and occupation of and full control over such lands for the purposes of livestock production are vested in the tribe, subject to a limited supervisory

control by the Department of Interior, *and the tribe may be considered to be a "range operator" as defined in the program.* [Italics supplied.]

As for base property, it is not disputed that the Pueblos own or otherwise control land and water, which should be classified and rated in the same manner as any other applicant's.

Question 1 accordingly is answered in the affirmative.

QUESTION 2

This question may be answered briefly in the negative. If a Pueblo itself is eligible to receive a grazing license or permit, as held in the answer to question 1, I see no greater reason to require those of its members who are to have the immediate custody or possession of the livestock to join in the application than to require that the stockholders of any other corporate livestock operator join in its application. It clearly is sufficient that the application be executed in the name of the Pueblo by such officers as may be required under the State law to execute any other instrument in its behalf.

QUESTION 3

Since question 1 has been answered in the affirmative, it appears that an answer to question 3 is not essential to a disposition of the general problem presented. It may be stated, however, that if for any reason it should be deemed preferable to file applications for grazing licenses or permits in the name of individual Indians or in the joint names of a Pueblo and individual Indians, such applications would be entitled to favorable consideration in the same manner as if filed in the name of the Pueblo alone.

While the ownership or control of the land or water on the one hand and the ownership of the livestock on the other may be regarded in a broad sense as divided between the Pueblo and the individual Indian, it is my opinion that either and, *a fortiori*, both together, are eligible for grazing privileges under the Taylor Act and the Federal Range Code. It already has been held in the opinion of February 13, 1937, *supra*, that an individual Indian, as well as a Pueblo, may be a qualified applicant under the rule now embodied in section 3 of the Federal Range Code. On the basis of the facts set forth in the discussion of question 3, concerning the nature of the relation between a Pueblo and its members, I should regard the individuals also as having a sufficient interest in the livestock to entitle them to favorable consideration.

The only remaining question concerning an application by an individual Indian turns on his ownership or control of the required

base property. In the advisory board's letter of March 8 to the regional grazier it is stated that "these few individuals who own the majority of the livestock, who wish to graze on the public range, should show to this Board a lease or allotment for certain areas by the pueblo * * *." In the first place, such a procedure is expressly prohibited by section 1 of the Wheeler-Howard Act (act of June 18, 1934, 48 Stat. 984), which provides that "no land of any Indian reservation * * * shall be allotted in severalty to any Indian." Secondly, the requirement sought to be invoked is clearly in disregard of a departmental holding to the contrary, under rules which were no different in this particular. In the opinion of February 13, 1937, *supra*, it was stated:

The possession of an allotment by an Indian would be significant only in showing him a landowner or occupant and entitled to preference. *However, it is not necessary that an Indian own an allotment in order to be entitled to preference.* An Indian who owns *any* interest in land, such as an inherited interest or an *occupancy right in tribal land, giving him the right of possession, or has ownership of water rights under proper authority* would undoubtedly, under the regulations, come within the definition of a qualified applicant entitled to preference. [Italics supplied.]

A lease or allotment obviously is not an exclusive means of acquiring control of base property. A showing of a right to possession or a right to use the base property, whether by consent of the owner or otherwise, clearly would be sufficient to establish "control." It of course would be necessary to point out definite base property, in order that it might be classified and rated, but this requirement appears to be satisfactorily met by the following language, if accurate, quoted from a letter dated April 1, from the Special Attorney for the Pueblo Indians to the chairman of the advisory board:

* * * Nevertheless the applications that have been presented to you for the various Pueblos and the showing made before your Board very clearly and unequivocally shows that definite amounts of range land are set aside in each Pueblo for use of the livestock owners of the Pueblo who are applicants for permits. It is true at the present time no individual Indian stockholder member of the Pueblo either owns, leases, or has an allotment of a definite describable area of range land. Yet the livestock owners of each Pueblo who are applicants do have a definite amount of range land for their use. This land, of which the applicants are occupants, should serve as an adequate base property. Under the grazing regulations of the Secretary of the Interior and those adopted by the respective Pueblos the said range lands on the reservations do round out a year's operation for those members of the community who use and occupy reservation range land which is dependent upon the use of public domain close thereto. * * *

It goes without saying, of course, that the same property could not be used as a base to the full extent of its rating for more than one license or permit.

The foregoing comments concerning grazing applications by individual Indians have been included in order that both the Division of Grazing and the Office of Indian Affairs may have the benefit of a complete expression of opinion. Whether the applications should be filed by the Pueblos alone, by the individual Indians alone, or in their joint names, is a matter for administrative determination and the form best suited to one service may be less convenient to the other. It is sufficient to say, without further detailed discussion, however, that nothing in either the Taylor Act or the Federal Range Code justifies an adverse recommendation on an application filed in any one of the three forms enumerated merely on that ground.

QUESTION 4

This question must be answered in the negative. Whether a showing of compliance with the State brand and sanitary laws should be made a condition precedent to the issuance of a license or permit to graze on lands of the United States is a matter of policy for administrative determination and I offer no opinion on the desirability of such a requirement. It is sufficient to say that neither the Taylor Act nor the Federal Range Code contains such a requirement and an advisory board, whose functions in any event are limited to making recommendations, is without authority to base those recommendations on factors outside the scope defined by the Congress in the act and by the Department in the rules.

In summary, it is my opinion that a grazing license or permit application filed either in the name of a Pueblo alone, in the name of an individual Indian, or in their joint names, is in acceptable form, since the facts submitted indicate clearly that either has a sufficient interest in the livestock to qualify as a "stock owner" within the meaning of the Taylor Act and the Federal Range Code and that either is in a position to show the necessary ownership or control of base property without, in the case of an individual Indian, a lease, allotment or other right to the exclusive use of the property. It is further my opinion that in the absence of a departmental rule requiring compliance with State brand and sanitary laws by applicants, the satisfaction of such a requirement cannot be made a condition precedent to the issuance of a grazing license or permit.

Approved: May 14, 1938.

HAROLD L. ICKES,

Secretary of the Interior.

UNITED STATES v. TERLIAMIS

Decided May 24, 1938

STOCK-RAISING HOMESTEAD—RESIDENCE REQUIREMENTS.

Evidence held sufficient to show that homestead entryman did not maintain a home on his entry to the exclusion of a home elsewhere. An entryman is not entitled under the act of August 22, 1914 (38 Stat. 704), to a change of residence requirements from seven months each year for three years to five months each year for five years, where subsequent to his application for such change he resided during the statutory life of the entry on adjoining land having about the same altitude and climatic conditions.

STOCK-RAISING HOMESTEAD—QUALIFICATIONS OF ENTRYMAN—OWNERSHIP OF LAND.

Evidence held sufficient to show that homestead entryman at the date of his application to make entry was the proprietor of more than 160 acres of land and, therefore, not qualified to make entry.

Alfred Thomas (46 L. D. 290) and *Siestreem v. Korn* (43 L. D. 200) cited and applied.

STOCK-RAISING HOMESTEAD—MARRIAGE OF ENTRYMAN AND ENTRYWOMAN—FAILURE TO COMPLY WITH RESIDENCE REQUIREMENTS—CANCELATION.

Where a homestead entryman marries a homestead entrywoman and they elect to and are permitted to perform the residence requirements on his entry, upon final decision holding the entryman's entry for cancellation for failure to comply with the residence requirements, the entrywoman should be required to show cause why her entry should not also be canceled.

CHAPMAN, *Assistant Secretary*:

Elias Nicolas Terliamis has appealed from a decision of the Commissioner of the General Land Office rendered January 25, 1938, which affirmed the decision of the local register holding his stock-raising homestead entry Denver 042776, containing 609.86 acres in T. 8 S., R. 87 W., 6th P. M., for cancellation. Upon the evidence adduced in adverse proceedings against the entry the register and the Commissioner concur in finding that the entryman did not establish and maintain residence on the land, and that he was at the date he filed his application to enter the land disqualified from making entry by reason of ownership of more than 160 acres of land, adjacent land to the extent of 480 acres being described as that owned by entryman. These findings are assigned as errors in the appeal.

As to residence, the record shows that entryman filed his application on April 4, 1930, which was allowed January 4, 1931. On February 22, 1933, entryman married Georgina Cerise who on June 2, 1932, was allowed like entry for 400 acres in the same locality. February 1, 1934, their election to make the family home on the husband's entry was approved. December 28, 1933, residence requirements were changed to five months for five years under the act of August 22, 1914 (38 Stat. 704), based upon affidavit of the entryman that the altitude of the land was 7,500 feet, and that the temperature

was low and the land was covered by deep snow in winter, making transportation of fuel, water, and supplies difficult and necessitating a very substantial dwelling.

The entryman admits that in April 1930 he purchased the adjoining ranch property of 480 acres upon which is a two-story house with five rooms and kitchen and other buildings; that for about 7 months each year this house has been his home since purchase, the home of his wife since marriage, and the home of his children since their birth. As to the remainder of each year, May to October, or June to November, he and his wife declare that they slept in the cabin erected on the homestead, taking meals there, but returning each day to the ranch property upon which entryman made his living. The homestead cabin is on one side of a public road and the ranch house on the other side, and they are but one-quarter of a mile apart. The homestead cabin is of boards with tar-paper roof, with one door, two windows and no floor, and has but one room. The entryman states the cabin is 12 feet by 16 feet or 14 feet by 16 feet; his wife states it is about 8 feet by 10 feet and 7 feet by 9 feet high, and was furnished with a built-in table, chairs, stove, and bed; that there are no outhouses, no accommodations, and water is far away and they went to the ranch house for what they needed, and that they kept their clothing at the ranch as well as horses and livestock and had a garden there.

Berthod, witness for defendant, testified that the cabin on the homestead was built in December 1931, and yet he states that entryman moved into it in June 1931; that he had seen entryman and wife often on the homestead, but did not know whether they stayed there at night as he was not there in the evenings after dark, but believed they did.

Frank Cerise, cousin of entryman's wife, and who holds a half interest with her in another ranch, stated he had seen entryman on the homestead and took supper with him there once, and had seen the entryman and his wife living there. He admitted that he did not know whether they ever slept there. Both of these witnesses admit that the climatic conditions and altitude are practically the same on both places.

Peter Grange, witness for the Government, testified that except in 1935 he was on the homestead quite a few times each year and that he never saw the entryman there and no sign of habitation at the cabin which has always been in bad condition and which had only a few jars and a little couch and stove in it and no supplies or clothing; that entryman and family lived on the ranch; that the cabin is about 50 yards from the road and easily visible therefrom; that the house was not fit to live in, the windows being broken.

Orest Gerbaz, witness for the Government, testified that he had occasion to observe the homestead while driving cattle and working on the road in 1931 and 1932 from April to October; that the homestead cabin was not built until the summer of 1933; that he also drove cattle and drove along the road in the years following and there was no evidence that the cabin was occupied; that the windows were not put in until the fall of 1935, and that three windows were not put in the cabin until this spring (1936) and that the entryman has been living to his knowledge on the ranch since 1931; that he had looked in the cabin several times.

The special agent who examined the land in November 1934 testified that there was no evidence that the cabin had been occupied and it was unfit for habitation.

It seems clear that the entryman did not provide any suitable place of abode for himself and wife and children of tender years on the entry. It is rather improbable that the cabin was used for the sleeping quarters of his family of small children during five months of the year, but assuming that to be true, it is evident from the testimony of entryman and wife that he did not have a home on the land at any time to the exclusion of a home elsewhere and that residence claimed is but pretense. It is clear also that he was not entitled to a change of residence, and the change would not have been allowed had he disclosed his intentions to live on adjacent property having the same climatic conditions for the remaining time. There was no error in finding that the entryman did not establish and maintain a home on the land.

The documentary evidence filed by the entryman shows that the ranch property mentioned above was sold under foreclosure proceedings under a deed of trust by the public trustee on March 3, 1930, to Leopold DeMerschman for the sum of \$7,960.78 and a certificate of purchase issued to him on the same day which recited that he would be entitled to a deed for said premises on December 4, 1930, unless the property was redeemed according to law. That on March 29, 1930, DeMerschman entered into a contract with Charles E. Myers to sell the certificate of purchase to him, in which Myers was to pay \$3,000 upon the deposit in escrow in the Citizens National Bank of Glenwood Springs, of the certificate, copy of contract, abstract of title, and other documents held by DeMerschman, and to pay the balance due with interest on December 10, 1930. In the event of default in payment, the documents placed in escrow were to be returned to DeMerschman and he was to retain the sums paid as purchase money. On March 31, 1930, Myers agreed to sell and transfer the ranch property to Terliamis, the entryman. This agreement recites that Myers is the owner of the equity of redemption in the

land. The purchase price was \$16,000, \$5,000 to be paid on execution of the agreement, \$4,000 and interest on December 10, 1930, and the remaining \$7,000 was to be paid by an interest-bearing promissory note, secured by deed of trust on the premises, upon delivery of the public trustee's deed to Terliamis. It was agreed that the first two payments were to be applied in payment of the sums due DeMerschman under the escrow agreement between DeMerschman and Myers. Upon expiration of the period allowed for redemption and payment of the \$4,000 the certificate of purchase was to be delivered to the Citizens National Bank, above mentioned, to the joint order of Myers and Terliamis, and a deed from the public trustee was to be obtained and recorded contemporaneously with the deed of trust to secure the payment of the promissory note of \$7,000. A warranty deed covering the premises was to be executed by Myers, placed in escrow with the bank and delivered to Terliamis on the payment of the \$4,000. In case there should be a redemption from the foreclosure sale by the principal debtors or a judgment creditor entitled to redeem, all redemption money was to be paid to Terliamis, he was to be reimbursed for all moneys paid, and the agreement was to terminate at his election and surrender of possession of the property. Provision was also made for forfeiture of the moneys paid and termination of the contract upon default by Terliamis in the performance of his part of the contract. Terliamis was given immediate right of possession upon execution of the contract. He exhibits a warranty deed from Myers to him dated April 1, 1930, and recorded December 5, 1930, made subject to the deed of trust for the unpaid purchase money, \$4,000 of which according to his testimony is still unpaid. It is presumed that Terliamis performed fully the conditions of the escrow agreement.

The entryman contends that the documentary evidence above set forth shows that the entryman had neither legal nor equitable title to the land at the date of his application, but a mere defeasible right in the land which he might lose by redemption of the land from the foreclosure sale, and under the terms of the certificate of purchase Myers could not convey any title until December 5, 1930, on expiration of the period for redemption.

This contention ignores the recital in the agreement between Myers and the entryman that the former was owner of the equity of redemption as well as the right of the inchoate title under the certificate of purchase. The holding of the Commissioner on this point is as follows:

Defendant gained immediate possession of the land and held it ever since. The record indicates that while some of Scott's (the debtor under the deed of trust) creditors may have been entitled to redeem the land under certain

circumstances the land was not redeemed by them, and that agreement with Myers was carried out. Under this agreement defendant purchased the rights of Scott, who apparently had the first right to redeem the land, and the right of DeMerschman, the purchaser at the foreclosure sale. In substance, it appears that defendant's full ownership of the land was incomplete only because he had not paid all the money, and the public trustee could not execute a deed until the time prescribed by law had expired.

The assumption that Myers was the owner of the equity of redemption as well as the assignee of the certificate of purchase was warranted from the recital in the agreement of March 31, 1930, and the fact that the entryman went into immediate possession which otherwise, it seems, would have remained in Scott until his right of redemption had expired. The fact that Myers was such owner is not denied on appeal. Theoretically, a right of redemption, if Scott did not exercise it, would have existed in lienors subsequent to the deed of trust and persons who would have been liable under a deficiency judgment under the statutes of the State, but the Department will not assume there were other persons entitled to redeem in the absence of proof that there were such persons.

Under his agreement the entryman was obligated to make payments to enable Myers to keep his agreement with DeMerschman and to make other payments in order to acquire title under the foreclosure sale. These obligations he fully kept by making timely payments as required and giving his secured note for the balance due. It appears, therefore, that at the time entryman filed his application there was nothing that would defeat his right to acquire the legal title other than his own acts or defaults.

In *Alfred Thomas* (46 L. D. 290) it was said:

The Department has repeatedly held that one is a "proprietor" within the meaning of Sec. 2289, as amended, if he has complete right to acquire legal title, or if, without that complete right, he has a valid and enforceable right to acquire legal title subject to defeat only by his own act or default. *Leitch v. Moen*, 18 L. D. 397; *Gourley v. Countrymen*, 27 Id. 702; *Smith v. Longpre*, 32 Id. 226; *Jacob J. Rehart*, 35 Id. 615.

In *Siestreem v. Korn* (43 L. D. 200) it was held that:

The word proprietor, as employed in this statute (Sec. 2289), means neither more nor less than owner, one who has a fee simple title to the land or may acquire such title by carrying out his own obligations or enforcing a vested right.

The above rules appear applicable to the present case. The cases of *Mantle v. McQueeney* (14 L. D. 313) and *Mathison v. Conquhoun* (36 L. D. 82) relied upon by entryman, were cases where the party who made the agreement to sell the land to the entryman prior to his application had acquired at that time no right, title, or interest in the land, and are inapposite. At the time of entry the entryman

in the case at bar was not qualified to make entry by reason of the ownership of more than 160 acres of land, and had he been qualified his entry is properly subject to cancelation, as his residence on the land to the exclusion of a home elsewhere was merely a pretense and not *bona fide*. The act of April 6, 1914, *supra*, under the provisions of which the election to reside on the entry of the husband was allowed, "residence thereon by the husband and wife shall constitute a compliance with the residence requirements upon each entry." As no such residence was made upon the entry in question, the wife of the entryman should be required to show cause why her entry should not be canceled.

Affirmed.

LEE J. ESPLIN ET AL.

Decided May 31, 1938

PUBLIC LANDS—WITHDRAWAL ORDER OF APRIL 17, 1926.

The order of withdrawal of April 17, 1926, took effect as to all subdivisions of the "vacant, unappropriated, unreserved public lands" containing the waters described in the order, the subsequent interpretive order being no more than an official finding that a certain tract is of the character and has the status defined in the order and is subject thereto.

State of New Mexico (55 I. D. 468) followed and applied

The withdrawal would attach to land containing waters developed by human agency if abandoned.

PUBLIC LANDS—RIGHTS OF WATER.

Rights to water are distinct from rights to the land upon which they exist.

Simons v. Inyo Cerro Gordo Mining & Power Company et al., 192 Pac. 144, *Robert J. Edwards and J. O. Jamieson v. Oscar T. Sawyer* (54 I. D. 144, 148) cited and applied.

SAME—MAINTENANCE OF RESERVOIR.

There can be no possession of public land under claim or color of title based upon mere construction, maintenance, and use of a reservoir for stock-raising purposes thereon and camping thereat. A reservoir on vacant public land collecting flood water only and used to water livestock, erected long prior to the withdrawal of April 17, 1926, and continuously maintained for such purpose thereafter by the builders or their successors in interest is not a water hole within the meaning of such withdrawal.

RIGHTS TO WATER—DEPARTMENT'S JURISDICTION.

As between private parties, the Department is without jurisdiction to determine the question as to the right to the water, that being a matter solely within the province of the State courts.

Silver Lake Power & Irrigation Company v. City of Los Angeles (37 L. D. 153); *Edwards and Jamieson v. Sawyer, supra*, cited and applied.

Any claim of a settler on public land to the waters of a reservoir thereon for which a certificate of water right has been granted by the State must be addressed to the proper authorities of the State, and any settlement

right that he may have will be subject to the rights granted under such certificate so long as it stands.

CHAPMAN, *Assistant Secretary*:

Appeals have been filed by Lee J. Esplin and Mason Meeks from the decision of an examiner of the Division of Grazing rendered June 5, 1937.

In the grant of a temporary grazing license on public lands to appellant, Esplin, the acting regional grazier, pursuant to the authority vested in him by the regulations of May 10, 1937, governing the administration of grazing districts under the Taylor Grazing Act, refused to give commensurate property rating to the Hacks Canyon Reservoir in which Esplin claimed an interest, located in what will probably be when surveyed the SE $\frac{1}{4}$ Sec. 8, T. 37 N., R. 5 W., G. & S. R. M., Arizona, for the reason that the lands upon which the reservoir is located were withdrawn as a public water reserve by Executive order of April 17, 1926, creating Public Water Reserve No. 107, according to departmental Order of Interpretation No. 228 issued March 15, 1937. On appeal by Esplin a hearing was held and a finding of fact and decision rendered as provided in the aforesaid regulations by the examiner. The examiner affirmed the action of the acting regional grazier in refusing to rate the reservoir as commensurate property by reason of the interpretive order but, upon consideration of the evidence, recommended vacation of the interpretive order on the ground that the rights of Esplin and those he represented were prior to the withdrawal of March 15, 1937, and upon vacation of such order that the Division of Grazing award grazing privileges based upon year-long proportionate ownership of the reservoir to the extent of 600 head of cattle to those parties entitled to such proportionate share.

In his appeal Esplin contends, in substance, that the land involved is not, and has not been since long prior to the withdrawal of April 17, 1926, vacant, unappropriated land; that it does not contain a spring or water hole as contemplated by said withdrawal; that the claim of Meeks, based upon alleged filing of a notice of settlement on the land in 1932, and actual settlement in May 1934, to a superior right to acquire the land involved and the waters thereon is without a valid basis and should be adjudicated in this proceeding. Meeks did not appeal from the decision of the acting regional grazier but responded to the notice of hearing and gave testimony concerning the reservoir, as to his alleged settlement, and as to the rights he asserted thereunder. He filed an appeal from the decision of the examiner, without assigning error, and, so far as it appears, without serving notice of his appeal on Esplin. His claim will, however, be considered

insofar as it is necessary to the determination of the propriety and validity of the order of interpretation and in resolving the question as to whether vested rights to the use of the water in the reservoir under section 2339, Revised Statutes, were secured by Esplin and those claiming a community of interest with him.

It appears from the evidence that in 1907, if not before, an earthen dike was constructed in the bed of a canyon on the land to catch floodwater for watering livestock and that it was washed out by floods and renewed from time to time. In 1924 or 1925 a ditch and wing dam were constructed to divert the floodwater from the canyon into a pit or pits excavated. This work was done by cattlemen using the adjoining range, some of them being the present claimants. In 1929 Ray D. Esplin, a sheepman, took possession of the reservoir, had it enlarged to 60 yards by 40 yards in area and to the depth of 9 feet. To avoid lawsuits and to compensate him for his development, he was paid \$1,200 to abandon his claim. This sum was paid by B. A. Riggs, Delbert Riggs, Ensign Riggs, Edward Lamb, Sr., Edward T. Lamb, Jr., David Esplin, Gilbert Heaton, Fred Heaton, Harold Reeve, Waldon Ballard, Afton Ballard, David Ballard and Lee J. Esplin, and apportioned among them according to the number of cattle that each had which watered there. Work was later done by some of these persons in 1933 and 1934 to clean the ditch and keep the reservoir in repair.

In 1934 Mason Meeks, appellant here, about May 1 built a rock house several hundred yards from the dam and asserts that he established residence therein and has maintained it since as the homestead law requires, and claims that he acquired the right to the reservoir and water by his settlement. He discloses that his family of five children and mother have lived elsewhere since alleged settlement. His actual occupation of the house as a home since 1934 is controverted. He admits he has the reservoir fenced in and has denied its use to sheepmen but not to cattlemen. He participated in the construction work done in 1925, but though watering his cattle at the reservoir since then did no further work thereon until 1935 when, at an expense of \$160, he restored the dike that diverts the water from the wash to the reservoir.

It is undisputed that the source of water supply is entirely from floodwater that runs down the draw and that there are no springs or natural seeps or streams feeding the reservoir; that since 1907 the reservoir has been used to water cattle by any cattlemen using the adjoining range; that the few cattle that drift in from other ranges are permitted to water there under a policy of reciprocity and that bands of sheep passing from summer to winter range, or vice versa,

have been watered there without molestation until stopped by Meeks; that the reservoir is a good one and the amount of water is depleted only by evaporation or consumption by cattle, and, although it goes dry at times, that on an average the reservoir is serviceable as a watering place for 11 months of a year. Esplin introduced in evidence a certificate issued by the State Water Commissioner May 12, 1937, to the same persons who are named above as purchasing the claim of Ray Esplin confirming their right as of April 16, 1936 (date of application), to an annual storage of 1.6 acre-feet and the use of 525,000 gallons of water per annum of Hacks Canyon Reservoir.

The withdrawal of April 17, 1926, took effect as to all subdivisions of the "vacant, unappropriated, unreserved public lands" containing the waters described in the order, the interpretive order being no more than an official finding that a certain tract is of the character and has the status defined in the order and is subject thereto. *State of New Mexico* (55 I. D. 466, 468). The withdrawal would attach to land containing the waters developed by human agency if the waters are abandoned by those who originally developed and conserved them. *Charles Lewis*, decided July 29, 1935, unreported. It is clear that there has been no abandonment of the reservoir by those who made and maintained it. The question, therefore, as to the legal propriety of the interpretive order depends on the conditions existing on the land at the date of Public Water Reserve No. 107 and its status at that time. As to the contention of Esplin that the land was not vacant or unappropriated because of its use as a stock watering place by stockmen in the community, it should be observed that rights acquired and safeguarded by section 2339 are distinct from any right in land itself. *Simons v. Inyo Cerro Gordo Mining & Power Company et al.*, 192 Pac. 144; *Robert J. Edwards and J. C. Jamieson v. Oscar T. S. Sawyer* (54 I. D. 144, 148). And it has been held that the existence of rights under the provisions of section 2339, Revised Statutes, is no bar to the acquisition of the land under the timber and stone act (*John H. Parker*, 40 L. D. 431), or under the stock-raising homestead law (*Thomas H. B. Glaspie*, 53 I. D. 577). There can be no possession of public land under color or claim of title based upon the mere construction, maintenance, and use of reservoir for stock-watering purposes thereon and camping thereat. Insofar as the case of *Wagoner v. Hanson* (50 L. D. 355) appears to declare to the contrary, it was not well considered and will not be followed. It, however, clearly appears in the present case that at the date of the order of withdrawal Esplin and other stockmen were maintaining a reservoir on the tract in question, constructed many years before, containing water collected by diverting flood water

that ran down a dry canyon, and were using and asserting rights to the same for stock-watering purposes. In *Santa Fe Pacific Railroad Company* (53 I. D. 210, 211) the Department said:

It is not believed that said order contemplated the withdrawal of tracts containing mere dry depressions or draws which do not, in their natural condition, furnish or retain a supply of water available for public use. Such a tract is not land which "contains a spring or water hole" in its natural condition, and it was not intended to withhold such land from acquisition by a person who has, by his own efforts, provided artificial means for collecting flood waters thereon.

Under this rule a dam across a dry wash to collect and store run-off water from the hills, and water collected in a mining shaft which was pumped in dry weather for stock watering were held not to be within the purview of the withdrawal above mentioned. See *Edwards and Jamieson v. Sawyer, supra*. Upon the evidence adduced, it is the conclusion of the Department that the Hacks Canyon Reservoir is not a water hole within the meaning of the Executive order of withdrawal of April 17, 1926, and there is no sufficient factual basis for the Order of Interpretation No. 228, finding that it is in the purview of the said withdrawal, and the order should be revoked.

The withdrawal out of the way, no sufficient reason appears for not awarding grazing privileges to those declared to have the right to the use of the waters and a right-of-way thereto in the certificates above mentioned, based upon their proportionate shares therein, because of any asserted claim to the water by Meeks either as a settler on the land in question or as an appropriator of the water. As between private parties, the Department is without jurisdiction to determine the question as to the right to the water, that being a matter solely within the province of the State courts. *Silver Lake Power & Irrigation Company v. City of Los Angeles* (37 L. D. 152, 153); *Edwards and Jamieson v. Sawyer, supra*. The certificate must be taken as establishing that the rights to the reservoir in question and to the waters therein to the extent granted are in the holders of the certificate issued by the State. Any claim that Meeks may assert to the water must be addressed to the proper authorities of the State, and any settlement right he may have affecting the tract in question (which is not a matter for decision in this proceeding) will be subject to the rights granted under said certificate so long as it stands.

The decision of the examiner is modified as above indicated.

The Division of Grazing will, therefore, prepare and submit a suitable order for revocation of the said Order of Interpretation No. 228, and the case is remanded for procedure in accordance with the above-stated views.

Modified and Remanded.

RESTORATION TO TRIBAL OWNERSHIP OF CEDED COLORADO UTE INDIAN LANDS

Opinion, June 15, 1938

INDIAN REORGANIZATION ACT, SECTION 3—RESTORATION OF LAND TO TRIBAL OWNERSHIP—REQUISITES.

For lands to be restored to tribal ownership under section 3 of the Indian Reorganization Act, (1) the Secretary of the Interior must find such restoration to be in the public interest and (2) the lands must be "remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public land laws of the United States."

INDIAN REORGANIZATION ACT, SECTION 3—CONSTRUCTION OF TERM "LANDS OF ANY INDIAN RESERVATION"—APPLICATION TO CEDED COLORADO UTE INDIAN LANDS.

Lands capable of restoration to tribal ownership are lands which were part of an Indian reservation at the time the lands were opened to disposal and need not be part of an existing Indian reservation or adjacent thereto. At the time the lands of the Confederated Bands of Ute Indians were ceded and opened to disposal under the act of June 15, 1880 (21 Stat. 199), they were part of the Colorado Ute Indian Reservation.

INDIAN REORGANIZATION ACT, SECTION 3—CONSTRUCTION OF TERM "SURPLUS LANDS"—APPLICATION TO CEDED COLORADO UTE INDIAN LANDS.

In permitting the restoration to tribal ownership of remaining "surplus lands" of any Indian reservation, the statute refers to lands ceded to the United States to be disposed of for the benefit of the Indians, and particularly lands so ceded which were left as surplus lands after allotment of the reservation to the Indians. The Colorado Ute Indian lands ceded under the act of June 15, 1880, come within this construction.

INDIAN REORGANIZATION ACT, SECTION 3—CEDED SURPLUS LANDS—EFFECT OF DESIGNATION AS PUBLIC LANDS.

Where surplus lands remaining after allotment have been ceded to be disposed of for the benefit of the Indians, the designation by Congress of such lands as public lands does not of itself affect the equitable interest of the Indians in the lands or the application of section 3 to the lands so designated.

INDIAN REORGANIZATION ACT, SECTION 3—APPLICATION TO CEDED COLORADO UTE LANDS.

The remaining undisposed of lands of the Colorado Ute Indian Reservation ceded under the act of June 15, 1880 (21 Stat. 199) held to be capable of restoration to tribal ownership under section 3 of the Indian Reorganization Act.

KIRGIS, *Acting Solicitor:*

At the instance of the Commissioner of Indian Affairs you [the Secretary of the Interior] have requested the opinion of this office on the authority of the Secretary of the Interior to restore to tribal ownership under section 3 of the Indian Reorganization Act (June 18, 1934, 48 Stat. 984), the remaining undisposed of lands in Colorado

ceded by the Confederated Bands of Ute Indians under the act of June 15, 1880 (21 Stat. 199). In phrasing the question, the Indian Office has asked whether section 3 is applicable to these lands in Colorado, "not situated adjacent to the existing Southern Ute Reservation." While this phrasing appears to restrict the question, it is believed that the Indian Office intends to request that all angles concerning the applicability of section 3 of the Indian Reorganization Act be determined. It is my intent to determine the matter in a comprehensive manner in view of the fact that the land involved is unusually large in extent, consisting of approximately 4,000,000 acres, and in view of the complicated legal and practical problems involved.

Section 3 of the Indian Reorganization Act reads as follows:

SEC. 3. The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however,* That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: *Provided further,* That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation: * * *. (Further provisos deal only with Papago Reservation.)

This section lays down two prerequisites for the application of the section to ceded Indian lands. First, the Secretary of the Interior must find that the restoration to tribal ownership will be in the public interest. Secondly, the lands involved must be "remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public land laws of the United States." The finding of public interest, while a requirement of law, involves the determination of administrative questions which need not be discussed in this opinion. It is sufficient to point out that a restoration is not a mandatory but a discretionary act to be weighed as a matter of public interest. The second prerequisite involves the determination whether, as a matter of law, the description of the lands subject to restoration applies to these ceded Colorado Ute lands. In making this determination the applicability of the various terms used in the description will be discussed.

I. THE COLORADO UTE AREA AS AN "INDIAN RESERVATION"

Lands to be restored must be surplus lands "of any Indian reservation." Therefore a first question involves the history and background of the Colorado Ute lands as an Indian reservation. In the first 20 years following the treaty of Guadalupe Hidalgo with Mex-

ico in 1848, the United States entered into negotiations with various of the Indian tribes occupying the area acquired from Mexico. Among the treaties made was one with the "Utahs" (December 30, 1849, 9 Stat. 984) for obtaining free passage through the "territory of the Utahs." In 1863 a treaty was made with the Tabeguache Band of Ute Indians (proclaimed December 14, 1864, 13 Stat. 673), by which the band relinquished its right and interest in all lands within the United States except a designated area. The treaty expressly declined to recognize any title or right of the band to the area ceded or reserved except that possessed by the Indians under the laws of Mexico. It has been claimed that the Indians had no title or interest under the laws of Mexico in the lands which they occupied and were not recognized by the United States as having the right of occupancy conceded to other Indian tribes in the United States. However, whatever may have been the interest of the Ute Indians in the lands occupied by them in this period, the treaty of March 2, 1868 (15 Stat. 619), with various bands of Ute Indians, who have since been commonly known as the Confederated Bands of Ute Indians, established a reservation for these Indians having the same status as any other Indian reservation in the United States. This treaty set apart a defined territory, consisting of approximately 15,000,000 acres, for the "absolute use and occupation" of these Ute Indians. The status of this territory as a reservation has been uniformly recognized by the Congress, the Court of Claims (*The Ute Indians v. The United States*, 45 Ct. Cls. 440), and the Department. The definition of an Indian reservation by the Supreme Court in *Minnesota v. Hitchcock*, 185 U. S. 373, 389, 390, that an Indian reservation is created when from what has been done there results a certain defined tract appropriated to Indian purposes, clearly covers the reservation of the Utes established by the 1868 treaty. In 1874 (18 Stat. 36), this reservation was reduced by approximately 3½ million acres through a cession by the Indians in consideration of a specified perpetual annuity, and the Indians retained no further interest in the lands thus ceded.

The reservation of the Confederated Bands of Ute Indians, as diminished by the 1874 cession, was the subject of the 1880 act under which the Confederated Bands ceded the lands involved in this opinion. The specific provisions of the 1880 act, its purpose and legal effect will be set forth in some detail later in this opinion. The actual result of the 1880 act, however, was that the Confederated Bands were divided into three groups, the Uncompahgre and White River Utes being located in Utah and the Southern Utes remaining in the southern portion of the reservation. All of the remainder of the reservation has been sold, set apart as national forests, or otherwise

disposed of, except the four million acres which are the subject of this opinion.

It might be claimed that in view of the above described results of the 1880 act, the reservation of the Confederated Bands was actually extinguished and that, therefore, the lands involved in this opinion are not surplus lands "of any Indian reservation." In my judgment, even if the reservation of the Confederated Bands of Utes were held no longer to exist, that fact alone would not negative the application of section 3 of the Indian Reorganization Act to the remaining undisposed of lands of that reservation. The phrase "of any Indian reservation" must be used in section 3 to describe the character and location of the lands at the time they were opened to disposal under the public land laws. The lands which may be restored to tribal ownership must be lands which were part of any Indian reservation, not of any forest or military reservation or of any other class of lands. Section 3 cannot mean that the lands must now have the character of Indian reservation lands, as they are not reservation lands but lands capable of being restored to reservation status under the Indian Reorganization Act. Nor can section 3 mean that the lands must be located within the geographical limits of an Indian reservation. In many instances of surplus land cessions entire portions of Indian reservations were cut off from the reservations and opened to disposal, while in other instances, by similar legal instruments, areas located within the reservations were opened to disposal. Whether the lands opened to disposal were cut off from or out of existing Indian reservation is a matter of historical circumstance and not of legal significance. Moreover, nothing in section 3 requires the remaining undisposed of lands to lie in any particular geographic relation to an existing Indian reservation. Such a requirement would ignore the well-known facts that the location of such lands is purely fortuitous and that the lands, by their very nature, are scattered tracts.

II. COLORADO UTE LANDS OPENED TO DISPOSAL UNDER THE PUBLIC LAND LAWS

The surplus lands of the Colorado Ute Indian Reservation were opened to disposal in designated ways under the public land laws by section 3 of the act of June 15, 1880. The relevant parts of the section read as follows:

all the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of public lands, at the same price and on the same

terms as other lands of like character, except as provided in this act: *Provided*, That none of said lands, whether mineral or otherwise, shall be liable to entry and settlement under the provisions of the homestead law; but shall be subject to cash entry only in accordance with existing law * * *.

This act was supplemented by the act of July 28, 1882 (22 Stat. 178), which provided that that portion of the Ute Reservation lately occupied by the Uncompahgre and White River Utes shall be "subject to disposal from and after the passage of this act, in accordance with the provisions and under the restrictions and limitations of section 3 of the act of Congress approved June 15, 1880 * * *." These provisions clearly bring the remaining undisposed of lands involved in this opinion within so much of section 3 of the Indian Reorganization Act as refers to remaining lands of an Indian reservation "heretofore opened * * * to sale, or any other form of disposal * * * by any of the public land laws of the United States."

III. CEDED COLORADO UTE LANDS AS "SURPLUS LANDS"

The key question in connection with the application of section 3 to the remaining Colorado Ute lands, is, in my opinion, the question whether these lands come within the designation of "surplus lands" in section 3. The word "surplus" means that which remains over and above what is required. It might be argued that practically all lands ceded by Indians were surplus lands according to this definition since they were doubtless considered as not being required by the Indians. However, Congress could not have intended that all remaining undisposed-of ceded lands should be available for restoration to tribal ownership, as such lands would embrace practically all of the remaining public domain. The Interior Department has taken the position that section 3 is not intended to cover all ceded lands but those ceded lands in which the Indians have retained an interest by reason of the fact that the lands were ceded to the United States to be disposed of by the United States in specified ways, the proceeds of the sale to be held for the benefit of the Indians. This type of ceded land was evidently in the mind of Congress at the time of the passage of the Reorganization Act. The debates on the bill in the Senate show that section 3 was discussed as a provision making possible the restoration of the use of the lands to the Indians in place of the proceeds to which they were entitled from any sale. (Congressional Record, 73d Congress, 2d session, page 11135.)

The reference to surplus lands in section 3 of the Reorganization Act refers, however, primarily to surplus lands remaining after the actual or contemplated allotment of the Indians, such surplus lands having been ceded to be disposed of for the benefit of the

Indians. The term "surplus lands" has been used commonly in connection with the allotment system and allotted reservations to refer to the lands not allotted or set aside for allotment and not reserved for administrative or tribal purposes. In the consideration of section 3 in Congress, the term "surplus lands" was defined in this manner. (Senate Report of the Committee on Indian Affairs on S. 3645, No. 1080, 73d Congress, 2d session; Congressional Record, 73d Congress, 2d session, page 11136.) The policy of the general allotment act and the allotment acts for specific reservations was to settle the individual Indians as farmers on individual tracts of land and to open the remainder of the reservation to disposal to white people. The purpose was different from that involved in previous disposals of Indian land since it was aimed at settling permanently and civilizing the individual Indians and at the same time opening their existing reservation to the advancing white settlers. The difference in purpose and effect between the conditional surplus land cession involved in the allotment acts and the previous type of cession in which the Indians were removed to another reservation to be held in common in the same manner as their previous reservation in which they then lost all interest is analyzed by the Supreme Court in the case of *Minnesota v. Hitchcock*, *supra*.

The 1880 cession agreement with the Colorado Ute Indians is one of the early examples of conditional surplus land cessions; in fact the provisions of the 1880 act set forth a plan of allotment and disposal of surplus lands which became stereotyped in later allotment acts. A commission was appointed to make a census of the Indians, to select lands to be allotted, to survey sufficient of these lands for allotment, and to cause allotments to be made. The provisions of section 3 of this act, quoted above, are significant in that they provide for the disposal only of those lands within the reservation "not so allotted." The legislative history of this 1880 act makes clear that the chief purpose of the act was the immediate allotment within the Colorado Ute Reservation of the individual Indians of various Ute bands and the opening to disposal of the remaining surplus lands. The opening up of the surplus lands was described as essential in view of the thousands of settlers and prospectors on the borders of the reservation who could not successfully be kept from entering the reservation by military or other means. The plan of allotment of the Indians was favored and bitterly opposed as the entering wedge in the allotment of the tribes generally throughout the United States. In fact, a general allotment act was pending in that session of Congress. (See House debates on the 1880 agreement, Congressional Record, 46th Congress, 2d session, June 7, 1880, pages 4251-4263.)

From the foregoing it definitely appears that the fact that this cession occurred several years before other allotment-cessions does not mean that this cession falls within the earlier type of outright cession and removal. This cession was rather a forerunner and a model of later allotment acts and differs in no important respect from these later acts. The fact that two of the three main groups of Indians were subsequently not allotted within the borders of the Colorado Ute Reservation does not alter my conclusion. The 1880 act did not provide for establishing new reservations but for supplying the Indians with allotments, and where allotments occurred outside the reservation, the Indians were to be charged a price of \$1.25 an acre to be paid from the proceeds of the land sold from the Colorado Ute Reservation. The allotments off the reservation were therefore in the nature of lieu allotments and, in the case of the Uncompahgre Utes, were made only because of the fact that insufficient agricultural lands were found within the Colorado Ute Reservation. (See Report of the Commissioner of Indian Affairs, 1881, at pages 19 and 325, *et seq.*)

There can be no doubt that the surplus lands remaining after allotment were to be sold for the benefit of the Ute Indians. The original agreement between the Government and the chiefs of the Confederated Bands of Ute Indians which preceded the 1880 act contemplated an outright sale of the surplus lands remaining after allotment in consideration of an annuity of \$50,000. In Congress it was pointed out that there would be realized in one year from one mine within the Colorado Ute Reservation nearly 20 times the entire principal sum from which these annuities to the Indians would be paid. The land was described as rich in minerals and of great value. As a result of the realization of the complete inadequacy of the annuity as a consideration for the relinquishment of the Indian right of occupancy in these lands, and in order that "full justice" might be done the Indians, the original agreement was amended by the 1880 act to provide that after the United States had been reimbursed the amount of the annuities paid the Indians and other expenses connected with the act, any further proceeds received from the sale of the land should be placed to the credit of the Indians. (Congressional Record, 46th Congress, 2d session, June 7, 1880, page 4261, June 12, 1880, page 4487.) The amended agreement as embodied in the 1880 act was subsequently accepted by the requisite number of Indians of the Confederated Bands.

The amended agreement was described by the Court of Claims in the case of *The Ute Indians v. The United States*, *supra*, page 464, as entitling the Ute Indians to receive all the proceeds of the reservation after the reimbursement and as providing for a transaction which was of no benefit to the United States, except the indirect benefit of opening a desirable territory to civilization. In the Court

of Claims case the Indians were awarded a judgment for the value of the lands within the reservation which had been set apart for public reservations and thereby been excluded from sale. The Interior Department has consistently recognized that the Indians are entitled to the proceeds from the disposal of these lands. (3 L. D. 296); (7 L. D. 191); (47 L. D. 560.) The jurisdictional act which authorized suit in the Court of Claims provided that upon the rendition of final judgment the principal fund from which the annuities of the Indians were obtained should be abolished and from that date no further annuities should be paid. As a result, therefore, since the 1910 decision the interest of the United States in the proceeds of the sale to the extent of \$50,000 annually has not existed and the remaining undisposed of surplus lands within the reservation have been subject to disposal for the unencumbered benefit of the Indians.

IV. EFFECT OF DECLARATION OF LANDS AS "PUBLIC LANDS"

From the foregoing it is my conclusion that the remaining undisposed of lands within the Colorado Ute Reservation are "surplus lands" within the meaning of section 3 of the Indian Reorganization Act. There remains only the question whether these lands must nevertheless be excluded from the scope of section 3 because of the fact that in the 1880 cession and in the subsequent act of 1882 it was provided that the lands not allotted "shall be held and deemed to be public lands of the United States." It has been urged that in the usual cession of surplus lands remaining after allotment no declaration that the lands ceded shall be public lands is made. As a consequence it is argued that these lands are not Indian lands in accordance with the holding in the case of *Ash Sheep Co. v. United States*, 252 U. S. 159. In that case the undisposed of ceded surplus lands of the Crow Reservation were held to be "Indian lands" within the meaning of a statute requiring the consent of the Indians to the use of the land for grazing purposes. The lands involved were ceded under the act of April 27, 1904 (33 Stat. 352), which provided that a designated portion of the reservation should be sold to the United States but that the United States should serve as trustee for the disposal of the lands for the benefit of the Indian.

In my opinion, the declaration in the 1880 act that the surplus ceded lands shall be public lands does not alter the fact that these lands are remaining surplus lands of an Indian reservation heretofore opened to disposal under the public land laws, within section 3 of the Indian Reorganization Act, even if the declaration lessened the interest of the Indians in the lands ceded during the time they were held by the United States and before they were sold. However, it is

also my opinion that this declaration did not make the 1880 cession different in legal effect from the Crow cession or other usual surplus land cessions where the Indians were to receive the proceeds of the sale. The significant legal effect of these cessions is that the United States becomes a trustee for the disposal of the land ceded. Regardless of the particular language of the cession, the result is that the Indians retain an equitable interest in the land until they have received the consideration bargained for, and the United States becomes a "trustee in possession." *Minnesota v. Hitchcock, supra; Ash Sheep Co. v. United States, supra.*

Surplus ceded lands to be disposed of for the Indians are frequently referred to in acts of Congress and departmental actions both as public lands and Indian lands. An example of the application by Congress of the term "public domain" to ceded surplus lands which would be "Indian lands" under the *Ash Sheep Co.* case, *supra*, occurs in the act of May 29, 1908 (35 Stat. 460), under which the Cheyenne River and Standing Rock Reservations in South Dakota were allotted. In this act it was provided that the Indians might use the timber upon the ceded surplus lands so long as these lands remained a part of the "public domain," and yet the act provided that the United States should act only as trustee for the Indians in the sale of the lands. In the act of Congress dismembering the Great Sioux Reservation, a provision that the unreserved lands shall be restored to the public domain is used in two places with obviously different meanings. In section 21 it is provided that the unreserved land shall be "restored to the public domain" to be disposed of to actual settlers only, the proceeds to go to the Indians. However, it is then provided that if the lands are not disposed of at the end of 10 years, they shall be paid for by the United States at a designated rate, and that the lands so purchased should then become "a part of the public domain." The first provision restoring the lands to the public domain could have had no legal effect to alter the equitable interest of the Indians in the land until sold or purchased by the United States.

The evident purpose of designating lands ceded for disposal for Indian benefit as public lands or public domain is to indicate that the lands are subject to disposal under public land laws. Lands so designated by Congress would seem therefore to be peculiarly within rather than without the scope of section 3 of the Indian Reorganization Act which refers to lands subject to disposal under the public land laws.

Surplus lands ceded to be disposed of for the Indians are in fact qualified public lands and also qualified Indian lands. They are public lands in that the United States has the legal title and has secured from the Indians a release of their right of occupancy and has arranged to dispose of them, but they are not public lands in the

full sense of the term as they are to be disposed of only in limited ways and upon certain conditions. *Minnesota v. Hitchcock, supra.* It should be noted that both the 1880 and the 1882 acts concerning the Ute land qualified the reference to the land as public land and subject to disposal under the public land laws by stated conditions and restrictions.

Surplus lands are also properly designated as Indian lands in view of the interest of the Indians in the proceeds of any disposal of the lands. This equitable interest is the significant condition attached to the lands which distinguishes them from the public lands generally as Indian lands. Since this condition was attached to the lands ceded by the Confederated Bands of Utes, the undisposed of lands may be as appropriately termed Indian lands as the lands ceded by other Indian tribes to be disposed of for their benefit. Under the regulations of the Interior Department of July 25, 1912, for governing the use of vacant ceded land (Regulations of the General Land Office, 1930, page 669) it was contemplated that remaining surplus lands, the proceeds of the disposal of which were for the benefit of the Indians, would be cooperatively administered by the Indian Office and the General Land Office, the Indian Office retaining jurisdiction of the use of the lands before they were sold and the General Land Office administering the final disposition of the lands. It is true that this administration by the Indian Office has not occurred in connection with these surplus Colorado Ute lands. The reason for that, however, is not the result of any legal difference but the result of practical considerations since the Indians were in fact allotted only in the southern part of the reservation, and since the surplus lands covered a vast area.

V. SUMMARY OF CONCLUSIONS

In view of the foregoing considerations, and in summary of my conclusions, it is my opinion that the undisposed of lands in Colorado ceded by the Confederated Bands of Ute Indians under the act of June 15, 1880, subject to the provisions and conditions set forth in that act, come within the designation in section 3 of the Indian Reorganization Act of remaining surplus lands of any Indian reservation open to disposal by the public land laws, and that they are, therefore, available for restoration to tribal ownership, provided the Secretary of the Interior finds the restoration to be in the public interest. It is immaterial as a matter of law whether the area to be restored is adjacent to the Southern Ute Reservation.

Approved: June 15, 1938.

OSCAR L. CHAPMAN,

Assistant Secretary.

GEORGE L. HOLLIS

Decided June 28, 1938

HOMESTEAD—SECOND ENTRY—ABANDONMENT.

Abandonment of a homestead entry because of inability to make a living thereon is an abandonment "because of matters beyond the control" of the entryman and sufficient to authorize restoration of the right to make homestead entry under the provisions of the act of September 5, 1914 (38 Stat. 712).

HOMESTEAD—QUALIFICATIONS OF ENTRYMAN—OWNERSHIP OF UNDIVIDED INTEREST IN COMMUNITY PROPERTY.

A husband who holds an undivided interest in land in Arizona which is the community property of the husband and wife is one "owning" land within the meaning of the act of March 3, 1891 (26 Stat. 1097) relating to the right to make adjoining farm entry.

McHarry v. Stewart (9 L. D. 344) criticized and distinguished.

ADJOINING FARM ENTRY—COMMUNITY INTEREST IN CONTIGUOUS LAND.

The community interest of a husband in 160 acres of land cannot be made the basis of an adjoining farm entry for the reason that he cannot show that the one-half of the land contiguous to the land applied for belongs exclusively to him. The disqualification, however, may be removed by the wife conveying her interest to her husband in that part of the land contiguous to the land applied for as an additional farm.

CHAPMAN, *Assistant Secretary*:

February 23, 1937, George L. Hollis filed a petition under section 7 of the Taylor Grazing Act, as amended by the act of June 26, 1936 (49 Stat. 1976), for classification of the NW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 14, T. 10 S., R. 9 E., G. & S. R. M., and also application for second entry under the act of September 5, 1914 (38 Stat. 712), and application to enter said tract as an adjoining farm under section 2289, Revised Statutes, as amended by the act of March 3, 1891 (26 Stat. 1095). Applicant alleged as basis for the right to make second entry that on April 21, 1909, he relinquished without consideration former homestead entry 03896, shown to contain 160 acres, due to conditions beyond his control in that he "had to go to Ray, Arizona, to work to earn a living, and found, I could not return to the land." As basis for adjoining farm entry he alleged he owned and resided upon contiguous E $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 14 and W $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 15, which was acquired during marriage, and which was, therefore, community property under the laws of Arizona in which he owned a one-half undivided interest.

By decision of December 13, 1937, the Commissioner of the General Land Office denied the application for second entry on the ground that applicant did not show what the conditions were that prevented his return to the land and further held that the applicant was not qualified to make entry of the tract sought as an adjoining

farm, and that he would not be entitled to do so until he could show that the community property had been subdivided and that the one-half thereof which belongs to him is the tract contiguous to the land applied for as an adjoining farm. The Commissioner followed and applied the rule announced in *McHarry v. Stewart* (9 L. D. 344) that—

An undivided interest in the original farm does not constitute such ownership thereof as will afford a legal basis for an adjoining farm.

From this decision the applicant has appealed.

The act of September 5, 1914, *supra*, requires that an applicant for a second homestead entry must show, among other things, that the prior entry or entries "were lost, forfeited, or abandoned because of matters beyond his control." In *Osmund Steensland* (46 L. D. 224) inability to make a living on an 80-acre homestead entry which could not be enlarged was regarded as an abandonment "because of matters beyond the control" of the entryman and sufficient to authorize restoration of the homestead right. If applicant had unequivocally and clearly shown that the inability to make a living on the land was the cause not only of leaving but failing to return to the entry, it is believed that his right of entry could have been properly restored, and should there exist no other legal impediment to the allowance of the application for adjoining farm the applicant could properly be required to make further showing in this respect.

The condition for the allowance of the adjoining farm entry under the act of March 3, 1891, *supra*, is that the land shall not "with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres."

In support of his contention that he qualified to make the adjoining farm entry applicant relies upon the ruling in *Thomas H. B. Glaspie* (53 L. D. 577). It is true in this case as well as the more recent one of *Keith v. Young*, decided May 12, 1938, unreported, it was held in effect that the ownership of a one-half interest of either husband or wife in land in Arizona which is community property under the laws of that State makes either of them a "proprietor" to the extent of their interest within the meaning of section 2289, Revised Statutes, which inhibits homestead entry by any person "who is the proprietor of more than 160 acres of land," and it well may be argued that the words "proprietor" and "owning" in the same section refer to the same character and quality of interest in land, so that if a husband is the owner of but a one-half interest in 160 acres of community property, and is chargeable with but one-half of that acreage in determining his qualifications to make original entry, as was held in the *Glaspie* case, he must be deemed the owner of only

a like interest in determining his qualifications to make an adjoining farm entry.

In *McHarry v. Stewart, supra*, the question presented was whether Stewart, the applicant for adjoining farm, was the owner of 60 contiguous acres which had been carved out by deed and conveyed to him by his wife as part of her undivided interest in a "probate homestead" set apart under the laws of California for the use of the surviving wife and minor children of her deceased former husband. The Department held that Stewart was not the owner of the 60 acres for three reasons, namely (1) the widow had no power to convey the land to him under the laws of the State, (2) that the word "owning" in section 2289 imported absolute and unqualified ownership and therefore did not apply to an ownership in common with others, and (3) that until it was known what part of the land would be allotted to the widow, his grantor, on partition, it could not be held that he owned contiguous land. The second reason, if necessary to the conclusion reached, is not compatible with the definition of the word "owner" in *Richards v. Ward* (9 L. D. 605) which held that one having an undivided interest as a tenant in common was an owner within the meaning of section 2260, Revised Statutes, and which further observed, evidently with the decision in *McHarry v. Stewart* in mind, that—

It is true that this Department has held that an undivided interest in land will not sustain an adjoining farm entry, under section 2289, Revised Statutes, but the principal reason given for that decision is that in cases of undivided ownership it cannot be known whether the portion of the common estate which will be allotted to the applicant, will when partitioned, adjoin the land he applied to enter, and that contiguity of the original farm is an essential under that section.

The second reason is also inconsistent with the statutory construction of the word "proprietor" in the same section in *Heirs of DeWolf v. Moore* (37 L. D. 110) and in the *Glaspie* and *Keith v. Young* cases above cited, and no good reason is perceived for giving the word "owning" in the same statute in connection with an application for an adjoining farm entry a different construction.

The fact that applicant cannot, however, show that he is the owner of contiguous land is fatal to his application.

It may be suggested, however, that the disqualification could be removed by mutual simultaneous deeds between the husband and wife, the wife conveying to the husband her interest in the half or some other proportion of the original farm contiguous to the land applied for as an additional farm in consideration of the husband conveying his interest to the wife in the remainder, provided the deeds were recorded, thus showing bona fide, present, and unconditional transac-

tion. Or the wife could deed her interest in the land contiguous to the desired adjoining farm and proof of such deeds, if recorded, would be accepted as evidence of such transfer of interest. This suggestion is made in view of the ruling of the Supreme Court of Arizona in *Main v. Main* (1900), 7 Ariz. 149, 69 Pac. 888, that a husband may transfer his interest in the community property to his wife, and the character of the title will be changed thereby to that of her separate property, and the further ruling by the said court in *Schofield v. Gold*, 26 Ariz. 296, 225 Pac. 71, that a married woman may convey by deed of gift to her husband her interest in the community estate, such conveyance not being prohibited by the laws of the State.

If such division be made, it will be essential that residence be performed on that part deeded to the husband and made the base for the adjoining farm entry. Otherwise, residence will have to be performed on the land entered.

As modified the decision of the Commissioner is affirmed.

Modified.

ROBERT E. BOYD

Decided June 28, 1938

STOCK-RAISING HOMESTEAD ENTRY—NOTICE TO LESSEE—LESSEE'S ASSENT TO RELINQUISHMENT.

Holder of recorded lease of a stock-raising homestead entry, if he files notice of his lease in the local office, is entitled under Rule 98 of Practice to notice of any contest or other proceeding affecting the land, and his assent is necessary to the acceptance of a relinquishment of the entry.

STOCK-RAISING HOMESTEAD ENTRY—ENTRYMAN'S RELINQUISHMENT WITHOUT LESSEE'S ASSENT

Failure of a lessee of a stock-raising homestead entry, who obtained his lease after the issuance of final certificate and recorded the same, to file notice of his lease in accordance with Rule 98 of Practice does not by reason of such failure cause him to lose his rights in the land by the acceptance of a relinquishment by the entryman and cancelation of the entry, as the entryman had no right to relinquish the entry without the assent of the lessee.

RELINQUISHMENT OF ENTRY—CERTIFICATE OF NONALIENATION REQUIRED.

Henry Gimbel et al. (38 L. D. 198) ; *Addison v. Hastie* (8 L. D. 618) ; *Falkner v. Hunt et al.* (14 L. D. 512), cited and applied.

Relinquishment of entry subsequent to final certificate should be accompanied by a certificate of nonalienation from the register of deeds of the county wherein the land lies.

CHAPMAN, Assistant Secretary:

June 12, 1930, Rosa Esther Rodriguez made stock-raising homestead entry Las Cruces 041980 for 633.95 acres in T. 23 S., R. 3 E.,

N. M. P. M. The time for final proof was extended to June 12, 1937. Final proof was submitted July 2, 1936, and final certificate was issued August 21, 1936. Adverse proceedings were ordered January 19, 1937, charging insufficiency in the stock-raising improvements. In the order directing the proceedings, entrywoman was given the privilege of filing a motion for suspension of the proceedings not exceeding six months during which time she was allowed to file supplemental proof showing she had placed \$396.44 worth of additional stock-raising improvements on the land, that sum being the extent of her deficiency according to the report of the Bureau of Investigations. August 18, 1937, entrywoman filed an affidavit showing additional improvements of the value of \$412.90 consisting of the value of $1\frac{3}{8}$ miles of four-wire fence and labor on roads. The affidavit was referred to the special agent in charge, Division of Investigations. October 12, 1937, the special agent in charge reported inspection of the additional improvements and that their value was but \$289.04 and there was still a deficiency in value of \$107. He recommended that entrywoman be given additional time to comply with requirements in that regard. October 4, 1937, entrywoman filed a relinquishment of the entry, followed on October 11 by a request to withdraw it, and on the next day by a withdrawal of said request. December 8, 1937, the Commissioner of the General Land Office in view of the relinquishment canceled the entry and closed the case. The lands are included in Grazing District No. 4 and it is represented that grazing license for the land has been issued to E. J. Isaacks.

December 13, 1937, Robert E. Boyd appealed from the order of cancellation and requested that the entry be reinstated, and if the required improvements were found sufficient that the entrywoman be awarded the land for the purpose of giving her a home and to protect his rights therein. The right he alleged was based on a lease entered into between him and entrywoman January 14, 1937, leasing the homestead premises to him for five years at an annual rental of \$40 per annum. A copy of the lease accompanied the appeal showing it was filed for record among the records of the county in which the land lies on January 14, 1937. Boyd further alleged that he paid the entrywoman \$40, the first year's rental; that the entrywoman having no money to place the additional improvements on the land he, by agreement with her, placed them on the land at a cost of \$400; that he was to be given credit on the rental and lease for the full sum due for said improvements and the balance above the rental due was to become a lien on the land when patent was received; that the improvements were sufficient in value to satisfy the requirements of the stock-raising homestead act and that the withdrawal of the re-

linquishment was at his solicitation and the recall of that withdrawal was due to representations made by others to the entrywoman that she would lose her right to certain relief money she was drawing if she accepted a patent.

By decision of February 28, 1938, the Commissioner dismissed the appeal on the ground that Boyd had shown no interest that would warrant reinstatement of the entry and held that upon the cancellation of the entry upon relinquishment the withdrawal of November 26, 1934, attached to the land. Boyd has appealed.

Rule 98 of Practice provides that, "Transferees and encumbrancers of land title to which is claimed or in process of acquisition under any public land law shall, upon filing notice of the transfer or encumbrance in the district land office, become entitled to receive and be given the same notice of any contest or other proceedings thereafter had affecting such land which is required to be given the original entryman or claimant." It further provides that any transfer or encumbrance shall be noted on the records and reported to the General Land Office and that such transferee or encumbrancer as well as the entryman must be made a party defendant to any proceeding against the entry. A lease of land is an encumbrance thereon. See cases cited under Words and Phrases, 2d Series, page 1021. Had Boyd filed notice as required by this rule he would have been entitled to receive notice of the relinquishment and it could not properly have been accepted without his assent thereto. The consequence does not, however, follow that by default in filing notice of encumbrance that the encumbrancer loses his rights in the land by the acceptance of the relinquishment and cancellation of the entry and that the land thereafter may be treated as vacant, unappropriated public land. It is well settled that upon issuance of final certificate upon a homestead entry prima facie equitable title vests in the entryman subject to the authority of the Land Department to cancel the entry for fraud, mistake of fact, or error of law within the period prescribed by section 7 of the act of March 3, 1891 (26 Stat. 1095). See cases cited, Entry X, Digest of Land Decisions 1 to 40, and note 4, Sec. 164 and Sec. 1168, title 43, U. S. C. A. Upon issuance of the certificate the land is transferable (*Peyton v. Desmond*, 129 F. 1; *King-Ryder Lumber Co. v. Scott*, 84 S. W. 487) and may be mortgaged (U. S. C. A., title 43, Sec. 164, note 5), devised (*ibid.*, note 6), and taxed (*ibid.*, note 24). The quantum of estates does not affect the principle stated, neither does the fact that the certificate and entry were under attack by adverse proceedings as the presumption of equitable title would continue unless and until the charge of invalidity was held established and the certificates canceled, those ac-

quiring an interest in the land, of course, being affected with notice that the entry was exposed to the peril of cancelation. There was nothing in contravention of public policy in the agreement subsequent to the issuance of the final certificate to lease the land in consideration of the promise of the lessee to erect the additional improvements required and have the cost credited against the rental under the lease, with the balance due to become a lien on the land after patent.

It is well settled that where an entryman transferred or mortgaged the land after receiving final certificate, he will not be permitted to relinquish the same and thereby defeat the rights of the transferee or mortgagee. *Henry Gimbel et al.* (38 L. D. 198) and cases cited. This principle has been applied where knowledge of the transfer was not brought home to the Land Department until after cancelation of the entry and a new entry allowed for the same land. See *Addison v. Hastie* (8 L. D. 618); *Falkner v. Hunt et al.* (14 L. D. 512). In the *Hastie* case it was said that the Government would not be a party to such an unconscionable wrong of permitting the entryman to relinquish the entry and thus defeat the rights of the mortgagee. Moreover, there seems to be an old rule that has never been abrogated so far as the Department is aware in requiring the relinquishment after final certificate to be accompanied by a certificate of nonalienation from the register of deeds for the county in which the land is located. See *Harlan P. Allen* (12 L. D. 224). It does not seem that there is any better method of obtaining satisfactory assurance that the equitable title is not affected by an outstanding interest and the rule should be enforced.

It is believed from the facts disclosed that the entrywoman had no right to relinquish the entry without a disclosure of the interest of Boyd and joinder by him in the relinquishment.

The interest of the entrywoman being subject to alienation and encumbrance was subject to the laws of the State relating to notice by record, and the grazing licensee must be charged with constructive notice of the prior recorded lease. The entry of Rodriguez will, accordingly, be reinstated subject to the adverse proceedings pending against it and Boyd and any licensee under the Taylor Grazing Act as well will be permitted to intervene in the proceedings. As the difference in valuation is small Boyd should be given the option of making additional improvements to the extent of the deficiency claimed by the special agent or joining issue on the charge.

The decision of the Commissioner is accordingly reversed and the case remanded for further proceedings as above stated.

Reversed and Remanded.

GEORGE J. PROPP

Decided July 22, 1938

STOCK-RAISING HOMESTEAD ACT—CONSTRUCTION—LEGISLATIVE HISTORY—CONTINGENCIES—PURPOSE.

Both the terms of the Stock-Raising Homestead Act (act of December 29, 1916, as amended (39 Stat. 862)) and its legislative history show the intent of Congress to condition accrual of all rights and equities upon specified contingencies in order to protect both applicant and Government.

STOCK-RAISING HOMESTEAD—DESIGNATION—DISCRETION OF THE SECRETARY OF THE INTERIOR—BASIS FOR CLASSIFICATION—SPECIAL INVESTIGATION.

Designation of lands as stock raising is entirely discretionary with the Secretary of the Interior, who in forming his judgment considers cumulative findings by governmental, scientific services resulting from continued scientific examination and study of the lands. Neither designation nor special investigation of a particular tract is a matter of right in an applicant.

TAYLOR GRAZING ACT—EFFECT ON STOCK-RAISING HOMESTEAD LAW—CHANGE IN LAND POLICY—VESTED INTERESTS.

The Taylor Grazing Act in effect repeals the stock-raising homestead law but, in abandoning old land policies for new, does no prejudice to the rights of any stock-raising homestead applicant, no citizen having any vested interest in a statute or a governmental policy.

STOCK-RAISING HOMESTEAD—APPLICATION—WHEN COMPLETE—RIGHTS INITIATED.

A stock-raising homestead application to enter undesignated lands initiates in the applicant no present rights but only a prospect of future rights of uncertain existence and remains incomplete until susceptible of allowance.

STOCK-RAISING HOMESTEAD—APPLICATION—WHEN ALLOWABLE—CONTINGENCIES—PRESENT RIGHTS.

Under sections 1, 2, and 8 of the act, an application for *original* entry is susceptible of allowance only upon the happening of both of two contingencies, designation of the land and nonuser of the preferential right accorded to applicants for *additional* entry, and only upon such occurrence initiates in the applicant *rights in esse*, viz, 1. an immediate, present, procedural right of priority as against third parties; and 2. an immediate, present, substantive right of occupancy of the land as against the Government.

STOCK-RAISING HOMESTEAD—SETTLEMENT IN ADVANCE OF DESIGNATION—RISKS—RIGHTS AND EQUITIES.

Acts of settlement in advance of designation are at the peril of the applicant and create as against the owner, the Government, no rights or equities susceptible of maturing into stock-raising homesteads.

STOCK-RAISING HOMESTEAD—INCOMPLETE APPLICATION—CONTINGENT RIGHTS—WITHDRAWAL—EXISTING VALID RIGHTS.

A stock-raising homestead application filed prior to the withdrawal order of November 26, 1934, for lands on that date remaining undesignated cannot prevent said withdrawal from attaching to the lands sought, such application being incomplete and having initiated only *rights in futuro* contingent

upon events not certain to occur, not *rights in esse* within the meaning of the term "*existing valid rights*" in the saving clause of the withdrawal order.

STOCK-RAISING HOMESTEAD—WITHDRAWAL—JURISDICTION TO DESIGNATE—RULE.

The Department is without jurisdiction to designate as of stock-raising character land withdrawn from entry by competent authority. A single failure to observe the rule neither changes nor vitiates it.

CHAPMAN, *Assistant Secretary*:

On November 28, 1933, George J. Propp of Fort Collins, Colorado, filed application, Denver 046169, to make original stock-raising homestead entry of N $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 6; NE $\frac{1}{4}$ Sec. 7, T. 6 N., R. 78 W., 6th P. M., containing 640.40 acres, within the boundaries of Colorado Grazing District No. 2. Simultaneously he petitioned for designation of the lands as stock raising and paid the required fees.

On August 29, 1935, the register rejected the application on the ground that the lands remained undesignated on November 26, 1934, and that accordingly being vacant and unappropriated they were adversely affected by the Executive order of that date issued in aid of the purposes of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269), and withdrawing from entry, subject to existing valid rights, all vacant, unreserved, and unappropriated public lands in Colorado and certain other States. On September 17, 1935, applicant filed notice of appeal and on October 16 a formal appeal brief. On October 14, 1936, the General Land Office affirmed the register's rejection.

From this decision applicant appeals for a remedy that will establish his rights on the following counts. 1. He alleges not only that the lands described will produce winter forage as well as summer grazing for 40 cows and an adequate living for a family and should therefore be designated as stock-raising lands but that his first-hand knowledge of this tract should carry more weight with the Department than the "office" classification of a bureau and that there can be no accurate report on the land without a field examination of the tracts involved. 2. He asserts that the Department after long pursuing a policy of designation so undeviating as to have led appellant and many other applicants to rely upon its continuance and to base their whole design for living thereupon has suddenly without advice or announcement to the public shifted its policy to one of nondesignation, thereby prejudicing the rights and expectations of such applicants. 3. He argues that in consequence the Department owes to him and those in similar plight special consideration in the form of either a continuance of the former policy or a modification of the Executive order. 4. He contends that under his application and petition for designation he has rights which departmental instructions and an opinion of the Solicitor have previously recognized as

“valid existing rights” (sic) and which as such should be honored under the saving clause of the temporary Executive order of November 26, 1934, subordinating withdrawal of lands to such rights.

This appeal neither sets forth new facts nor points out any right existing in appellant on the date of the withdrawal which could have exempted the application from the force of the order. It does however, disclose fundamental misconceptions of the stock-raising homestead law and of the legal relations between land applicants and landowner leading to wholly erroneous conclusions regarding appellant's rights as against the Government. Such confusion should not persist.

As to designation of lands as stock raising, the stock-raising homestead act created neither rights nor obligations. The terms of section 2 could not more plainly indicate that such designation was to be wholly discretionary with the Secretary. Equally clearly the legislative history of the act shows the experimental nature of the act and the belief of the Congress that designation must often be withheld to spare the pioneer years of disillusionment on unrewarding lands. The Secretary was therefore charged with the duty of ascertaining through the scientific services of the Government whether the lands sought were chiefly valuable for forage crops and grazing and, if so, adequate to promise a living on the 640-acre unit. It was his further duty to withhold designation should they be pronounced unadapted to such purpose or adapted but inadequate. Nor might the Secretary accord designation even to adequate lands of suitable character should they be more valuable for some other public purpose. Thus, designation is a matter not of right in the applicant but of discretion in the Secretary. To argue that it is mandatory upon the Secretary is to misunderstand the purpose of the Congress and to distort the language of the act.

As for field investigation of particular tracts, no provision of law confers on an applicant a right to such examination at will. It is frequently forgotten that the Government is the owner of the public lands and that its mere adoption of a give-away land policy neither deprives it of control of its own in its own way before bestowing its gift nor confers upon potential donees the right to prescribe the terms of gift. During more than 20 years the public lands of the semi-arid regions within which lie the tracts here involved have been and continue to be under constant scientific investigation by the appropriate Government bureaus, including laboratory studies and repeated field examinations by qualified scientists. Cumulative findings based on such research are not to be dismissed as “office information” of little worth in comparison with allegations by an individual having an interest to be served. For various reasons the Department frequently orders further investigation of par-

ticular tracts applied for but such action is a matter of discretion in the landowner, not one of right in the land seeker and will, of course, not be ordered when sought as here to advance purposes discontinued by the Government.

As appellant complains, the stock-raising homestead has been discarded. On the basis of both scientific findings and executive experience the Congress in order to conserve the public domain and promote its highest use has adopted new land policies, implementing them in the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269), amended by the act of June 26, 1936 (49 Stat. 1976), and thus in effect repealing the stock-raising homestead law, with which they are inconsistent.

This change in land policy was not however the sudden, unheralded move alleged by appellant. It had been studied and debated in the Congress during several years and widely discussed in the press, particularly that of the States intimately concerned. But even had it been brought about overnight and without notice it would not have prejudiced any rights of appellant or other applicants for stock-raising homesteads. The Government's long maintenance of a policy of rapid, large-scale disposal of the public lands has never been a guarantee to citizens of a continuance thereof nor can it preclude the Government from modifying or even reversing that policy at will. It is elementary constitutional law that a citizen has no property or vested interest in a rule of the common law, a statute or a governmental policy.

* * * the law itself, as a rule of conduct, may be changed at the will or even at the whim of the legislature unless prevented by constitutional limitations. (*Munn v. Illinois*, 94 U. S. 113, 134.)

* * * the promise which the law may today hold out to one standing in a particular relation to the owner * * * is only a legislative expression of the present view as to what is proper and politic; an expression which confers no rights and is subject to be withdrawn at any time, whenever the view of what is just or politic may change. (Story, Commentaries on the Constitution, vol. 2, p. 700. See also Cooley, Principles of Constitutional Law, 351-2.)

* * * most civil rights are derived from the public laws; and if, before the rights become vested in particular individuals, the convenience of the State procures amendments or repeals of those laws, those individuals have no cause of complaint. The power that authorizes or proposes to give may always revoke before an interest is vested in the donee. (Woodbury, J., in *Merrill v. Sherburne*, 1 N. H. 199, 213, 8 Am. Dec. 52, 64, 65.)

Thus the Government owes nothing in either law or equity to those who based hopes and expectations upon an anticipated continuance of the stock-raising homestead law, and there is no merit in any claim to the contrary.

Appellant's contention that by virtue of his application he acquired a valid right existing on November 26, 1934, and therefore saving the desired lands from the force of the withdrawal order evinces complete misapprehension of the nature of the rights set up by the stock-raising act, which in turn leads to misinterpretation of the Solicitor's opinion of February 8, 1935. In public land law the stock-raising homestead act is *sui generis*, an application thereunder initiating in the applicant no immediate rights as against the Government but only a capacity to acquire contingent rights of uncertain, future existence. Both analysis of the law and consultation of its legislative history show that in enacting it 21 years ago the Congress deliberately drew it so as to condition the accrual of every right against the owner, the Government, upon a series of contingencies, none certain to occur, and to prevent any right or equity against the Government from arising prior to the happening of those contingencies.

Sections 1 and 2 both make clear that undesignated lands are not subject to entry, and section 8 shows that even lands designated in pursuance of an application for an *original* stock-raising entry are not subject to such *original* entry unless in the 90-day period following designation the preferential right to *additional* entry created in certain others by section 8 shall not have been exercised. It being long-settled law that application to enter land not subject to entry at the date of application confers on the applicant no rights as against the Government, it follows that if lands are undesignated when application is made, the mere filing of an application with payment of fees and petition for designation does not bring into existence any immediate or present right to the land. The application remains incomplete until it becomes susceptible of allowance. That in turn can come about only upon the happening of the two contingencies above mentioned, designation of the lands and nonuser of the additional entry preference right. If these two contingencies occur, then, and then alone, does there spring into existence in the applicant a valid present right in the lands applied for, as distinguished from a mere prospect of a right of uncertain, future existence. *Hall v. Stone* (1893) (16 L. D. 199); *John F. Silver* (52 L. D. 500, 501); *Mildruff H. Young*, On Rehearing (55 I. D. 448, 450). See also Cooley, Principles of Constitutional Law, p. 351, 3d ed., 1898, by McLaughlin, quoted in *Pearsall v. Great Northern Railway Company*, 161 U. S. 646, 673.

The intention of the Congress thus to hedge about the accrual of rights to the stock-raising applicant is emphasized and extended by certain other provisions of the law dealing with settlement and improvement of the land in advance of designation, acts which appellant believes should entitle an applicant to special consideration

from the Government. Under other laws such acts are usually productive of immediate rights. Here, while not prohibited, they were to be at the peril of the applicant if performed before designation and were not to create as against the owner, the Government, any right susceptible of maturing into a right to a stock-raising homestead.

By these several restrictions the Congress sought to protect the applicant against himself and the Government against the applicant. It intended the law not only in terms to advise prospective homesteaders against advance outlay of time and money on lands which might never be designated but also to protect the Congress against a multiplicity of claims for relief by homesteaders hoping for designation and taking a gambler's chance on it only ultimately to lose through nondesignation their entire premature investment in lands which could never be theirs. Unless and until the contingencies should occur, advance settlement was to remain an abortive enterprise productive of neither rights nor equities in so far as a stock-raising homestead was concerned.

Senator Thomas of Colorado made this clear in the Senate debate on December 21, 1916, when in reference to advance occupation he said: (Cong. Rec., vol. 54, pt. I, p. 642; *id.* p. 644 for remarks of Senator Reed Smoot of Utah.)

* * * this procedure shall confer upon the locator *no right whatever* until the land has been properly designated. In other words he acquires *no equities* by such occupation which can under any circumstances be used against the Government, but after the land has been so designated then his rights as a locator begin. [Italics supplied.]

Other provisions of the act contemplate other contingent rights, of far less probable existence because contingent on more numerous happenings little likely to occur. Even the so-called "preference" right, a right not substantive but procedural, not in or to the land but to priority over third parties, created to protect the prior but suspended stock-raising application against subsequent applications of types immediately allowable otherwise, is a right not in being but of uncertain future existence, contingent upon the same two happenings above described.

Hence in summary it is seen that between application and designation the stock-raising applicant has as against the Government no immediate, fixed right of either present or future enjoyment, whether complete or inchoate, and no equity. He has only a recognized capacity to acquire rights of uncertain future existence, a bare prospect of some day enjoying rights doubly or even triply contingent. He has nothing *in esse* therefore which by either congressional intent

or judicial construction can fall within the meaning of the saving clause of the withdrawal order of November 26, 1934. There is no magic in legal reasoning which can convert a capacity or a prospect into an "existing valid right."

Accordingly, the lands here involved not having been designated, appellant on November 26, 1934, had no existing valid right exempting the lands from the force of the order. The withdrawal therefore attached. Nor does the Solicitor's construction of the term "existing valid rights" given in his opinion of February 8, 1935, lead to a different conclusion. As support for his contention that his application gave him an "existing valid right," appellant quotes the Solicitor's statement (55 I. D. 210):

* * * I believe that all prior valid applications for entry, selection or location which were substantially complete at the date of withdrawal should be considered as constituting valid existing rights within the meaning of the saving clause of the withdrawal order.

But this category of prior applications creating existing valid rights does not include the stock-raising application for lands remaining undesignated at withdrawal. The applications here described as creating the saving rights are restricted by the restrictive relative clause to those applications which were "substantially *complete* at the date of the withdrawal" and we have seen above that the stock-raising application remains *incomplete* until the happening of the contingencies which render the land applied for subject to entry. In appellant's case the contingencies not having occurred before November 26, 1934, the application continued incomplete on that date and hence cannot fall within the Solicitor's definition. *

Appellant refers to another interpretation of a similar term in the March 4, 1933 withdrawal relating to Gunnison National Forest, made in a letter of June 2, 1933, to the Denver register and alleges error in the Department's failure to follow such interpretation. That however was never the rule. It has never been followed, reported, or incorporated into general instructions. The Department has considered itself as without jurisdiction to designate as subject to entry as stock-raising land withdrawn from entry by competent authority and for over 20 years has made its rules those of the above analysis.

The withdrawal order having attached to these lands, the decision is affirmed.

Affirmed.

JOHN F. RICHARDSON AND CHARLES F. CONSAUL

Decided July 29, 1938¹

PUBLIC LANDS—OWNERSHIP OF CERTAIN ISLANDS AS BETWEEN UNITED STATES AND STATE.

The State of Louisiana and others protested the issuance of any oil or gas lease by the United States of East Timbalier Island and adjoining islands off the coast of Louisiana on the ground that the State owned the islands. As a result of the action of the waters of the Gulf of Mexico and the elements, East Timbalier Island, during the hundred years of its known history, has advanced about $2\frac{1}{4}$ miles in a northerly direction, a distance of nearly 15 times its present average width. And while the contour of the island has changed, and several segments have broken away to become small islands, the principal island has maintained its substantial identity. Ever since 1837 the island has been and still is being treated by the United States as its public land. Until it protested in this case, Louisiana never asserted ownership or jurisdiction and never repudiated the ownership and jurisdiction of the United States. The conduct of Louisiana and its lessees has been inconsistent with ownership by the State. *Held:* The islands are public lands of the United States and the protests should be overruled.

OIL AND GAS LEASE—FINDING THAT LANDS OUTSIDE KNOWN STRUCTURE—EVIDENCE REQUIRED.

Section 17 of the act of February 25, 1920, as amended by the act of August 21, 1935 (41 Stat. 437, 49 Stat. 674), provides that all lands subject to disposition under the act which are known or believed to contain oil or gas deposits, may be leased by the Secretary of the Interior to the highest bidder by competitive bidding, but that the person first making application for the lease of any lands not within any known geologic structure of a producing oil or gas field shall be entitled to a preference right over others to a lease of such lands without competitive bidding. *Held:* The finding that lands attempted to be leased without competition are outside a known structure should be based upon clear and convincing evidence and should not be made in the face of substantial doubt.

OIL AND GAS LEASES—FINDING THAT LANDS WITHIN KNOWN STRUCTURE—COMPETITIVE BIDDING FOR LEASE.

Two persons filed respective applications for an oil and gas lease of East Timbalier Island and adjoining islands without competitive bidding, under section 17 of the act of February 25, 1920, as amended (41 Stat. 437, 49 Stat. 674). Three months prior to the filing of the applications a well was completed at a point 915 feet from East Timbalier Island, was brought into production, and continued to produce until two months after such filing, when the well clogged with sand, and production temporarily ceased while the obstruction was being removed. Another well is being constructed at a distance of 540 feet from the island. The Director of the Geological Survey reported to the Commissioner of the General Land Office that the island is within the known geologic structure of the Timbalier Dome oil field. *Held:* The islands are within the known geologic

¹ See *United States ex rel. Richardson v. Ickes*, District Court of the United States for the District of Columbia, Law No. 90480, final judgment of District Court entered October 26, 1938, dismissing a mandamus action brought by Richardson to compel the Secretary of the Interior to issue an oil and gas lease of the islands to him.

structure of a producing oil field and must be offered for leasing by competitive bidding.

STATUTORY CONSTRUCTION—OIL AND GAS LEASES—"PRODUCING OIL OR GAS FIELD."

An oil or gas field which has produced oil or gas and is capable of further production is a "producing oil or gas field" within the meaning of section 17 of the act of February 25, 1920, as amended, even though production has ceased. ✓

ICKES, *Secretary*:

At 10:10 a. m. on April 29, 1938, the appellant John F. Richardson filed an application for an oil and gas lease without competitive bidding of land described as follows: "East Timbalier Island Bird Refuge and adjoining islands situated along the coast of La Fourche Parish, Louisiana, lying between Grand Pass Timbalier and Raccoon Pass, about 250 acres." Twenty-three minutes later the appellant Charles F. Consaul similarly filed an application for a lease without competitive bidding for an area described as follows: "Fractional Sections 4 and 5, T. 24 S., R. 22 E., Louisiana M., comprising East Timbalier Island, the areas of said fractional sections being as follows: Sec. 4, 2.71 acres; Sec. 5, 59.66 acres/62.37 acres lying in the State of Louisiana."

Both applicants appeal from decisions of the Commissioner of the General Land Office, dated July 14, 1938, which respectively denied their applications on the ground that the lands applied for were within a known producing field.

The State of Louisiana, the Southern Sulphur Corporation, and the Gulf Refining Company have appeared herein and protest the granting of any leases on the ground that the State of Louisiana is the owner of the lands involved by virtue of the State's inherent sovereignty, and because they were created in Timbalier Bay after the admission of Louisiana into the Union.

East Timbalier Island is a long, narrow, sandy island on the gulf coast of Louisiana. It is more than three miles long and its mean width is some 800 feet. In its length it runs more or less east and west. Timbalier Bay is on the north, the Gulf of Mexico on the south.

During the hundred years of its known history, the island has slowly advanced about two and a quarter miles in a northerly direction, a distance of nearly fifteen times its present average width. The waters of the gulf have slowly but relentlessly washed up the easily shifted sands over a ridge on the south, and the elements have moved them down the slope towards the north. Thus, what the island has constantly lost in area on the south it seems to have gained on the north. The contour of the island has changed. And several segments have broken away at each end to become small islands in turn; these are the "adjoining islands * * * between Grand Pass

Timbalier and Raccoon Pass," described in appellant Richardson's application. But the principal island has otherwise bravely resisted the elements and has maintained its substantial identity throughout the years.

Ever since 1837, the island has been and still is being treated by the United States as its public land. It was located in that year by surveyors of the Federal Government. Based on their survey, it is shown on the General Land Office plat of T. 24 S., R. 22 E., Louisiana meridian, approved May 19, 1842. Three Presidents have taken formal action premised on the island being property of the United States. On March 25, 1844, it was included in a military reservation by order of President Tyler. The military reservation was canceled and the island placed under the control of the Secretary of the Interior by President Cleveland on September 23, 1886. On December 7, 1907, the island was reserved by President Theodore Roosevelt as a preserve and breeding ground for birds, to be known as East Timbalier Island Reservation. Since then the Department of Agriculture has maintained the island as a bird refuge and by means of signs posted on the island, has given notice to the world of the existence of the refuge and of its jurisdiction thereover. The island is locally known as "Bird Island."

Until the State of Louisiana first protested the issuance of leases to the appellants by letter of its attorney general to this Department, dated June 8 of this year, it had at no time asserted ownership of, or jurisdiction over East Timbalier Island or its adjoining islands, nor had it in any manner, express or implied, ever denied the ownership of these lands or the exercise of jurisdiction over them by the United States.

In 1928, the State of Louisiana granted an oil and gas lease to one E. C. Andrus. This lease was subsequently assigned to Southern Sulphur Corporation and in 1936 assigned by it to the Gulf Refining Company, the present lessee. The lease does not specifically include the lands described in the applications of the appellants. The lands covered by the lease are generally described as "All the lands, beds and bottoms owned by the State of Louisiana" in certain waters, among them those in which are located East Timbalier Island and its adjoining islands.

But neither the State nor any of its lessees has ever attempted to drill wells on or in any other manner occupied the island or the adjoining islands. On the contrary, the Gulf Refining Company has recently constructed one oil well and is constructing a second in the waters of Timbalier Bay on the north side of the island, one of which is 540 feet and the other 915 feet from the nearest point of the island. Moreover, this past spring the company wrote the Department of

Agriculture requesting it to permit the building of a footwalk from the wells to the island so that its employees might walk to the island and swim from the beach on the gulf side.

All these facts are persuasive that the protests of the State of Louisiana, the Southern Sulphur Corporation, and the Gulf Refining Company are without substance and they are accordingly overruled.

We turn now to the question whether the applications of the appellants for leases without competitive bidding were properly denied. The statute which authorizes the Secretary of the Interior to issue oil leases of public lands and defines his duties and powers in the subject matter is the act of February 25, 1920, as amended by the act of August 21, 1935 (41 Stat. 437, 49 Stat. 674). The relevant provisions of the statute are these:

SEC. 17. All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits, except as herein otherwise provided, may be leased by the Secretary of the Interior * * * to the highest responsible qualified bidder by competitive bidding under general regulations. * * * That 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 this Act * * * shall be entitled to a preference right over others to a lease of such lands without competitive bidding * * *.

It is manifestly in the public interest that as a general rule oil leases of public lands be granted by competitive bidding rather than to the first applicant. The consideration received by the Government is greater and the possibility of favoritism and collusion is minimized. The broad authority granted to the Secretary at the outset of section 17 incorporates that general rule. If the lands are "known or believed to contain oil or gas deposits, except as herein otherwise provided," the lease is to be sold to the highest bidder by competitive bidding. The only exception "otherwise provided" is in that portion of section 17 which provides that "a preference right over others to a lease without competitive bidding" shall be granted to "the person first making application for the lease of any lands not within any known geologic structure of a producing oil or gas field." Congress has formulated the general policy that competition and the greater public benefit are to be preferred. The portion of section 17 which makes provision for the exception uses categorical language. It describes the lands subject to noncompetitive leasing as "not within a known geologic structure." This language is in contradistinction to that used to describe the lands to be leased by competition; these lands may be either "known or *believed* to contain oil or gas deposits." [Italics supplied.] For these reasons, I think that the finding that lands attempted to be leased without competition are outside a known structure should be based upon clear and con-

vincing evidence. The finding should not be made in the face of substantial doubt.

In this case, there is no such clear and convincing evidence and there is substantial doubt. In fact, there is no evidence that the lands covered or intended to be covered by the applications of the appellants are not within a known structure. On the contrary, the facts indicate that those lands *are* within a known structure. Prior to January 27 of this year, the Gulf Refining Company completed its so-called No. 3 well in Timbalier Bay, at a point 915 feet from East Timbalier Island. On January 27, the well was brought into production and continued to produce oil until the end of June. The well then clogged or filled with sand and production has temporarily ceased while the obstruction to the flow of oil is being removed. The company is now constructing another well in the bay, called No. 4, at a distance of 540 feet from the island. Moreover, the Director of the Geological Survey reported to the Commissioner of the General Land Office that the island is within the known geologic structure of the Timbalier Dome oil field.

It is argued that because the two wells of the Gulf Refining Company are not now producing, the area cannot be said to be within "the known geologic structure of a producing oil * * * field." To construe the statute so literally would be absurd. Any temporary cessation in the flow of oil would serve to defeat the obvious purpose of the statute to grant the rewards of a noncompetitive lease to those venturing into "wild cat" areas. The words "producing oil * * * field" were plainly intended to encompass this case. Production has merely been interrupted, the field is capable of production and the applications of the appellants were filed three months after public newspaper announcement of the flow of oil from the well of the Gulf Refining Company.

In *Moss v. Schendel*, A. 6287, unreported, decided March 24, 1924, the Department held:

The applicant Moss * * * alleges that the lands were not, at the time of his application, within a producing field, as all wells in that field which had produced either oil or gas, were not producing, but were exhausted, the wells abandoned and the casing pulled and the wells plugged, * * * The records disclose that the Torchlight field was a known producing field long before the passage of the leasing act, and was so defined long prior to the filings by appellant or Schendel. The Department is also aware that large oil companies which have been operating in the field did abandon it in 1923, as alleged, but is not convinced that such abandonment warrants a redefinition of the structure or the revocation of the classification of the area as a producing field at this time. The term "producing oil or gas field" as used in section 13 of the leasing act must be construed to include areas in which there has been production and which are *capable* of producing more oil, otherwise cessation of production in a given field because of a strike or other external matters

would render areas which were clearly oil bearing, subject to prospecting operations and, when oil was brought in, the reward for discovery provided in section 14 of the act would be improperly conferred in a case where such discovery was not essential to the determination, already made, that the land was valuable for oil and gas deposits. Until further showings are made which are persuasive that the area does not still contain valuable deposits of oil, the field will not be redefined.

The language in section 13 of the statute thus construed is substantially the same as that used in section 17 and the sound principles announced are applicable to both.

My finding of fact is that the lands involved are within the known geologic structure of a producing oil field. The respective applications of the appellants for noncompetitive leases were properly denied. East Timbalier Island and the adjoining islands between Grand Pass Timbalier and Raccoon Pass should immediately be offered for leasing by competitive bidding under seal. The Commissioner of the General Land Office is to take appropriate action accordingly, subject to approval by the Department of the form of the advertisement and of the acceptance or rejection of any bid.

The decisions of the Commissioner are affirmed.

Affirmed.

ON MOTIONS FOR REHEARING

Decided September 8, 1938

ICKES, *Secretary:*

On July 29, 1938, I affirmed a decision of the Commissioner of the General Land Office denying the respective applications of the appellants for oil and gas leases without competitive bidding, of East Timbalier Island and adjoining islands between Grand Pass Timbalier and Raccoon Pass, off the coast of Louisiana, and held that the islands should be offered for lease by competitive bidding. By the same decision I overruled the protests of the State of Louisiana, the Southern Sulphur Corporation, and the Gulf Refining Company objecting to the granting of any leases on the ground that the State of Louisiana is the owner of the islands involved.

The appellant Richardson, the State of Louisiana, the Southern Sulphur Corporation, and the Gulf Refining Company have moved for rehearing. No arguments or facts which were not considered in deciding the appeal are now presented and I am convinced my decision was right and should not be disturbed.

The State of Louisiana, the Southern Sulphur Corporation, and the Gulf Refining Company repeat their claim that the State rather than the United States owns the islands. My decision of July 29, 1938, set forth facts demonstrating that since 1837 the United States

had continuously asserted dominion over the area involved and had always treated it as public land of the United States. I also said that until the State first protested the issuance of leases to these appellants on June 8 of this year, it had at no time asserted ownership of, or jurisdiction over the islands, nor had it in any manner, express or implied, ever denied the ownership of these lands or the exercise of jurisdiction over them by the United States. It is significant that neither the State, the Southern Sulphur Corporation, nor the Gulf Refining Company challenges these facts and conclusions. The motions for rehearing are denied.

Motions denied.

F. RAY CLEMENTS

Decided August 1, 1938

GRAZING DISTRICTS—ADVISORY BOARDS—FUNCTIONS—RULES.

A district advisory board has no administrative authority and no function other than to make recommendations in the light of departmental rules and, while its members may agree on certain factual standards by which their recommendations concerning the application of those rules will be governed, they cannot make rules, nor can the factual standards agreed upon impose higher requirements than those imposed by the rules.

GRAZING DISTRICTS—ADVISORY BOARDS—REGIONAL GRAZIER.

Under all of the grazing rules, the first decision on an application for a grazing license is made by the regional grazier, and a recommendation by an advisory board, made only for the purpose of providing the regional grazier with pertinent factual information which otherwise might not come to his attention, and followed by the regional grazier, cannot be "sustained," the word "sustain" connoting an upholding by a subordinate administrative or judicial officer of such action as otherwise would stand in the absence of an appeal proceeding.

CHAPMAN, *Assistant Secretary*:

This is an appeal by F. Ray Clements, of Magdalena, New Mexico, from the decision of an examiner of the Division of Grazing dated June 18, 1937, affirming the action of the regional grazier in rejecting the application of the appellant for a grazing license in New Mexico Grazing District No. 2-B for the year 1937.

The area in controversy embraces vacant lands in Sec. 26, T. 3 S., R. 6 W., Secs. 21, 27, 28, and 33, T. 3 S., R. 5 W., N. M. P. M. Following the consideration of Clements' application by the district advisory board, the regional grazier formally notified him that the following recommendation had been made:

That your application for a license to graze livestock on the public range denied for the reason that your application does not meet the requirements of Advisory Board Rule No. 2, quoted below:

"WATER CLAUSE.—Adequate stockwater is required for the period of the license. It will be considered according to its dependency on public range for seasonal use to the extent of the carrying capacity of the area properly serviced therefrom."

Clements protested and on March 3, 1937, the advisory board reconsidered his application. On the same day the regional grazier formally notified him that the board had adhered to its original recommendation and that "you are hereby notified * * * that the recommendation of the Advisory Board be sustained." Several comments should be made in connection with this notification. First, the functions of a district advisory board, which are set forth on page 6 of the Compiled Rules of June 14, 1937, and in Sec. 12, Par. *i* of the Federal Range Code, approved March 16 and June 22, 1938, do not include that of making "rules." It has no administrative authority and no function other than to make recommendations *in the light of departmental rules then existing* and while its members may agree on certain factual standards by which their recommendations concerning the application of those rules in particular cases will be made, they can impose no higher requirement than those for which provision is made in the rules. See *Joseph F. Livingston* (56 I. D. 92) decided March 29, 1937.

Secondly, the word "sustain" connotes an upholding of such action of a subordinate administrative or judicial officer as otherwise would stand in the absence of an appeal proceeding. Under all of the grazing rules, however, the first decision on an application for a grazing license is that made by the regional grazier and not the recommendation of the advisory board, which is made only for the purpose of providing the regional grazier with pertinent factual information which otherwise might not come to his attention. The regional grazier accordingly cannot "sustain" the recommendation of the advisory board any more than any other administrative officer can "sustain" an expression of opinion on the part of someone else whose views he may have solicited in order better to enable him to formulate his own decision. He may follow a recommendation in whole or in part, by taking action in the light of it, but he cannot "sustain" it.

Lastly, the "rule" in question, even if sought to be put into effect in the first instance by the regional grazier, appears open to some question under the rules of January 28, 1937, which governed the consideration of Clements' application. Those rules contained no mention of a requirement that an applicant have water adequate for a year-long livestock operation. See *R. C. Montgomery* (A. 21414), decided June 28, 1938.

Following the action of the regional grazier, Clements requested a hearing, which was held on June 14, 1937, at Magdalena, New

Mexico, before an examiner of the Division of Grazing. The examiner affirmed the decision of the regional grazier, but for the reason that the appellant's base property had not been used in connection with the public range during the 5-year period immediately preceding June 28, 1934, the date of the enactment of the Taylor Grazing Act. Under the rules of January 28, 1937, the property thereby was within Group 2 of the preference class.

Clements' application was for the year 1937, and under the rules then applicable a license could in any event have been effective only until May 1, 1938. The appeal accordingly is moot and might be dismissed on that ground alone were it not for the fact that the issue appears to be one the determination of which may be of significance in the consideration of any current application under the Federal Range Code, approved March 16 and June 22, 1938, which has superseded the rules applicable in the instant appeal.

The base property of the appellant consists of a well located on a homestead entry of 640 acres in Sec. 25, T. 3 S., R. 6 W. The weight of the evidence is that the well was not "curbed" until the year 1937, that it has not been equipped, and that the only means of lifting water to the surface is by a rope and bucket. The evidence further supports the conclusion that the well was developed subsequent to the enactment of the Taylor Grazing Act. It therefore is within Group 2 of the preference class under the rules of January 28, 1937. The record shows that the area in controversy is serviced by other waters which are within Group 1. The decision of the examiner accordingly was correct.

While it is not essential to a determination of the instant appeal under the rules of January 28, 1937, the record indicates that the appellant's well does not constitute an adequate year-long supply for stock-raising purposes. This requirement, while not included in the rules of January 28, 1937, has been incorporated in Sec. 2 (k) of the Federal Range Code.

The examiner's decision is affirmed, and the appeal is dismissed without prejudice to Clements' right to file an application for 1938, although it would appear doubtful that any such application, based on the well involved in this appeal, should receive any more favorable consideration than did the 1937 application, since sections 2 (k), 2 (1), and section 4, paragraph *a* not only include the requirement that Class 1 water be "available, accessible, and adequate," as mentioned above, but also require that it have been used prior to June 28, 1934.

Affirmed.

ROMAN C. NUNEZ ET AL.

Decided August 1, 1938

PUBLIC LANDS—GRAZING—COMPETING WATERS—PRIOR WATERS.

Under section 2 (1) of the Federal Range Code, approved March 16 and June 22, 1938, water which was used to service certain range for a given number of livestock during the five-year period immediately preceding June 28, 1934, is "prior" water, but only to the extent of the greatest number of livestock properly grazed from it during said period, and where a part of the range serviced was included in a stock-drive during the entire period, the grazing on these lands was not "proper," and the water should be regarded as Class 2 water to the extent that it serviced the stock driveway lands. Although the water is principally Class 1 water and therefore not subject to competition by a Class 2 water owned by another and serving a part of the same range, it is subject to competition by Class 2 water as to that part which serviced the stock driveway lands.

J. N. Wells, decided June 28, 1938 (A-21249), cited and applied.

CHAPMAN, *Assistant Secretary*:

Roman C. and Serapio Nunez have appealed from the decision of an examiner of the Division of Grazing, dated October 7, 1937, sustaining the decision of the regional grazier in denying their application for a grazing license in New Mexico Grazing District No. 6 for the year 1937.

On May 19, 1937, the regional grazier formally notified the applicants that the district advisory board had recommended the rejection of their application—

* * * for the reason that "the available range is insufficient to meet the requirements of all the preferred class, and your dependent commensurate property has not been used in connection with the public range for a 'full grazing season' during the five-year period prior to June 28, 1934." This places you in group 2 of the preference class and classifies you as a Class 2 applicant.

The applicants filed a protest and the record includes an undated copy of what purports to be a notice by the regional grazier to the effect that the board had recommended on June 5 "that their original action be sustained" and advising the applicants "that your application to be suspended pending report from Range Survey as to the location of your waters." The Nunezes filed what is designated as a "motion for Review" and on August 24, 1937, a hearing was held at Roswell, New Mexico, before an examiner of the Division of Grazing. Intervention was made in the appeal by the Bloom Land and Cattle Company, to whom the lands for which the Nunezes had applied had been allotted.

The period of time involved in the Nunez application expired April 30, 1938, and the Rules for the Administration of Grazing Dis-

tracts, approved January 28, 1937, which governed the consideration of the application, have been superseded by the Federal Range Code, approved March 16 and June 22, 1938. The appeal accordingly is moot and might be dismissed on that ground. Since it appears that one of the issues may be of some significance in the consideration of any current application under the Federal Range Code, however, it will be discussed briefly.

The base properties of the appellants consist of a well situated in the SE $\frac{1}{4}$ Sec. 20, T. 11 S., R. 20 E., N. M. P. M., and a surface tank situated in the NW $\frac{1}{4}$ Sec. 28. The record indicates that these properties were used in livestock operations in connection with the public range from about April 20, 1935, which was subsequent to the enactment of the Taylor Grazing Act (act of June 28, 1934, 48 Stat. 1269). These waters accordingly were within group 2 of the preference class defined in the rules of January 28, 1937, and are now Class 2 waters under section 4, paragraph *a* of the Federal Range Code. The intervener has a well known as the Border Well, situated in Sec. 1, T. 11 S., R. 20 E. It is conceded that this well was in use long prior to the enactment of the Taylor Act and it hence was within group 1 of the preference class defined in the rules of January 28, 1937, and is now a Class 1 water under the Federal Range Code. The service areas of the appellants' and the intervener's waters overlap and in the absence of any other qualifying factor the intervener would be entitled to a license equivalent to the carrying capacity of the entire service area of the Border Well, subject only to the deductions for which provision is made in section 4, paragraph *a* of the Federal Range Code. This appears to have been the basis upon which the examiner proceeded in his decision.

An additional factor has thus far been ignored, however. The Division of Grazing's Exhibit A, which is a map of the area involved, shows that an area comprising approximately four sections in the overlapping service areas was once included in a stock driveway under section 10 of the act of December 29, 1916 (39 Stat. 862). These sections were in a stock driveway during the entire 5-year period immediately preceding the enactment of the Taylor Act but the driveway withdrawal was revoked on November 18, 1936. The issue presented, therefore, is whether, as to the carrying capacity of *these lands*, the Class 2 water of the appellants can compete with the Class 1 water of the intervener under section 2 (n) of the Federal Range Code, which provides:

Competing water means water which is available, accessible, and adequate to service some part of the Federal range serviced by other water of the same class. In determining whether prior waters are competing, each shall be considered only to the extent that it is prior water.

While the use of the words "other water of the same class" would at first seem to negative the possibility of such competition, an examination of other provisions of the Federal Range Code makes it clear that the Border Well and the appellants' water must be regarded as competing waters to a certain extent. The appellants' water admittedly is not "prior water" within section 2 (1) of the Federal Range Code, which provides:

Prior water is water which was used to service certain range for a given number of livestock during the 5-year period immediately preceding June 28, 1934. It will be considered prior water only to the extent of the greatest number of livestock that was properly grazed from it during said period.

While the intervenor's well was used to service the area involved during the 5-year period, the limitation in the latter sentence in section 2 (1) necessitates ignoring the carrying capacity of the lands which were in the stock driveway during that period in determining the extent of the *priority* of the well, since no livestock could be "properly" grazed on the driveway except in a driveway movement made in accordance with the provisions of section 10 of the act of December 29, 1916, *supra*, and the limitation clearly contemplates a regular grazing operation free from any legal restraint. That is to say, if it be assumed, for the purpose of discussion, that 500 head of livestock was the greatest number grazed from the Border Well during the 5-year period and if the carrying capacity of the lands in the stock driveway be assumed to be 100, manifestly 100 head should be charged to the driveway and only 400 head should be regarded as having been "properly" (i. e., legally) grazed from the well. The well consequently would be a prior water only to the extent of 400 head and if its service value, which is defined in section 2 (m) as the "number of livestock that can [now] be grazed properly from such water," be greater than 400, the well should be regarded as a Class 2 water to the extent of such excess. It may be stated parenthetically that there might be other factors which would contribute to improper grazing and which would necessitate an additional deduction. In the absence of evidence in the record on this point, however, attention is being given in this discussion only to such part of the intervenor's grazing as may not have been "proper" because it was illegal.

Applying the foregoing analysis to the instant case, the intervenor's Border Well is a Class 2 water to the extent of the excess, if any, of the number of livestock which can *now* be properly grazed from it over a number computed by deducting the number allocable to the carrying capacity of the sections which were in the driveway during the 5-year period from the greatest number grazed from the well during that period. It accordingly competes with the appellants' water for the carrying capacity of such part

of the old driveway as is located within the common service area but not for a greater carrying capacity of the Federal range than the excess just described. Section 4, paragraph *a* of the Federal Range Code provides in part:

* * * Water will be rated for its service value by *deducting therefrom the carrying capacity of half of the area serviced jointly by competing water of the same class, and the carrying capacity of all private or State land located within such service area and not owned or controlled by the applicant.* * * * [Italics supplied.]

Under this provision, the carrying capacity of old driveway lands located within the common service area of the appellants' and the intervenor's waters should be divided equally between them on the basis of their competing Class 2 waters.

The foregoing constitutes an amplification of the principle laid down in *J. N. Wells*, A-21249, decided June 28, 1938. For a discussion of a similar issue regarding the use of base property, see an opinion of the Solicitor (M. 29741), approved April 18, 1938.

Since the Nunez appeal is now moot, it is unnecessary to determine whether the examiner's decision was correct under the rules of January 28, 1937. The appeal is dismissed, but without prejudice to any 1938 application filed by the appellants. Such an application should be considered under the appropriate provisions of the Federal Range Code and in the light of the foregoing discussion.

Appeal dismissed.

J. W. LEMONS ET AL.

Decided August 4, 1938

PUBLIC LANDS—GRAZING—WATERS.

Section 2, paragraph *m*, of the Federal Range Code, approved March 16 and June 22, 1938, provides that the "service value" of water offered as base property for a grazing license or permit is "the number of livestock that can be grazed properly from such water" and therefore, in computing the service value of a particular water, not only the amount of the water, but also the topographical and other factors that limit the area that can be grazed from it must be considered.

Where there are competing waters of the same class, neither water entitles the applicant to a grazing permit or license for the full service value thereof, but there must be a deduction in each license or permit to the extent of one-half of the carrying capacity of the area serviced jointly by the waters.

PUBLIC LANDS—GRAZING—PRIVATELY OWNED OR CONTROLLED LANDS—CROSSING PERMITS.

Where the privately owned or controlled lands of a licensee or permittee are separated by intervening public lands that have been allotted to another, crossing privileges over the intervening lands should be granted to such licensee or permittee.

CHAPMAN, Assistant Secretary:

J. W. Lemons and Henry T. Frazor, of Roswell, New Mexico, have appealed from the decision of an examiner of the Division of Grazing dated October 7, 1937, sustaining the decision of the regional grazier in allotting grazing privileges to them in New Mexico Grazing District No. 6 on the following-described lands:

Beginning at the quarter common to Secs. 17 and 20, T. 13 S., R. 22 E., thence east to near the southwest corner of Sec. 15, T. 13 S., R. 22 E., thence north 1 mile east to the northeast corner of Sec. 15, T. 13 S., R. 22 E., thence south 1 mile, east $\frac{1}{2}$ mile, south 2 miles to the south quarter corner of Sec. 26, T. 13 S., R. 22 E., thence east $\frac{1}{2}$ mile, south $\frac{1}{2}$ mile, west $\frac{1}{4}$ mile, south $\frac{1}{2}$ mile to the township line between townships 13 and 14 south, thence west $1\frac{1}{4}$ miles along this township line to the south quarter corner of Sec. 34, T. 13 S., R. 22 E., north $\frac{1}{4}$ mile, west $\frac{1}{4}$ mile, south $\frac{1}{4}$ mile to the township line again, thence west along the township line to near the southwest corner of Sec. 33, T. 13 S., R. 22 E., thence north 1 mile, west to the north quarter corner of Sec. 32, T. 13 S., R. 22 E., thence north 2 miles to point of beginning.

In addition to the allotment granted Frazor and Lemons, other lands, 12 sections in number, are requested in Ts. 13 and 14 S., Rs. 21 and 22 E. These lands have been allotted to the Bloom Land and Cattle Company.

A local hearing, resulting from the appeal of Frazor and Lemons, was held at Roswell, New Mexico, August 24, 1937, at which time intervention was made by the conflicting allottee, the Bloom Land and Cattle Company.

The appeal was transmitted to the Department on December 23, 1937, when a substantial part of the period for which the license was effective had expired. The intervener's brief was transmitted on February 8, pursuant to the grant of an extension of time. The appeal is now moot and might be dismissed on that ground alone were it not for the fact that the issue presented, i. e., the size of the allotment which the appellants should be granted, appears to be one which again may arise in any appeal filed in connection with the application which the appellants have made for the current year. The record discloses that on April 18, the regional grazier granted the appellants the same allotment as that complained of here, for the period from May 1, 1938, to April 30, 1939. The facts therefore will be discussed briefly in the light of the applicable provisions of the Federal Range Code, approved March 16 and June 22, 1938.

A careful review of the record has been made and the briefs filed on behalf of Frazor and Lemons and the Bloom Land and Cattle Company have been considered. It is evident that the base water offered by appellants Frazor and Lemons is of such character that it comes within group 1 of the preference class as provided in the Rules for the Administration of Grazing Districts, approved January

28, 1937, and that it also is a Class I water as defined in section 4, paragraph *a* of the Federal Range Code.

All of the five waters offered by the intervenor are of the same character and four of them, namely the Well Camp Well, the Sampson Well, the Burnt Well, and the Twin Butte Well, compete with the one well offered by Frazor and Lemons, within the meaning of "competing water" as defined in section 2 (n) of the Federal Range Code. In order to determine the extent of the license to which the appellants are entitled, therefore, it is necessary to apply the following portion of section 4, paragraph *a*, in which the significant language has been emphasized:

* * * Water will be rated for its service value by *deducting therefrom the carrying capacity of half of the area serviced jointly by competing water of the same class*, and the carrying capacity of all private or State land located within such service area and not owned or controlled by the applicant. * * *

Section 2 (m) provides that the "service value" of water is "the number of livestock that can be grazed properly from such water." A computation of the service value of a particular water, apart from its competition with other waters, therefore involves not merely a determination of the *amount* of water available, but a consideration of topographical and other factors. In the brief filed by the appellants it is contended that a 4-mile radius should be used in circumscribing their base water to define the service area, since livestock can graze a distance of four miles from water in this locality. The following is quoted from pages 5-6 of the appellants' brief:

* * * The Examiner and the Range Survey, and the Division of Grazing's administrative officers in various other hearings held that at about the same time as the instant case was heard, held to the theory that where there are no barriers, either artificial or natural, stock could travel four miles to water in this area. These facts are stipulated in a number of other cases, and the stipulation as entered into in this case accepted the findings of the Range Survey on these matters, and despite the fact that the Range Survey officer who testified did not so state in this particular case, it is our position that the case should be decided upon the same theory as was presented in several other cases heard about the same time. In all of these cases a compass was used and a circle was described about each watering place, and in the case of permanent, year-long water a four-mile radius was used. If such a circle is described around the Lemons and Frazor well, it will include all of the lands lying in Township 13 South, Range 21 East, except perhaps fifty or sixty acres lying immediately adjacent to the Eva Smith homestead. * * *

It is not stated expressly in the record that a 4-mile radius was used in rating the appellants' water. Assuming it to be proper in the particular locality, however, and applying it to the one water of the appellants and to the four competing waters of the intervenor, the resulting service value of the appellants' water, *following the deductions for which provision is made in section 4, paragraph a*, conforms

substantially with the carrying capacity of the allotment already granted them. It appears that the appellants, in their argument, have failed to take into consideration this deduction requirement in cases involving competing waters. It is stated in their brief that if their well be circumscribed by a circle having a 4-mile radius, "it will include all of the lands lying in Township 13 South, Range 21 East, except perhaps fifty or sixty acres * * *." It is assumed that reference is made to "all of the lands" in controversy rather than literally to all of the lands in the township, since a circle having a 4-mile radius cannot include a township when the center of the circle is in the next township and $2\frac{5}{8}$ miles from the township line, as in this instance. In any event, however, the lands in T. 13 S., R. 21 E., which are in controversy are serviced by the Well Camp and Twin Butte Wells of the intervener as well as by that of the appellants and the deductions for competing water accordingly are necessary. Similar deductions are necessary insofar as the intervener's wells compete with that of the appellants in servicing any other lands.

Inasmuch as the 1937 appeal is moot it is unnecessary to consider its merits under the rules of January 28, 1937, which have been superseded by the Federal Range Code, and it accordingly is dismissed without prejudice to the right of Frazor and Lemons to have any appeal taken from the action of the regional grazier on their 1938 application considered in regular course under the applicable provisions of the Federal Range Code. In the absence of a change in the determining physical factors involved in the 1937 appeal, however, it appears doubtful that there would be any ground for modifying the action already taken.

The record indicates that Frazor and Lemons control the $W\frac{1}{2}$ Sec. 23, $W\frac{1}{2}$ Sec. 26, $N\frac{1}{2}$, $E\frac{1}{2}SE\frac{1}{4}$ Sec. 22, $E\frac{1}{2}E\frac{1}{2}$ Sec. 21, $W\frac{1}{2}SW\frac{1}{4}$ Sec. 15, T. 13 S., R. 21 E., which lands are situated one and one-half miles west of other private property controlled by appellants, situated in Secs. 29 and 30, T. 13 S., R. 22 E. The intervening vacant lands located in Secs. 23, 24, 25, and 26, T. 13 S., R. 21 E., have been allotted to the intervener. The record is silent as to whether crossing privileges over the described Federal range have been afforded to the appellants Frazor and Lemons. In adjudicating any application for crossing privileges, consideration should be had under section 8, paragraph *d* of the Federal Range Code.

Appeal dismissed.

SAM L. SMITH ET AL.

Decided August 4, 1938

PUBLIC LANDS—GRAZING—BASE PROPERTIES—WATERS—PRIORITY.

Grazing operations during the priority period on lands embraced in stock driveways or on another's homestead cannot be considered "proper" grazing for the purpose of determining the extent of an applicant's priority under section 2 (1) of the Federal Range Code, and the carrying capacity of those lands should be deducted in computing the extent to which the waters of an applicant are prior waters.

Roman C. Nunez (56 L. D. 363), cited and applied.

CHAPMAN, *Assistant Secretary*:

The Bloom Land and Cattle Company and J. J. Cole and Sons, both of Roswell, New Mexico, have appealed from a decision of an examiner of the Division of Grazing, dated January 11, 1938, which affirmed the decision of the regional grazier.

On July 9, 1937, the regional grazier formally notified Sam L. Smith, of Roswell, New Mexico, that his 1937 application for a license to graze in New Mexico Grazing District No. 6 would be granted to the extent of 10 cattle, 8 horses, and 100 sheep on a certain described allotment of public lands, including portions of Secs. 10, 11, 14, 15, 22, and 23, T. 11 S., R. 21 E., N. M. P. M. The Bloom Land and Cattle Company and J. J. Cole and Sons appealed to an examiner of the Division of Grazing from the action taken by the regional grazier on their applications, on the ground that they were entitled to have the lands which had been allotted to Sam L. Smith included in their allotments. While the record is not clear, it appears that Ben and W. E. Smith, who had been granted an allotment adjoining that of Sam L. Smith on the north, also intervened in the hearing held by the examiner on October 18, 1937, at Roswell, New Mexico. The examiner affirmed the decision of the regional grazier in granting the described allotment to Sam L. Smith. From this decision the Bloom Land and Cattle Company and J. J. Cole and Sons have appealed to the Department.

The period of time involved in the applications for license expired April 30, 1938, and the Rules for the Administration of Grazing Districts, approved January 28, 1937, have been superseded by the Federal Range Code, approved March 16 and June 22, 1938. The appeals accordingly are moot and might be dismissed on that ground. Since it appears, however, that the issue involved in the hearing was one which again may arise in the consideration of any 1938 grazing applications made by the parties under the Federal Range Code, it will be discussed briefly.

The base property of Sam L. Smith consists of a well situated in Sec. 15, T. 11 S., R. 21 E. This well was developed in 1935, and hence

was within group 2 of the preference class defined in the Rules of January 28, 1937, and is now a Class 2 water under section 4, paragraph *a*, of the Federal Range Code. It appears that all of the other parties interested in this controversy have waters so situated that their service areas overlap that of the well controlled by Sam L. Smith, and that all of these other waters were within group 1 of the preference class defined in the Rules of January 28, 1937, and are now Class 1 waters under the Federal Range Code. In the absence of any other qualifying factor Sam L. Smith's preference right to a substantial portion of the service area of his well therefore would be junior to that of the other parties, since Class 1 and Class 2 waters cannot compete for the same range. See section 2 (n) of the Federal Range Code.

An additional factor thus far has been ignored, however. Sam L. Smith's Exhibit A, which is a map of the area involved, shows that a substantial portion of the overlapping service areas of the several waters in question was, during the 5-year period immediately preceding June 28, 1934, included either in homestead entries or in a stock driveway established under section 10 of the act of December 29, 1916 (39 Stat. 862). The stock-driveway withdrawal was revoked subsequent to June 28, 1934, and some of the homestead entries have been relinquished. This case accordingly presents the same issue as that involved in *Roman C. Nunez* (56 I. D. 363), decided August 1, 1938. The only additional factor presented in this case is that of the existence of the homestead entries during the 5-year period, but the case is governed by the principles laid down in the *Nunez* case, in which it was held that any grazing operation on a stock driveway during the 5-year period cannot be considered as "proper" grazing for the purposes of determining the extent of an applicant's priority under section 2 (1) of the Federal Range Code. Since any grazing operation conducted by any of the parties on another's homestead entry would be equally improper within the meaning of the rule, the carrying capacity of those lands, as well as that of the lands included in the stock driveway, should be deducted in computing the extent to which the waters of the Bloom Land and Cattle Company, J. J. Cole and Sons, and Ben and W. E. Smith are prior waters.

Since the decision in the *Nunez* case, *supra*, in which the Bloom Land and Cattle Company also was involved, contains a complete discussion of the principles applicable in this situation under the Federal Range Code, it is unnecessary to discuss this appeal further. It is sufficient to say that the allotment granted Sam L. Smith appears to be a proper one under the Federal Range Code, based on a finding that his class 2 water competes with the waters of the other parties to the extent that they are class 2 waters, and there was

nothing in the Rules of January 28, 1937, which would have justified a different conclusion.

Any applications for grazing licenses filed by the parties for the year 1938 should be considered under the appropriate provisions of the Federal Range Code and in the light of the foregoing discussion.

The decision of the examiner is affirmed and the appeals are dismissed.

Affirmed.

AUTHORITY OF THE FEDERAL POWER COMMISSION TO GRANT POWER LICENSES WITHIN NATIONAL PARKS OR NATIONAL MONUMENTS

Opinion, August 19, 1938

NATIONAL PARKS—NATIONAL MONUMENTS—RESERVATIONS—FEDERAL POWER ACT.

The term "reservations" as defined in the Federal Water Power Act (41 Stat. 1063), as amended by the Federal Power Act (49 Stat. 838), does not include national parks or national monuments.

INTERPRETATION OF STATUTES—RESTRICTED BY INTENT OF CONGRESS.

The operation of a statute will be restricted within narrower limits than the words import where the literal meaning embraces cases not intended by the legislative body; *Trinity Church v. United States*, 143 U. S. 457, 472 (1892); *United States v. American Bell Telephone Co.*, 159 U. S. 548, 554 (1895).

NATIONAL PARKS—NATIONAL MONUMENTS—INTENTION OF CONGRESS—POWER DEVELOPMENT—FEDERAL POWER ACT.

The intention of the Congress to protect national parks and national monuments from encroachment of power development within such reservations is supported by the legislative history of section 201 of the Federal Power Act.

NATIONAL PARKS—NATIONAL MONUMENTS—FEDERAL POWER COMMISSION—AUTHORITY TO GRANT LICENSES—NAVIGABLE WATERS.

The Federal Power Commission does not have authority to grant licenses for power works within national parks or national monuments, whether or not there are navigable waters within such reservations.

NATIONAL PARKS—NATIONAL MONUMENTS—FEDERAL POWER COMMISSION—LICENSES—PROPOSED LEGISLATION.

It is not necessary to include in proposed legislation establishing or extending national parks or national monuments a provision designed to prohibit the Federal Power Commission from granting power licenses therein.

KIRGIS, *Acting Solicitor.*

At the request of the Director of the National Park Service, there has been submitted for my consideration and opinion the question whether it is necessary to include in proposed legislation for establishing or extending national parks or national monuments, a provision to prohibit the Federal Power Commission from granting power licenses therein, (a) if the proposed reservations or extensions

do not include navigable waters, or (b) if the proposed reservations or extensions embrace navigable waters.

Section 4 of the Federal Water Power Act (41 Stat. 1063), as amended by section 202 of the Federal Power Act (49 Stat. 838), provides in part as follows:

The Commission is hereby authorized and empowered—

* * * * *

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: * * *

Section 3 of the Federal Water Power Act, as amended by section 201 of the Federal Power Act, provides in part as follows:

The words defined in this section shall have the following meanings for purposes of this act, to wit:

(2) "Reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; *but shall not include national monuments or national parks.* [Italics supplied.]

Prior to the enactment of section 201 of the Federal Power Act, the definition of the term "reservations" in section 3 of the Federal Water Power Act specifically included national monuments and national parks. The Federal Power Commission, however, was prohibited from granting licenses within certain national parks and national monuments by the Act of March 3, 1921 (41 Stat. 1353), which provided:

That hereafter no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power, within the limits *as now constituted* of any national park or national monument shall be granted or made without specific authority of Congress, and so much of (the Federal Water Power Act) as authorizes licensing such uses of existing national parks and monuments by the Federal Power Commission is hereby repealed. [Italics supplied.]

It will not be doubted that the Commission is not authorized under amended section 4 of the Federal Water Power Act, quoted above, to issue licenses for dams or other project works for the purpose of

developing power within national parks and national monuments, in view of the new definition of the term "reservations" made in the Federal Power Act. The argument might be advanced, however, that the authority conferred by this section to issue licenses for works "necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which the Congress has jurisdiction under its authority to regulate commerce," is not limited to bodies of water outside national park and national monument reservations. Although this argument conceivably might be supported by the grammatical meaning of the words of section 4, it is a settled rule of statutory construction that the operation of a statute will be restricted within narrower limits than the words import where the literal meaning embraces cases not intended by the legislative body; *Trinity Church v. United States*, 143 U. S. 457, 472 (1892); *United States v. American Bell Telephone Company*, 159 U. S. 548, 554 (1895).

The narrowing of the meaning of the words quoted above from section 4 of the Federal Water Power Act is amply supported on two grounds: (1) the apparent purpose for the separation of the Commission's jurisdiction over power works on waters over which the Congress has regulatory authority under the commerce clause, and such works on public lands and reservations; (2) the clear intent of the Congress to protect national parks and national monuments from the encroachment of power development within the limits of such reservations.

As to the first ground, it may be seen by considering the Federal Water Power Act as a whole, and especially by reading section 23 together with section 4, that the separation of the Commission's jurisdiction was made to distinguish the separate bases on which the regulatory power of the Congress must be founded. Section 23 of the Federal Water Power Act, as amended by section 210 of the Federal Power Act, provides in part as follows:

(b) *It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construc-*

tion file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. *If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.* [Italics supplied.]

In an opinion advising the President of the scope of authority of the Federal Power Commission in passing upon an application for license under section 23, the Attorney General said (36 Op. Atty. Gen. 314, 322):

There is nothing in Section 23 of the Federal Water Power Act or any other provision of the law that authorizes the Commission to deny or grant a license in a case like that under consideration because of aesthetic, recreational, scenic or like considerations. To construe the statute to allow the Commission to take such matters into consideration would raise very grave doubt as to its validity. *Where, as in the case of Cumberland Falls, no part of the public domain and no national reservations are involved, the power of the Federal Government rests wholly on the Commerce Clause and the consequent power to conserve and improve navigation on streams suitable for interstate and foreign commerce.* [Italics supplied.]

It is also apparent from amended section 23, quoted above, that the license issued by the Federal Power Commission embraces the right to use the public lands or reservations of the United States for rights-of-way as well as the right to utilize for power development waters over which the Congress may have jurisdiction. This is made additionally clear by section 10 (e) of the Federal Water Power Act, as amended by section 205 of the Federal Power Act, which provides that the annual charge paid by licensees shall include an amount for recompensing the United States for the use, occupancy and enjoyment of its lands or other property. As a practical matter, it would be difficult if not impossible to utilize the waters within national parks or national monuments for power development without constructing some part of the power works upon or over lands of such reservations.

As to the second ground, reference should be made to section 212 of the Federal Power Act which contains a provision to the effect that nothing in the Federal Water Power Act, as amended "shall be construed to repeal or amend the provisions of the amendment to the Federal Water Power Act, approved March 3, 1921 (41 Stat. 1353) or the provisions of any other act relating to national parks and national monuments." This intention of the Congress to protect national parks and national monuments from encroachment of power

development within such reservations is supported by the legislative history of section 201 of the Federal Power Act which redefines the term "reservations." In a report No. 1318 (74th Congress) of the Committee on Interstate and Foreign Commerce of the House of Representatives, accompanying the bill, S. 2796, which became the Federal Power Act, it is stated (page 22) :

The definition of the former term ("reservations") has been amended to exclude national parks and national monuments. Under an amendment to the act passed in 1921, the Commission has no authority to issue licenses in national parks or national monuments. *The purpose of this change in the definition of "reservations" is to remove from the act all suggestion of authority for the granting of such licenses.* [Italics supplied.]

The statement accompanying the conference report on the bill included the following explanation of the redefinition of the term "reservations" (Cong. Rec. Vol. 79, p. 14621) :

The Senate bill included national monuments and national parks in the definition of "reservations" in Section 201 amending Section 3 of the Federal Water Power Act, but the House amendment excluded national monuments and national parks in conformity with the Act of 1921.

It is my opinion that the Federal Power Commission does not have authority to grant licenses for power works within national parks or national monuments, whether or not there are navigable waters within such reservations, and that, therefore, it is unnecessary to include in proposed legislation a provision designed to limit the jurisdiction of the Federal Power Commission.

Approved: August 19, 1938.

OSCAR L. CHAPMAN,
Assistant Secretary.

SANTA FE PACIFIC RAILROAD COMPANY

Opinion, August 19, 1938

RAILROAD LANDS—EFFECT OF WITHDRAWAL BY EXECUTIVE ORDER No. 6910, NOVEMBER 26, 1934, ON RAILROAD'S RIGHT OF SELECTION.

Where at the time of the withdrawal of November 26, 1934, by Executive Order No. 6910 the lands within the indemnity limits of the grant to the Santa Fe Railroad Company were known to be insufficient to satisfy the losses of the grantee in lands in the place limits of the grant, the withdrawal did not affect the right of selection of such lands by the company and no classification of the land is necessary under section 7 of the Taylor Grazing Act, as amended, in order to invest the company with the right of selection and, furthermore, the establishment of a grazing district including such land does not in any manner affect such right of selection.

CHAPMAN, *Assistant Secretary*:

The Commissioner of the General Land Office by letter of July 11, 1938 ("F" Santa Fe 074968), sets forth the following stated facts:

On December 1, 1937, the Santa Fe Pacific Railroad Company filed indemnity selection No. 33, Santa Fe 074968, under the Act of July 27, 1866 (14 Stat. 292); for Secs. 1, 3, 9, 11, 13, 15, 21, 23, 25, 27, 33, 35, T. 4 N., R. 21 W., N. M. P. M., New Mexico. The company also filed a petition for classification of the land under Section 7 of the Act of June 28, 1934 (48 Stat. 1269), to be subject to indemnity selection under its land grant.

The land is in Grazing District No. 2, established March 27, 1936.

* * * * *

An adjustment of the grant to the Santa Fe Pacific Railroad Company, approved by the Department on December 9, 1931, letter "F" AB, November 30, 1931, shows that there was no deficiency in the grant on the date of definite location, March 12, 1872, and that none appeared until the year 1930. The first apparent deficiency is due to a withdrawal of land in the indemnity limits to the amount of 191,031.74 acres made on April 25, 1930, under Executive Order No. 5339, for classification and pending determination as to the advisability of including such lands in a national monument. This withdrawal creates a deficiency in the grant of 73,834.19 acres as of December 31, 1930.

Adverting to the saving clauses in the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269), and in the Executive Order No. 6910 of November 26, 1934, as amended, withdrawing all vacant, unreserved, unappropriated public land in Arizona and certain other States from settlement, location, sale or entry, and to rulings of the Supreme Court in *United States v. Northern Pacific Railway Co.*, 256 U. S. 51, 66, the Commissioner requests that he be instructed:

* * * whether the right of indemnity selection under the Act of July 27, 1866, by the Santa Fe Pacific Railroad Company in lieu of land lost to the grant in place is such a prior valid and existing right as to be excluded from the operation of the Act of June 28, 1934, the withdrawal of November 26, 1934, and the grazing district so that classification under Section 7 of the Grazing Act is not necessary.

It appears from the facts presented that at the date of the establishment of the grazing district under the Taylor Grazing Act and at the date of the Executive withdrawal of November 26, 1934, there existed a known deficiency in lands to satisfy the indemnity rights of the railroad company to the extent of 73,834.19 acres. The question is presented whether in the face of this deficiency, the rights of the railroad grantee to make selection of the remaining lands which were subject to such selection were adversely affected by the establishment of the grazing district under the provision in the first section of the Taylor Grazing Act authorizing the establishment of grazing districts or by the Executive order of November 26, 1934.

The emphatic declarations of the Supreme Court in the Northern Pacific case, *supra*, seem to afford a conclusive answer. Those rules

more particularly applicable to the case presented are, quoting from the syllabus, as follows:

2. By the company's acceptance of this proposal, followed by construction and operation of the railroad and acceptance of the railroad by the President, the proposal was converted into a contract, entitling the company to performance by the Government. P. 64.

3. The provision relating to indemnity land was as much a part of the grant and contract as the one relating to land in place; and the right of the grantee to land within the indemnity limits in lieu of land lost within the place limits was intended to be a substantial right such as is protected by the due process clause of the Constitution. P. 64.

4. Assuming that the land applicable as indemnity remaining within the indemnity limits was not enough to make up for unsatisfied losses in the place limits, the Government could not deprive the company's successor of its right to such land by setting it aside for forest purposes. Pp. 64-66.

5. The rule that, under such a grant, no right of the railroad company to land within the indemnity limits attaches to any specific tract until the company has selected it, applies as between the company and settlers under the homestead and pre-emption laws (the continued operation of which within the indemnity limits the granting act itself provides for), and applies also as between the company and the United States when the lands available for indemnity exceed the losses, but it has no application as between the company and the United States if the lands available for indemnity are insufficient for that purpose. P. 65.

In the opinion, summing up the argument, the court said:

Giving effect to all that bears on the subject, we are of opinion that after the company earned the right to receive what was intended by the grant it was not admissible for the Government to reserve or appropriate to its own uses lands in the indemnity limits required to supply losses in the place limits. Of course, if it could take part of the lands required for that purpose, it could take all and thereby wholly defeat the provision for indemnity. But it cannot do either. The "substantial right" conferred by that provision (*Weyerhaeuser v. Hoyt, supra*), cannot be thus cut down or extinguished. *Sinking Fund Cases, supra*.

In the suit for accounting brought by the United States against the Oregon & C. R. Co., 8 F. (2d) 645, the court said:

* * * The court in *United States v. Northern Pac. Ry. Co.*, 256 U. S. 51, 41 S. Ct. 439, 65 L. Ed. 825, *supra*, very distinctly and very explicitly declares it is not admissible for the government to reserve or appropriate to its own use lands in the indemnity limits required to supply losses in place limits. A reference to the language of the court will indicate with what emphasis it enunciated the principle.

and applied this principle to several of the items under consideration. In one of these (Item 13 (k)), the President reserved certain lands in the indemnity limits of the grant for national forests long subsequent to the time a deficiency was found to exist to meet the losses sustained in the place limits, and the court held it was inadmissible for the Government to reserve or appropriate to its own use any of such lands. Based upon the rulings in *United States v. Northern*

Pacific Railroad Co., supra, the Department held in *Vicksburg, Shreveport and Pacific Railroad Company, Quapaw Land Company, transferee* (52 L. D. 191) that an indemnity selection filed by the transferee where there was a deficiency of upwards of 200,000 acres available for indemnity selection was superior to soldier's preference right application upon the opening of the lands under the act of January 21, 1922 (42 Stat. 358), and was an equitable claim subject to allowance and confirmation within the meaning of that act.

It seems clear from the rulings above referred to that upon the finding that the lands within the indemnity limits of the grant to the Santa Fe Pacific Ry. Co. were insufficient to satisfy its indemnity rights, its transferee, the Santa Fe Pacific Railroad Company must be deemed to have earned the remaining lands subject to selection without regard to the fact whether application therefor had been made or not and that such right could not be affected by subsequent legislation of Congress authorizing withdrawals of public land, or by Executive or departmental withdrawals of public land and the reservation thereof for certain purposes, regardless of whether the withdrawals or reservations contained exceptions to insure the preservation of the railroad grantee's rights or not.

It should be noticed, however, that nothing is seen in the provisions of the Taylor Grazing Act authorizing the creation of grazing districts or in the withdrawal of November 26, 1934, which may reasonably be construed as an attempt to abridge or destroy the right of indemnity selection in such cases by the railroad grantee. It is provided in the first section of the Taylor Grazing 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 for the provisions of this act.

and the withdrawal of November 26, 1934, is made "subject to valid existing rights."

My conclusion, therefore, is that in view of the known insufficiency of the land within the indemnity limits of the grant to the Santa Fe Pacific Railroad Company to satisfy its rights of indemnity for losses of land in the place limits at the time of the withdrawal of November 26, 1934, that its rights are not affected by such withdrawal and no classification of the land is necessary under section 7 of the Taylor Grazing Act, as amended, in order to invest the company with the right of selection, and furthermore, that the establishment of the grazing district including such lands does not in any manner affect the right of selection by the company of such lands.

ORIN L. PATTERSON ET AL.

Decided September 8, 1938

GRAZING LEASES—QUALIFICATIONS OF APPLICANTS—LESSEES OF CONTIGUOUS LANDS ENTITLED.

Section 15 of the Taylor Grazing Act, as amended by the act of June 26, 1936, contemplates the award of leases thereunder not merely to owners, but to owners who are occupying and using the contiguous lands for the grazing of livestock.

Where an applicant for lease is engaged in the business of purchasing, selling, and assigning of grazing lands and is not engaged in the livestock business, leasing the lands he holds to others, he is not such an occupant as contemplated by the Taylor Grazing Act and is not a qualified occupant for a lease under section 15 of said act.

The person or association of persons leasing or subleasing contiguous privately owned lands are entitled under the statute to a preference right to a lease of the lands contiguous to those controlled by them, and not the person from whom they lease or others who own no land contiguous to that which they seek.

CHAPMAN, *Assistant Secretary*:

Awards of grazing leases under section 15 of the Taylor Grazing Act as amended were made by the Commissioner of the General Land Office to Orin L. Patterson on February 17, 1938 (The Dalles 030597), to William R. Keeton February 25, 1938 (The Dalles 030517), to M. J. and Julia Thompson on February 23, 1938 (The Dalles 030464). Certain of the tracts embraced in the application of Keeton and other tracts embraced in the application of the Thompsons and another tract embraced in the application of Mary MacKay Stewart (The Dalles 030528) were awarded to Patterson on the basis of ownership or control of contiguous land. Each of these applicants who applied for tracts awarded to Patterson has appealed, the complaint of each being that Patterson is not engaged in the livestock business or in the grazing of livestock, but that his principal business is the purchase, sale, and assignment of leases of grazing lands, and each contends that he is not therefore entitled to a lease of lands, particularly over those who are owners or lessees of nearby property devoting it to grazing uses.

The special agent's report confirms the statement that Patterson is not engaged in the livestock business. The agent states that Patterson's principal business appears to be the leasing of lands from various owners of small tracts, blocking them up and subleasing at a profit of one cent to three cents per acre. He, however, further states that Patterson "leases and controls practically all of the lands surrounding the tracts described in his application, and it does not appear that it would be practical to refuse to issue a lease on the ground that the applicant is not in the stock business as these

tracts can be used practically only by lessees of the adjoining patented lands." He further states that—

His [Patterson's] activities are beneficial to both the individual owners of the land, who are thus able to obtain at least enough rental to pay taxes, and to stockmen who are thus able to make one lease for a fairly large area of land which they can use and control without the necessity of entering into a large number of leases with persons widely scattered over the country.

that—

Patterson stated he had advised all his lessees of their right to lease the Government lands and that in most cases the lessees had filed such applications.

Section 15 of the act of June 26, 1936 (49 Stat. 1976), provides:

That preference shall be given owners, homesteaders, lessees, or other lawful occupants of contiguous lands to the extent necessary to permit proper use of such contiguous lands. * * *

It is believed that the act contemplates the awarding of preference rights not merely to owners but owners who are occupying and using the contiguous lands for the grazing of livestock. Any different construction would open the door to owners of contiguous lands to secure leases from the Government and then sublease at a rental in excess of that fixed in the Government leases, thus making such leases a medium of speculation by those not in the bona fide occupation of grazing livestock. This view of the meaning of the act is reflected in paragraph 25 (e) of the regulations of April 30, 1937, Circular 1401, Revised, which declares as one of the grounds for cancellation of a lease that:

If the preference right lessee fails to retain ownership or control of the lands tendered as a basis for such preference right

and in paragraph (c), page 2, of the standard lease form which provides that the lessor reserves the right, "to reduce the leased area if it is excessive for the number of stock owned by the lessee." Without presuming that such is the intent of Patterson, the issuance of a lease to him provides an opportunity for speculation. It is believed that Patterson is not such occupant as contemplated by the act, and, therefore, is not a qualified applicant for any of the lands included in the proposed lease to him, and that his application should be rejected.

The person or association of persons who, under leases or subleases from Patterson, graze the contiguous privately owned lands are entitled under the statute to a preference right to a lease of the lands contiguous to that controlled by them and not Patterson or appellants who own no such contiguous land to that which they seek. It is possible that such lessees of Patterson have refrained from making application for lease in reliance on assurances that they would secure the use of the land through arrangements with Patterson.

For the reason stated, further action upon the lease applications of the appellants will be suspended to afford such lessees an opportunity to file applications in their own behalf for the public lands adjoining their holdings. These applicants are unknown to the Department. They may, however, be notified through Patterson. Accordingly, such occupants of the lands embraced in the proposed lease to Patterson will be given 60 days from service of notice of this decision on him to file proper applications for the land contiguous to their holdings and upon transmission of such applications that are timely filed such adjustments will be made as may be deemed proper.

Keeton also files an appeal from the action of the Commissioner in offering the SW $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 5, T. 12 S., R. 27 E., to Thomas R. Throop (The Dalles 030455) alleging—

* * * that the appellant owns adjoining privately owned lands and has a Taylor Act lease upon lands on the east side thereof, and that if said lands were not allowed to your appellant it would make an irregular contour in his range allotment and would present serious difficulties in range management for the reason that said 40-acre tracts lie on the creek bottom immediately above the privately owned lands of the appellant, and that naturally the appellant cannot keep his stock from drifting thereon.

(b) that said Throop and Throop own no privately owned land adjoining said two 40-acre tracts.

He further states that the award to Throop would present a problem in fencing.

In his application the appellant did not mention any tracts adjoining the land in controversy as owned by him. In his appeal from the rejection by the register of his application for said tracts, among others, he observes that Throop and Throop alleged they had a lease on S $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 5 and other land, "when in truth and fact this applicant is the owner of the fee of said lands." Throop alleged in his application that he rented, among other tracts, N $\frac{1}{2}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$, and S $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 5, T. 12 S., R. 27 E., though he did not mention such tracts in his application for renewal.

Appellant does not state what tract of adjoining land he owns in his appeal. If he refers to the S $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 5 he does not deny Throop's allegation that he holds it under lease nor does appellant deny that Throop has a lease on the two forties adjoining the tracts in question on the west. If Throop has possession and use of adjoining land under lease he presents a better ground for preference than mere ownership of the land. Appellant does not allege that he would be prejudiced by the short tenure of Throop's lease, if it is short. In any event, the prejudice would be small as Throop's lease from the Government is but for a year. The so-called irregularity in contour of the range permitted Keeton by the award of the land to Throop as well as special difficulties of administration are not apparent.

In accordance with these views the offer to Throop will not be disturbed, and the decision of the Commissioner to that extent is affirmed. The proposed lease, above referred to, to Patterson is returned unexecuted and his application rejected. The proposed leases to Keeton and Thompson are likewise returned unexecuted and further action on their applications will be suspended to await action by the lessees of Patterson. The decision of the Commissioner is modified accordingly and the case remanded for appropriate action.

Modified and remanded.

MEANING OF WORDS "MACHINERY AND EQUIPMENT" AS USED IN CONTRACT FOR LEASE OF POWER PRIVILEGE AT BOULDER DAM

Opinion, October 25, 1938

BOULDER DAM CONTRACT—LEASE OF MACHINERY AND EQUIPMENT FROM UNITED STATES.

The words "machinery and equipment * * * for the generation of electrical energy" in Article (9) (a) of the Contract for Lease of Power Privilege at Boulder Dam, dated April 26, 1930, as amended, between the United States and the City of Los Angeles and the Southern California Edison Company, Ltd., as lessees, must be taken to have been used in their commonly accepted sense and were not intended to embrace incidental structures of a permanent character or fixtures attached to and forming part of such structures, but rather those items installed in or affixed to such structures for the generation of power for the use of the allottees which will require periodic replacement due to ordinary use and wear.

MARGOLD, *Solicitor:*

My opinion has been requested as to the meaning of "machinery and equipment" as used in the Contract for Lease of Power Privilege at Boulder Dam, dated April 26, 1930, as amended, between the United States and the City of Los Angeles and the Southern California Edison Company, Ltd., as lessees.

Articles (9) (a) of the contract provides:

Compensation for the use, for the periods of lease thereof, of machinery and equipment furnished and installed by the United States, for each lessee respectively, for the generation of electrical energy, equal to the cost thereof, including interest charges at the rate of four per centum (4%) per annum, compounded annually from the date of advances to the Colorado River Dam fund for the purchase of such equipment and machinery to June 1 of the year next preceding the year when the initial installment becomes due under this article, shall be paid to the United States by the lessees, severally, in ten (10) equal annual installments, so as to amortize the total cost (including interest as fixed above), and interest thereafter upon the unpaid balance of such total cost at the rate of four per centum (4%) per annum. The first

installment payable by each lessee shall be due on June 1 next following the date the machinery leased by such lessee is ready for operation and water is available therefor, as announced by the Secretary, and the subsequent nine (9) installments shall be paid on June 1 of each year thereafter.

It is now necessary to determine and allocate the cost of "machinery and equipment * * * for the generation of electrical energy" and the Bureau of Reclamation seeks advice as to whether incidental structures at the Boulder Dam project such as "the control tunnel, the excavation and foundations for the high-voltage switching stations, the oil and control houses, and the steel supporting structures at the switching stations," should be properly included in the term "machinery and equipment," the cost of which is repayable separately by the power allottees as compensation for the use thereof.

Under Article (6) of the contract, the United States agreed to construct a dam and, in connection therewith construct "outlet works, pressure tunnels, penstocks, power-plant building, and furnish and install generating, transforming and high-voltage switching equipment for the generation of the energy allocated to the various allottees, * * *."

Article (8) further provides:

The machinery and equipment for the generation of power will be provided and installed and owned by the United States. The city and the company shall each notify the Secretary of the Interior, in writing, within two (2) months after receipt of written notice from him that diversion of the Colorado River has been effected for the construction of Boulder Canyon Dam, as to their respective generating requirements in order that the United States may be able to determine the type and initial and maximum ultimate capacity of the generating equipment to be installed in the power plant. Generating units and other equipment to be installed by the United States shall be in sufficient number and of sufficient capacity to generate the energy allocated to and taken by the lessees and the various allottees, served by each lessee as stated in article fourteen (14) hereof, upon the load factors stated by the respective allottees with proper allowance for the combined load factors of all allottees served by each lessee. Each lessee shall give notice to the Secretary of the date at which it requires its generating equipment to be ready for operation, such notice to be given at least three years before said date. If a lesser number of generating units is initially installed, the United States will furnish and install, at a later date or from time to time on like terms, such additional units as with the original installation will generate the energy allocated. The city and the company shall each cooperate with the United States in the preparation of designs for the power plant, and in the preparation of plans and specifications for the machinery and equipment to be installed in connection therewith and required by each, respectively.

Each allottee (including lessees) shall have opportunity to be heard by the Secretary or his representatives upon the design, capacity, and cost of machinery before contracts therefor are let.

Under Article (10) (a) (b), the United States leased to the lessees "such power-plant units and corresponding plant facilities and incidental structures as may be necessary to generate the energy" allocated to them, and energy for those allottees for whom they were designated the generating agencies.

Under Article (16), in consideration of the lease, the lessees agreed :

(1) To pay the United States for the use of falling water for the generation of energy for their own use, respectively, by the equipment leased hereunder (except as otherwise provided in article seventeen (17) hereof), as follows:

(a) One and sixty-three hundredths mills (\$0.00163) per kilowatt-hour (delivered at transmission voltage) for firm energy;

(b) One-half mill (\$0.0005) per kilowatt-hour (delivered at transmission voltage) for secondary energy;

(2) To compensate the United States for the use of the said leased equipment as herein elsewhere provided; and

(3) To maintain said equipment in first-class operating condition, including repairs to and replacements of machinery; provided, however, that, if the expenditures for replacements shall exceed at any time the sum accumulated by the lessees as a depreciation reserve in accordance with rules and regulations prescribed by the Secretary, pursuant to the Boulder Canyon project act, less all amounts previously withdrawn for replacements, then the rates aforesaid shall be readjusted as hereinafter provided so as to reimburse the said lessees severally for such excess expenditures within the term of this lease.

It has been suggested that since Article (6) specifies the items to be constructed by the United States in connection with the dam, all items other than the dam, outlet works, pressure tunnels, penstocks, and power-plant building should be regarded as "machinery and equipment" installed for the generation of energy. It is believed; however, that such a classification is neither authorized nor justified since on such a basis items which may be clearly incidental to the storage and control of water must necessarily be categorized as machinery and equipment for the generation of energy.

It has also been suggested that, except insofar as items are specifically classified in the contract, the line of demarcation was intended to be drawn between items necessary or incidental to the storage and control of water and those items used in connection with the development of power. Such a view finds a basis in the fact that under the contract the United States retains full control of the water at Boulder Dam whereas the generation of power is in the hands of the lessees. The contract does not purport to sell energy but merely grants to the lessees the right to use falling water for the generation of energy. Accordingly, it is argued that the terms "machinery and equipment * * * for the generation of electrical energy" was intended to include all items, other than those specified under Article (6) as appurtenant to the dam, which are not incidental to the storage, control, and delivery of falling water for the

generation of power. Such a construction, however, is not only anomalous, since it would require such relatively permanent items as control tunnels and switching station foundations to be classified as "machinery and equipment," but is also inconsistent with provisions of the contract which indicate a contrary intent and which I believe to be controlling.

It is my opinion that the words "machinery and equipment * * * for the generation of electrical energy" were not intended to embrace incidental structures of a permanent character or fixtures attached to and forming part thereof but rather those items, installed in or affixed to such structures and used in connection with the development of power for the use of the allottees, which will require periodic replacement due to ordinary use and wear. This is indicated by the use in Articles (6) and (9) (a) of the words "furnish and install" with reference to "machinery and equipment" whereas the permanent structures specified in Article (6) are to be "constructed." Also, as used in Article (8) of the contract, the words "machinery and equipment" obviously mean "apparatus" and not permanent improvements or structures.

This conclusion is further strengthened by the fact that under Article (9) (a), the provision under which the question here being considered arises, not only must the total cost of the generating machinery and equipment be repaid in addition to payments for the use of falling water but it must be amortized in ten equal annual installments, although the Boulder Canyon project act merely imposes a limitation of fifty years within which the costs of the project must be repaid and the rates for the use of falling water were fixed in the contract with that limitation in mind. The only logical rationale of that provision of the contract (Article (9) (a)) would seem to be that the items contemplated for inclusion within the category of "machinery and equipment" were expected to have a relatively short economic life and that it was, therefore, deemed advisable to provide for the reimbursement to the United States of the cost of those items prior to the time replacement would be necessary.

It is accordingly my opinion that the words "machinery and equipment" must be taken to have been used in the contract in their commonly accepted sense. Control tunnels, the foundations for the high-voltage switching stations, and the oil and control houses appear to be relatively permanent facilities and should not be classed as "machinery and equipment." It is suggested that the classification of other items (except those specified in Article (6) of the contract as appurtenant to the dam) be determined in accordance with generally accepted accounting practice, insofar as such practice is consistent with this opinion.

However, as has been already indicated, not all items which may be classified as "machinery and equipment" are amortizable under Article (9) (a). The cost of only those items of "machinery and equipment" which are used for or in connection with the development of energy for the use of the power allottees is repayable to the United States by the allottees under that provision. The cost of items of "machinery and equipment" which serve a purpose in addition to their use for the generation of energy should be allocated proportionately.

Approved: October 25, 1938.

HARRY SLATTERY,
Under Secretary.

A. T. WEST AND SONS

Decided November 2, 1938

GRAZING AND GRAZING LANDS—WATER RIGHTS—BASE PROPERTY OF APPLICANT FOR GRAZING LICENSE.

Where a water hole is not one of natural occurrence but has been developed entirely by human agency, it is not a water hole within the meaning of the Executive order of April 17, 1926, and, if owned or controlled by an applicant for a grazing license, it may be recognized as base property for such license.

PUBLIC LANDS—WATER RIGHTS—EXECUTIVE ORDER OF APRIL 17, 1926.

The Executive order of April 17, 1926, does not apply to water which, in its natural condition, does not furnish or retain a supply of water available for public use.

Where lands containing waters to which the Executive order of April 17, 1926, is not applicable have been included in a departmental Order of Interpretation, such order should be revoked.

Departmental Order of Interpretation No. 208, issued August 22, 1934, pursuant to Executive order of April 17, 1926, revoked. *Santa Fe Pacific R. R. Co.* (53 I. D. 210) cited and applied.

PUBLIC LANDS—EFFECT OF WITHDRAWAL ORDER ON VESTED WATER RIGHTS.

Under the provisions of section 2340, Revised Statutes, embodying section 17 of the act of July 9, 1870 (16 Stat. 218), subsequent disposal or withdrawal of lands containing waters, the rights to which have vested or accrued, are subject to an easement sufficient to permit of the continued use of such waters.

Barnes v. Sabron, 10 Nev. 217; *Oliver v. Agasse*, 132 Calif. 297, 64 Pac. 410, cited and applied.

SLATTERY, *Under Secretary:*

An appeal has been taken by A. T. West, Wesley West, Henry West, Karl West, Berry West and Alice West Chesley, referred to in the proceedings as A. T. West and Sons, from a decision of an examiner,

Division of Grazing, relative to 1938 grazing licenses in Arizona Grazing District No. 4. The appellants' application for a 1938 license was denied in part by the regional grazier and an appeal was taken pursuant to which a hearing was ordered at Safford, Arizona, on May 17, 1938, before said examiner. At the hearing J. E. George, J. P. Christensen, Art Lee, and M. E. Earven, holders of licenses on allotted lands adjoining or in the vicinity of the lands allotted to the appellants under their license, were allowed to enter as interveners. The hearing was held on the date and at the place specified and all of the parties appeared, either in person or by counsel. On May 25, 1938, the examiner rendered his decision wherein he modified the decisions of the regional grazier only to the extent of re-defining the boundaries of the allotments granted to the respective parties under their licenses. It is from this decision that the present appeal has been taken.

It appears from the record that the region is one in which it is difficult to determine the lands which can be properly serviced by the waters of the various parties, and that there has been considerable controversy over the allotments heretofore granted. There appear to be certain canyons and ridges that traverse the area and that serve as effective barriers to the migration of livestock. These barriers limit, in some cases, the service areas of the various waters. In view of the difficulties attendant on a determination of the lands which the parties are entitled to use and of the lands which can most readily and practicably be serviced by these waters, it would be difficult for the Department to attempt to state that the present allotments are improper, provided proper consideration had been given to the base properties of the various applicants. However, it appears that due consideration has not been given to a certain watering place which is claimed by the appellants and therefore it is necessary for the cases to be remanded for further consideration and adjustment of the allotments by the regional grazier.

The record shows that the appellants are claiming ownership and control of a water hole or seep known as Johnny Creek Spring and located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 12, T. 5 S., R. 26 E., G. & S. R. M. Both the regional grazier and the examiner have failed to recognize this water as base property of the appellants for the reason that it was withdrawn as a public water reserve. However, the examiner states in his decision that the appellant "may file with the record, for consideration of the Secretary, such evidence as he may desire in support of his claim of possession and beneficial use of the waters in question and the improvements made by him, together with record evidence of his compliance with the State law pertaining to the initiation and maintenance of the rights asserted by him."

The records of the Department show that the SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 12, T. 5 S., R. 26 E., on which the water is located, was designated as Public Water Reserve No. 107, by departmental Order of Interpretation No. 208, issued August 22, 1934, pursuant to Executive order of April 17, 1926. It appears that the water hole is not one which is of natural occurrence but was developed entirely through the efforts of the appellants. It also appears that it has been continuously maintained by the appellants since 1887 and that in order to be properly used it has been necessary for them to clean the water hole and maintain fences around it to prevent its being damaged or destroyed by livestock coming there to water. The evidence shows that it is a permanent water and has never been dry since first used by the appellants in 1887.

The record also shows that on February 24, 1933, A. T. West filed with the State Water Commissioner an application to appropriate this water, alleging use since 1887, and that the application was withdrawn upon advice of the Commissioner that no appropriation was necessary in view of the provision of section 2, article XVII of the Constitution of Arizona to the effect that—

All existing rights to the use of any of the water in the State for all useful and beneficial purposes, are hereby recognized and confirmed.

This would serve to show that all necessary steps have been taken to insure the right to this water under the laws of Arizona, and that such right is acknowledged by the State.

It is significant that the water is not a spring or water hole in its natural condition, but on the contrary appears to have been developed and maintained entirely through West's efforts, and it is therefore not of a type similar to that contemplated by the withdrawal of April 17, 1926, *supra*. In *Santa Fe Pacific Railroad Co.* (53 I. D. 210, 211), the Department said:

It is not believed that said order contemplated the withdrawal of tracts containing mere dry depressions or draws which do not, in their natural condition, furnish or retain a supply of water available for public use. Such a tract is not land which "contains a spring or water hole" in its natural condition, and it was not intended to withhold such land from acquisition by a person who has, by his own efforts, provided artificial means for collecting flood waters thereon.

Under this rule, and upon the evidence adduced, it is the conclusion of the Department that the Johnny Creek Spring is not a water hole within the meaning of the Executive order of April 17, 1926, and that Order of Interpretation No. 208, issued August 22, 1934, should be revoked.

Without attempting to decide the extent of West's right to the water as it may be governed by the measure of his beneficial use, it appears that, insofar as West's ownership or control is concerned, it

is sufficient to entitle him to claim the water as base property and to such amendment of his license or allotment as may be warranted thereby.

It might be contended that, although West may have a sufficient title to the water, the withdrawal of the land on which the water is located would prevent the beneficial use of the water as long as the withdrawal remains outstanding and would justify the refusal of the regional grazier and the examiner to consider this water as base property. In answer to this it may be pointed out that once a water right has been obtained the continued use of the water is insured by the provisions of section 2340, Revised Statutes, embodying section 17 of the act of July 9, 1870 (16 Stat. 218), which reads as follows:

Rights subject to vested and accrued water rights. All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by section 51 (section 2339, R. S.) of this Title. [Parenthetical matter supplied.]

Under these provisions, a subsequent disposal or withdrawal by the Government of the land on which the water is located would be subject to an easement sufficient to permit of the continued use of the water. *Barnes v. Sabron*, 10 Nev. 217; *Oliver v. Agasse*, 132 Calif. 297, 64 Pac. 410.

It appears that the consideration of the Johnny Creek Spring as base property of the appellants will require augmentation of their allotment and a readjustment of the boundaries of the allotments of the other parties. For this reason, the case is remanded for procedure in accordance with the above-stated views. Also the Division of Grazing will prepare and submit a suitable order for revocation of Order of Interpretation No. 208.

Remanded.

GEORGE C. VOURNAS

Decided November 10, 1938

OIL AND GAS LEASES—MINERAL LEASING ACT—POWER OF SECRETARY.

Normally an application for an oil and gas lease under the Mineral Leasing Act is in the first instance considered by the Commissioner of the General Land Office. If the decision is adverse to the applicant, he has a right to appeal to the Secretary of the Interior. However, the Secretary is not obliged to discharge his responsibility for the issuance of leases under the statute only by way of appeal. He may assume jurisdiction at any stage of the proceeding and of his own motion.

OIL AND GAS LEASES—MINERAL LEASING ACT—STATUTORY CONSTRUCTION—PRODUCING OIL OR GAS FIELD.

Section 17 of the Mineral Leasing Act provides that lands which are known or believed to contain oil or gas may be leased by the Secretary of the

Interior by competitive bidding, but that the person first making application for a lease of lands "not within the known geologic structure of a producing oil or gas field" shall be entitled to a preference right over others to a lease without competitive bidding. An application for an oil and gas lease without competitive bidding of East Timbalier Island and adjoining islands off the coast of Louisiana stated that the islands were not within the known geologic structure of any producing oil or gas field. Nine months prior thereto a well was completed at a point 915 feet from East Timbalier Island, was brought into production. It continued to produce for two months, when the well clogged with sand and production temporarily ceased while the obstruction was being removed. Another well is being constructed at a distance of 540 feet from the island. The Director of the Geological Survey reported to the Commissioner of the General Land Office that the island is within the known geologic structure of the Timbalier Dome oil field. *Held:* An oil or gas field which has produced oil or gas and is capable of further production is a "producing oil or gas field" within the meaning of section 17 of the act of February 25, 1920, as amended, even though production has ceased. Thus, even if it be assumed that at the time of the filing of the application for a lease in this case, neither of the two wells may have been producing, the islands are within the known geologic structure of a producing oil field and cannot be leased without competitive bidding.

OIL AND GAS LEASES—MINERAL LEASING ACT—KNOWN GEOLOGIC STRUCTURE.

Whether the lands involved in an application for an oil or gas lease under the Mineral Leasing Act are or are not within the known geologic structure of a producing oil field is judged as of the time of the filing of the application.

OIL AND GAS LEASES—MINERAL LEASING ACT—KNOWN GEOLOGIC STRUCTURE—WITHDRAWAL FROM NONCOMPETITIVE LEASING.

Prior to the filing of an application for an oil and gas lease under section 17 of the Mineral Leasing Act without competitive bidding, the Secretary of the Interior had found that the lands involved were within the known geologic structure of a producing oil field and should be offered for leasing by competitive bidding. *Held:* As a result of the Secretary's finding the lands were withdrawn from leasing except by competitive bidding. Hence an application filed thereafter was in any event a futile attempt to gain a preference right over others to a lease without competitive bidding.

IOKES, Secretary:

George C. Vournas, a lawyer, of Washington, D. C., has applied for an oil and gas lease without competitive bidding of East Timbalier Island and adjoining islands between Grand Pass Timbalier and Raccoon Pass off the coast of Louisiana. His application was filed in the office of the Commissioner of the General Land Office on October 21, 1938.

Normally, this application would in the first instance be considered by the Commissioner of the General Land Office. If his decision were adverse to the applicant, he would have a right to appeal to the Secretary of the Interior. Regulations of May 7, 1936 (55 I. D. 502, 506, 507); Rule 74, Rules of Practice (51 L. D. 547, 559). However,

the Mineral Leasing Act places responsibility for the issuance of leases thereunder on the Secretary. Section 17, Act of February 25, 1920, as amended by Act of August 21, 1935 (41 Stat. 437, 443, 49 Stat. 674, 676). The Secretary is not obliged to discharge that responsibility only by way of appeal. He may assume jurisdiction at any stage of the proceeding and of his own motion. *West v. Standard Oil Co.*, 278 U. S. 200, 213; *Knight v. United States Land Association*, 142 U. S. 161, 177, 178. Accordingly, I have assumed original jurisdiction to consider and dispose of this application.

The relevant provisions of the Mineral Leasing Act are these:

SEC. 17. All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits, except as herein otherwise provided, may be leased by the Secretary of the Interior * * * to the highest responsible qualified bidder by competitive bidding under general regulations. * * * That the person first making application for the lease of any lands not within any known geologic structure of a producing oil or gas field * * * shall be entitled to a preference right over others to a lease of such lands without competitive bidding * * *.

The application requests a lease without competitive bidding and states that the islands described are not to the best of the applicant's knowledge and belief within the known geologic structure of any producing oil or gas field. The islands are the very same ones involved in my decision in *John F. Richardson and Charles F. Consaul* (56 I. D. 354). In that case, Richardson also applied for a lease without competition and claimed the lands were not within such a structure. And 23 minutes later Consaul did likewise. On July 14, 1938, the Commissioner denied both applications. On July 29, 1938, I affirmed the decisions of the Commissioner. In my decision I said:

* * * the facts indicate that those lands *are* within a known structure. Prior to January 27 of this year, the Gulf Refining Company completed its so-called No. 3 well in Timbalier Bay, at a point 915 feet from East Timbalier Island. On January 27, the well was brought into production and continued to produce oil until the end of June. The well then clogged or filled with sand and production has temporarily ceased while the obstruction to the flow of oil is being removed. The company is now constructing another well in the bay, called No. 4, at a distance of 540 feet from the island. Moreover, the Director of the Geological Survey reported to the Commissioner of the General Land Office that the island is within the known geologic structure of the Timbalier Dome oil field.

* * * My finding of fact is that the lands involved are within the known geologic structure of a producing oil field. * * * East Timbalier Island and the adjoining islands between Grand Pass Timbalier and Raccoon Pass should immediately be offered for leasing by competitive bidding under seal.

On August 19, 1938, Richardson commenced an action against the Secretary of the Interior in the District Court of the United States

for the District of Columbia, seeking a writ of mandamus compelling the Secretary to issue to him an oil and gas lease of the islands. The Secretary moved to dismiss the action on the ground that the complaint failed to state a claim against the defendant. The motion was argued before Justice O'Donoghue on October 21, 1938, and at the close of the argument the court granted the motion. In the course of orally stating his decision, the court said that his ruling would have been the same had Richardson filed an application after the Gulf Refining Company well stopped flowing at the end of June. Richardson was represented at the argument of the motion by Eugene D. Saunders of New Orleans and W. Cameron Burton of Washington, D. C.; the latter is an office associate of the applicant, George C. Vournas. All of them are attorneys of record for Richardson. The proceedings before Justice O'Donoghue terminated shortly before noon. At 3:22 p. m. of the same day Burton filed the application of Vournas which is now before me for disposition.

In my decision in the Richardson-Consaul case, I found as a fact that the islands were within the known geologic structure of a producing oil field. I accordingly held that the islands must be leased by competitive bidding. That decision has been sustained by the ruling of Justice O'Donoghue dismissing Richardson's action. Whether the lands involved in an application for an oil or gas lease are or are not within the known geologic structure of a producing oil field is judged as of the time of the filing of the application.¹ The only conceivable difference between the facts in the Richardson case and this is that at the time Richardson filed his application one of the Gulf Refining Company wells was still producing oil, while at the time Vournas filed his application neither well may have been producing. Under Justice O'Donoghue's ruling and departmental decisions any such difference would be immaterial. *Moss v. Schendel*, A. 6287, unreported, March 24, 1924, and *Kermitt D. Lacy* (54 I. D. 192). In the Richardson-Consaul case, I said:

It is argued that because the two wells of the Gulf Refining Company are not now producing, the area cannot be said to be within "the known geologic structure of a producing oil * * * field." To construe the statute so literally would be absurd. Any temporary cessation in the flow of oil would serve to defeat the obvious purpose of the statute to grant the rewards of a noncompetitive lease to those venturing into "wild cat" areas. The words "producing oil * * * field" were plainly intended to encompass this case. Production has merely been interrupted, the field is capable of production and the applications of the appellants were filed three months after public newspaper announcement of the flow of oil from the well of the Gulf Refining Company.

¹ See *Payne v. Central Pacific Ry. Co.*, 255 U. S. 228; *Payne v. New Mexico*, 255 U. S. 367; *Wyoming v. United States*, 255 U. S. 489; *Santa Fe Pac. R. R. Co. v. Fall*, 259 U. S. 197; Departmental Instructions (48 L. D. 98); *A. W. Mason* (48 L. D. 213), and *Charles R. Haupt* (48 L. D. 355, 358).

In *Moss v. Schendel*, A. 6287, unreported, decided March 24, 1924, the Department held:

✓ "The applicant Moss * * * alleges that the lands were not, at the time of his application, within a producing field, as all wells in that field which had produced either oil or gas, were not producing, but were exhausted, the wells abandoned and the casing pulled and the wells plugged, * * * The records disclose that the Torchlight field was a known producing field long before the passage of the leasing act, and was so defined long prior to the filings by appellant or Schendel. The Department is also aware that large oil companies which have been operating in the field did abandon it in 1923, as alleged, but is not convinced that such abandonment warrants a redefinition of the structure or the revocation of the classification of the area as a producing field at this time. The term "producing oil or gas field" as used in section 13 of the leasing act must ✓ be construed to include areas in which there has been production and which are *capable* of producing more oil, otherwise cessation of production in a given field because of a strike or other external matters would render areas which were clearly oil bearing, subject to prospecting operations and, when oil was brought in, the reward for discovery provided in section 14 of the act would be improperly conferred in a case where such discovery was not essential to the determination, already made, that the land was valuable for oil and gas deposits. Until further showings are made which are persuasive that the area does not still contain valuable deposits of oil, the field will not be redefined."

The language in section 13 of the statute thus construed is substantially the same as that used in section 17 and the sound principles announced are applicable to both.

It follows that even if we assume that at the time Vournas filed his application no oil was flowing from the Gulf Refining Company wells, he is not for that reason alone entitled to a preference right to a lease without competition.

Moreover, as a result of my determination in the *Richardson-Consaul* case that the islands are within the known geologic structure of a producing oil field, the islands were withdrawn from leasing except "to the highest responsible qualified bidder by competitive bidding." Vournas filed his application after that withdrawal was effective. Consequently, his attempt to gain a "preference right over others to a lease of such lands without competitive bidding" was in any event futile. Section 17, Mineral Leasing Act, *supra*; *H. A. Hopkins* (50 L. D. 213); *Lincoln-Idaho Oil Company* (51 L. D. 235).

The application is denied, subject to the right to move for re-hearing pursuant to Rule 83 of the Rules of Practice. (51 L. D. 547, 561).

Application denied.

ON MOTION FOR REHEARING

Opinion, January 5, 1939

SLATTERY, *Under Secretary*:

By decision of November 10, 1938, the Department rejected the application of George C. Vournas for an oil and gas lease without competitive bidding of East Timbalier Island and adjoining islands between Grand Pass Timbalier and Raccoon Pass, off the coast of Louisiana.

The application has been filed on October 1, 1938. The grounds of rejection were: (1) that although no well might have been producing oil on or near the island when Vournas filed his application, one of the wells of the Gulf Refining Company had been producing oil a short time before and the islands were within the known geologic structure of a producing oil field; and (2) that the application was filed after the islands had been withdrawn from leasing except "to the highest responsible qualified bidder by competitive bidding."

On December 2, 1938, the applicant filed a motion for rehearing. But on December 10, before the case was reached for determination, he filed a withdrawal of his motion for rehearing and of his lease application.

The motion for rehearing is accordingly dismissed, the case is closed, and the record is returned to the General Land Office.

PROTECTION OF INDIAN OCCUPANCY OF MINERAL LANDS

Opinion, November 28, 1938

INDIANS—OCCUPANCY OF PUBLIC LANDS—PROTECTION—NECESSITY OF ABILITY TO OBTAIN TITLE.

Under the holding in the case of *Cramer v. United States*, 261 U. S. 219, and the rulings of the Interior Department, Indian occupancy of public lands is entitled to be protected against adverse disposition of the lands, whether or not the Indian occupants are privileged to obtain title to the lands occupied.

INDIANS—OCCUPANCY OF PUBLIC LANDS—MINERAL LANDS—PROTECTION.

No grounds exist for a distinction in the protection accorded Indian occupancy of public lands because the lands occupied are mineral rather than non-mineral.

INDIANS—OCCUPANCY OF PUBLIC LANDS—ADVERSE PATENT TO MINERAL LANDS—REMEDY.

Where mineral lands have been patented to an adverse party without protection of the Indian occupants thereon, action may be taken by the United States to modify the patent to exclude the lands occupied or to obtain a declaration that the title is subject to the occupancy rights of the Indians.

CANCELATION OF PATENTS—STATUTE OF LIMITATIONS—APPLICABILITY TO ACTIONS TO PROTECT INDIAN OCCUPANCY.

The act of March 3, 1891 (26 Stat. 1095, 1099), limiting to six years the time within which actions may be brought by the United States to annul patents does not apply to actions by the United States to protect the right of occupancy of Indians.

MARGOLD, *Solicitor*.

You referred to me for opinion the question raised by the Indian Office whether the decision in the case of *Cramer v. United States*, 261 U. S. 219 (1923), protecting Indian occupancy on public lands, which in that case were nonmineral, can be considered to include Indian occupancy of mineral lands, and if not, whether any protection can be accorded to Indian occupancy of mineral lands. This question necessitates a close analysis of the *Cramer* case.

In 1866 Congress granted to the Central Pacific Railway a series of odd-numbered sections of land, excepting such lands as were "reserved" or "otherwise disposed of," and patent was issued therefor in 1904. The United States brought suit, approximately fifteen years later, on behalf of certain individual Indians to cancel the patent insofar as it covered lands which had been occupied by the Indians. The Indian occupancy was found to date from 1859, and to consist of substantial improvement and use of the land. The Supreme Court held that the patent should be canceled insofar as it covered the lands in the actual occupancy of the Indians as such lands were "reserved" or "otherwise disposed of" at the time of the grant. In reaching this conclusion, the court reasoned as follows:

1. At the time of the 1866 grant to the railroad the Indians had no right to acquire title to the public lands occupied by them, the first act granting this right being the act of March 3, 1875 (18 Stat. 402, 420). Nevertheless, it has been the policy of the Federal Government to protect and respect the Indian right of occupancy until that right was interfered with or determined by the United States.

2. The right of occupancy protected by the United States is not only nomadic tribal occupancy but includes the occupancy of individual Indians who have settled on the lands to make an independent living. In fact, the agricultural occupancy of lands by individual families is particularly deserving of protection by the United States, in view of the policy of the Government to encourage such settlement and independence.

3. The policy of protecting the occupancy of individual Indians on public lands has received strong support in the rulings of the Interior Department, as shown in the instructions issued by that Department to its field officials, and in the cases decided before the Department in which Indian occupancy was protected against the grant or patent of lands to adverse parties.

4. The fact that the right of occupancy of the Indians has not been recognized in any statute or other formal governmental action is not conclusive, since the right is based upon a settled governmental policy. In view of this policy, the possession of the public lands by the Indian occupants must be considered to be with the implied consent of the Government.

5. The statute limiting to six years the time within which suits may be brought by the United States to annul patents (act of March 3, 1891, 26 Stat. 1095, 1099) does not apply to suits by the United States to protect the right of occupancy of individual Indians. That statute is designed to conclude the United States itself and not the rights of third persons which may be protected through action by the United States.

It should be noted that the Supreme Court in setting forth its reasons for its conclusion made no distinction as to the kinds of public lands which might be occupied by the Indians. On its face the reasoning would be as applicable to mineral lands as to non-mineral lands. No such distinction would seem to be necessary unless there is some action of Congress which necessitates it.

Congress has passed laws which distinguish mineral lands from other public lands by reserving such lands from disposition except in the manner provided by the mineral laws, and until comparatively recent years Indians were not privileged under the laws to obtain title to mineral lands. The question may then arise whether such mineral land legislation in any way altered the policy of the Federal Government to protect the occupancy of Indians on public lands. This question is amply answered in the negative by analysis of the *Cramer* case and the rulings of the Interior Department which demonstrate that the Government has recognized an interest in the Indians in the lands they have occupied and improved which is unaffected by legislation for the final disposition of the lands occupied (whether or not such legislation is limited to lands not "otherwise disposed of"), and which is protected whether or not the Indians are themselves able to obtain the title.

The court in the *Cramer* case pointed out, as previously indicated, that there was no way by which the Indians could obtain title to the lands they occupied at the time of the grant of the lands to the railroad. Yet, their occupancy was protected against a specific grant of lands by Congress because of the implied consent and policy of the Federal Government. See also *Cramer v. United States*, 276 Fed. 78 (C. C. A. 9th 1921). On May 31, 1884, the Interior Department promulgated regulations (3 L. D. 371) directing field officials to refuse all entries and filings where the lands were occupied and improved by Indians. These instructions applied to all types of entries and filings.

and to all Indians, although at the time of the instructions the only Indians qualified to obtain title to the public lands upon which they had settled were Indians who had abandoned their tribal relations and were otherwise qualified under the act of March 3, 1875. These instructions were reissued in 1887, in order to obtain stricter compliance and thereby prevent continued dispossession of Indian occupants by white men. In 15 L. D. 19, these instructions were applied to protect the occupancy of a tribal member dating from 1872, and it was there held that the Indian occupant had obtained an "inchoate interest" in the lands by virtue of her occupancy. In 16 L. D. 15, the Department determined, as a first and separate question, that lands in the cultivation and improvement of certain Indians should be protected against patenting to adverse parties before it considered the question whether or not the particular Indians involved were qualified to obtain allotment of the land themselves. The occupancy of public lands as a village by the Quileute Indians was protected (16 L. D. 209), although there was no means by which the tribe could obtain title to the village site. In 19 L. D. 518, it was held that the grant to a State of swamplands in 1850 was subject to the prior right of occupancy of the Indians. At the time of the grant to the State in 1850, there was no law permitting the Indians to obtain title to the lands. In holding in that decision that no patent could be issued to the State so long as the Indian occupancy continued, the Department cited and followed the reasoning in the case of *United States v. Thomas*, 151 U. S. 577. In another decision protecting the occupancy of an Indian against adverse homestead entry (30 L. D. 125), it was specifically stated that "the qualification of the Indian or his purpose to obtain title to the lands" were not involved in the case. Similar protection of the Indian right of occupancy occurs in 12 L. D. 516 and 13 L. D. 269. Land granted to the State in 1889 and sold by the State in 1892, was held (33 L. D. 454) to be not properly granted to the State, in view of the open occupancy by an Indian, although the Indian did not apply for an allotment of the lands until 1903. The "established policy" of protecting the interests of Indians in lands occupied "prior to initiation of rights under the various public land laws" is reiterated in the recent decision in 53 I. D. 481, at 489.

In view of the foregoing, this Department would break from its own precedents if it held that Indian occupancy could be protected only where the Indian occupants were eligible to obtain title to the lands they occupied. It is my opinion that the principle of the *Cramer* case and the rulings of the Department necessitate a holding that the Indian right of occupancy should be protected whether or not the occupancy occurs on mineral lands.

It appears from the files connected with this request for an opinion that the particular case underlying this request involves an occupancy by Indians for three generations of lands in California which were patented to mineral entrants in 1915. In view of the long, substantial and open occupancy by the Indians of this land at the time of the patent, it is evident that the action of the Department in patenting the land was not in conformity with the policy of the Government or the Department's own instructions, and that an injustice was done to the Indians. This situation was aggravated by the fact that at the time of the issuance of the mineral patent an application by the Indian occupants for an allotment of the lands was before the Department but had been overlooked. Since that date this Department has at intervals sought to palliate the injustice by attempting without success to purchase lands for these Indians. At no time has a conclusive analysis of the rights of the Indians been made. In 1915, the Department of Justice was requested to investigate the case, but the only determination then made was inconclusive. It consisted of a paragraph in a letter from the United States Attorney at San Francisco, reading as follows:

A doubt arises in my mind as to whether a court of equity would cancel or set aside a mineral patent after a contest had been made and a final determination made as to the kind of land, merely upon the grounds that the Interior Department had overlooked an application that was pending relative to an Indian allotment. I understand that mineral lands are only disposable under the mining laws. If this assumption is true could the Interior Department have made the allotment?

This statement indicates that the United States Attorney merely raised the question whether the Indian was entitled to the allotment of the land in any case, and that no definite consideration, if any consideration, was given to the right of the Indian occupants to be protected in their occupancy, regardless of their ability to obtain an allotment of the lands. Since that time, the Indians have persisted in their claim to occupancy in spite of their failure to obtain support from the Government and their eviction by State authorities.

The time which the Department has permitted to lapse without correcting this situation now militates against drastic action towards its correction. However, in view of the decision of the Supreme Court in the *Cramer* case, that the statute of limitations on actions to cancel patents does not apply where protection of Indian occupancy is sought, there is no legal bar to action by the United States to protect the Indians even at this date, through obtaining a modification of the patent insofar as it includes the occupied lands or a declaration that the mineral title is subject to the occupancy rights of the Indians. It is my opinion that the mineral patents were incorrectly issued, and

that this case should be resubmitted to the Department of Justice for its consideration of the occupancy rights of the Indians in the light of the *Cramer* case.

Approved: November 28, 1938.

OSCAR L. CHAPMAN,
Assistant Secretary.

PART II

REGULATIONS UNDER SECTION 40 OF THE MINERAL LEASING ACT

UNITED STATES DEPARTMENT OF THE INTERIOR, GEOLOGICAL SURVEY.

The act approved June 16, 1934 (48 Stat. 977) amended the mineral leasing act of February 25, 1920 (41 Stat. 437), by adding thereto Sec. 40 of the leasing act, as follows:

SEC. 40. (a) All prospecting permits and leases for oil or gas made or issued under the provisions of this Act shall be subject to the condition that in case the permittee or lessee strikes water while drilling instead of oil or gas, the Secretary of the Interior may, when such water is of such quality and quantity as to be valuable and usable at a reasonable cost for agricultural, domestic, or other purposes, purchase the casing in the well at the reasonable value thereof to be fixed under rules and regulations to be prescribed by the Secretary: *Provided*, That the land on which such well is situated shall be reserved as a water hole under section 10 of the Act of December 29, 1916.

(b) In cases where water wells producing such water have heretofore been or may hereafter be drilled upon lands embraced in any prospecting permit or lease heretofore issued under the Act of February 25, 1920, as amended, the Secretary may in like manner purchase the casing in such wells.

(c) The Secretary may make such purchase and may lease or operate such wells for the purpose of producing water and of using the same on the public lands or of disposing of such water for beneficial use on other lands, and where such wells have heretofore been plugged or abandoned or where such wells have been drilled prior to the issuance of any permit or lease by persons not in privity with the permittee or lessee, the Secretary may develop the same for the purposes of this section: *Provided*, That owners or occupants of lands adjacent to those upon which such water wells may be developed shall have a preference right to make beneficial use of such water.

(d) The Secretary may use so much of any funds available for the plugging of wells as he may find necessary to start the program provided for by this section, and thereafter he may use the proceeds from the sale or other disposition of such water as a revolving fund for the continuation of such program, and such proceeds are hereby appropriated for such purpose.

(e) Nothing in this section shall be construed to restrict operations under any oil or gas lease or permit under any other provision of this Act.

Under the provisions of this act all permits and leases issued after its approval are subject to the authority of the Secretary of the Interior to take over, purchase necessary casing in, and condition for water production any well drilled which strikes water of value for any of the uses named in the act, provided that the taking over of

such well will not restrict operations under the permit or lease. The Secretary of the Interior may also take over and condition wells heretofore or hereafter drilled under permits and leases previously issued, and may develop water in any wells plugged or abandoned or wells drilled prior to the issuance of permits or leases by persons not in privity with the permittees or lessees.

The provisions of this act do not apply to wells drilled on lands entered or patented under any of the public land laws with reservation of the oil and gas deposits since any water developed in such lands does not belong to the United States.

Before approving any notice of intention to abandon any well on land not excluded above, which well is known or believed to contain water of such quality and quantity as to be valuable and usable at a reasonable cost for agricultural, domestic, or other purposes, the Federal oil and gas supervisor having jurisdiction will submit a report to the Director of the Geological Survey, containing information as to the location of the well by legal subdivision of the public land survey, the depth to water, the yield, if determinable, the suitability of the water for irrigation, stock, domestic, or other beneficial use, the amount and reasonable value of casing to be purchased, the nature and estimated cost of repairs to condition the well as a source of water, the existing and prospective markets for the water, and any other pertinent factors bearing on a determination of the economic value of the water supply available. A similar report will be made by the supervisor as to other existing wells or plugged or abandoned wells coming within the purview of the act.

Upon receipt of this report the Geological Survey will determine the value of the water for any of the purposes stated in section 40 of the act. If the water is found to be valuable and usable at a reasonable cost for any of the purposes specified in the act, the land subdivision which contains the well will, if subject thereto, be held to be withdrawn by Executive order of April 17, 1926, and reserved for public use pursuant to section 10 of the act of December 29, 1916 (39 Stat. 862), as a water hole. If the water is found not to be valuable and usable at a reasonable cost for any of the purposes specified in the act, the oil and gas supervisor will be directed to authorize proper abandonment of the well.

When the oil and gas supervisor recommends that a well be preserved as a source of water he will notify the register of the appropriate district land office of such recommendation and of the land subdivision specifically involved. Upon receipt of such notice the register will note the same on the tract books and will thereafter allow no filing or entry for the subdivision involved until otherwise directed by the Commissioner of the General Land Office. When a well found subject to the act has been duly conditioned for use under

the direction of the oil and gas supervisor, when title to the necessary casing has been duly vested in the United States, and when decision to lease rather than to operate has been reached, the register will be directed to receive applications for lease of the requisite premises and water involved. Such applications, including preference claims asserted under section 40 (c), will be submitted in regular course to the General Land Office where preference rights will be determined and an appropriate lease for the use of the water will be prepared for award by the Secretary of the Interior to such applicant as he shall determine to be equitably entitled thereto. The effective period of the lease, and the terms and conditions thereof, shall be determined by the Secretary of the Interior.

Funds available to the Geological Survey for the plugging and abandonment of wells shall be advisable for the purchase of casing and other necessary equipment contemplated by the act, for the conditioning and maintenance of water wells, and for the development of water supplies in abandoned wells found subject to the provisions of the act.

W. C. MENDENHALL,

Director of the Geological Survey.

I concur:

ANTOINETTE FUNK,

Acting Commissioner of the General Land Office.

Approved: October 23, 1934.

T. A. WALTERS,

Acting Secretary of the Interior.

STATE EXCHANGE APPLICATIONS UNDER THE PROVISIONS OF SECTION 8 OF THE TAYLOR GRAZING ACT

UNITED STATES DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

August 21, 1936.

FROM THE ACTING ASSISTANT COMMISSIONER OF THE GENERAL LAND
OFFICE TO THE SECRETARY OF THE INTERIOR:

A number of State applications under section 8 of the Taylor Grazing Act have been received in this office in which the State applies for surface rights only, which is construed as an election to receive patent to the selected land with a reservation to the United States of all minerals which may be contained therein. The State has also filed an election to have such exchange applications based upon equal areas.

In view of the provisions of the act of June 26, 1936 (49 Stat. 1976), amending section 8 of the act of June 28, 1934 (48 Stat. 1269), it is

considered that where a State exchange application is based upon equal areas and the State elects to receive title to the selected lands with a reservation of all minerals to the United States, it will not be necessary to make any inquiry as to the mineral or nonmineral character of the selected lands but that, all else being regular, a patent may be issued to the State for such lands with a reservation of all minerals to the United States provided the State files in addition to the evidence required by the governing regulations (Circular No. 1398) an affidavit that no part of such land is claimed, occupied or being worked under the mining laws. In this connection see 54 I. D. 47.

Approved: September 3, 1936.

CHARLES WEST,
Under Secretary.

**PUBLICATION OF NOTICES OF OFFERING OF PUBLIC LANDS FOR
LEASE**

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
August 29, 1936.

The Commissioner of the General Land Office is authorized, where conditions warrant such action, to cause the publication of notice, in lieu of the individual notice provided for in paragraph (15) of Circular No. 1401, approved July 28, 1936, offering for lease under section 15 of the act of June 28, 1934 (48 Stat. 1269), as amended by the act approved June 26, 1936 (49 Stat. 1976), all the vacant, unreserved, and unappropriated public lands within any county in any State, outside of duly established grazing districts, or proposed grazing districts.

Such notice shall be published in a newspaper having general circulation in the county involved.

HAROLD L. ICKES,
Secretary of the Interior.

**GRAZING LEASES UNDER SECTION 15 OF TAYLOR GRAZING ACT
AS AMENDED JUNE 26, 1936**

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY.

Instructions, September 14, 1936

TAYLOR GRAZING ACT—PURPOSE—LIBERAL INTERPRETATION INTENDED—ISOLATED TRACTS.

The paramount purpose of the Taylor Grazing Act is to secure orderly and regulated use of the grazing lands of the public domain, and this purpose is

erved by the issuance of leases of isolated tracts as well as by the establishment of grazing districts. Accordingly, in the absence of special reason, its accomplishment should not be interfered with through a more restricted interpretation of the word "unreserved," in section 15 of the act, than Congress has clearly indicated it to have in section 1 thereof.

RESERVED PUBLIC LANDS—TERMS "RESERVED" AND "UNRESERVED" RELATIVE—GRAZING DISTRICT.

Public lands may be "reserved" for another purpose and still be "unreserved" for the purpose of inclusion within a grazing district.

TAYLOR GRAZING ACT—PROVISIONS CONSIDERED IN PARI MATERIA—EFFECT.

Reference to provisions of the Taylor Grazing Act other than section 15 indicates clearly that the word "unreserved" therein, relating to public lands, should not be regarded as excluding from the operation of the section lands embraced within withdrawals except such as are inconsistent with the use of such lands for grazing purposes under the terms of the act.

TAYLOR GRAZING ACT—AUTHORITY GRANTED DEPARTMENT HEAD IN RE LAND RESERVATION—INTENT—INCOMPATIBILITY OF USES.

The purpose of the requirement in the Taylor Grazing Act that the head of the appropriate department approve the inclusion of reserved land in a grazing district obviously has been imposed in order to prevent such inclusion whenever the prior reservation is for a purpose inconsistent with the use of the land for grazing purposes.

"UNRESERVED" PUBLIC LANDS DEFINED—SECTION 15, TAYLOR GRAZING ACT, CONSTRUED.

Held, That by giving to the word "unreserved," in section 15 of the Taylor Grazing Act its meaning when employed in section 1 of the act, namely, *not reserved for a purpose inconsistent with grazing*, the underlying purpose of the act can be subserved without defeating the object Congress sought to achieve by its use of that word.

First Assistant Secretary Walters to the Commissioner of the General Land Office:

You have requested instructions in your letter of August 26, 1936, whether applications for grazing leases under section 15 of the Taylor Grazing Act (act of June 28, 1934, 48 Stat. 1269), as amended by section 5 of the act of June 26, 1936 (49 Stat. 1976, 1978), may be allowed in certain circumstances.

Section 15 of the Taylor Grazing Act, as amended, provides in part:

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: * * *

Many of the applications filed for leases under the foregoing embrace lands covered by withdrawals by various Executive orders for purposes of resurvey, aid of legislation, power sites, classification of lands, phosphate, potash, petroleum, oil shale, and for other

public purposes generally under the act of June 25, 1910 (36 Stat. 847), as amended by the act of August 24, 1912 (37 Stat. 497), or by withdrawals of public lands for reclamation projects made under authority of section 3 of the act of June 17, 1902 (32 Stat. 388). The specific question raised is whether such lands are "unreserved" lands of the public domain within the meaning of section 15 of the Taylor Grazing Act.

Reference to other provisions of the act indicates clearly that the word "unreserved" should not be regarded as excluding lands covered by such withdrawals from the operation of section 15. First, section 1 provides in part:

* * * the Secretary of the Interior is authorized * * * to establish grazing districts or additions thereto * * * not exceeding in the aggregate an area of one hundred and forty-two million acres of vacant, unappropriated, and *unreserved* lands from any part of the public domain of the United States (exclusive of Alaska), which are not in national forests, national parks and monuments, Indian reservations, revested Oregon and California Railroad grant lands, or revested Coos Bay Wagon Road grant lands, and which in his opinion are chiefly valuable for grazing and raising forage crops: *Provided*, That no lands withdrawn or *reserved for any other purpose* shall be included in any such district *except with the approval* of the head of the department having jurisdiction thereof. * * * [Italics supplied.]

Thus, lands may be "reserved" for another purpose and still be "unreserved" for the purpose of inclusion within a grazing district.

Secondly, the following language in section 6 is important:

* * * nothing herein contained shall restrict prospecting, locating, developing, mining entering, leasing, or patenting the mineral resources of such districts under law applicable thereto.

While it, of course, would be possible to construe the act as permitting the inclusion of lands within grazing districts although such lands already have been reserved for other purposes, and at the same time not to permit the issuance of grazing leases with respect to lands similarly withdrawn but not suitable for inclusion within a grazing district, there is no need or reasonable basis for such a distinction. The paramount purpose of the act is to secure orderly and regulated use of the grazing lands of the public domain. This purpose is served by the issuance of leases of isolated tracts as well as by the establishment of grazing districts. In the absence of special reason, its accomplishment should not be interfered with through a more restricted interpretation of the word "unreserved" in section 15 than the Congress clearly has indicated it to have in section 1. The purpose of the requirement in the act that the head of the appropriate department approve the inclusion of reserved land in a grazing district obviously has been imposed in order to prevent such inclusion whenever the prior reservation is for a purpose inconsistent with the use of the land for grazing purposes. The word "unreserved" as

used in section 1 thus means, in effect, not reserved for a purpose inconsistent with grazing. By giving a similar construction to the same word in section 15, the underlying purpose of the act can be subserved without defeating the real object which Congress sought to achieve by its use of that word.

You are accordingly instructed that grazing lease applications for lands which are withdrawn as stated by you may be allowed, although when necessary the leases may be appropriately conditioned in order to prevent interference with the purpose of the prior reservation. In cases of lands withdrawn for power-site purposes the Federal Power Commission should be called upon for report and recommendation, and when lands included in withdrawals for reclamation projects are involved the Bureau of Reclamation should be called upon for report and recommendation.

CLASSIFICATIONS UNDER TAYLOR GRAZING ACT

[Circular No. 1411]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

October 6, 1936.

REGISTERS, UNITED STATES LAND OFFICES:

DIRECTOR, DIVISION OF GRAZING:

ACTING DIRECTOR, DIVISION OF INVESTIGATIONS:

Section V, page 8 of Circular No. 1401, approved July 28, 1936, entitled "Regulations Governing the Leasing of Public Lands, Exclusive of Alaska, for the Grazing of Livestock Under the Act of June 28, 1934 (48 Stat. 1269), as Amended by the Act approved June 26, 1936 (49 Stat. 1976)," is hereby amended by adding thereto Paragraph (23a), as follows:

Lands embraced in a grazing lease shall be subject to classification and disposal under the provisions of section 7 of the act of June 28, 1934 (48 Stat. 1269), as amended by the act of June 26, 1936 (49 Stat. 1976), provided that before the allowance of any entry, selection, or location under said section 7 evidence must be furnished that the applicant has agreed to compensate the lessee for any grazing improvements placed on the lands entered, selected, or located under the authority of the lease and for any injury caused to the lessee's grazing operations by reason of the loss of the leased lands from his leasehold. In the event the interested parties are unable to reach an agreement as to the amount of such compensation the amount shall be fixed by the Commissioner of the General Land Office subject to the right of appeal to the Secretary of the Interior, whose decision shall be final. All such agreements, to be effective, must be approved by the Commissioner of the General Land Office. The failure of the applicant to pay the lessee in accordance with the agreement shall be just cause for cancellation of the entry, selection, or location. All subsequent annual rental charges will be proportionately reduced for the loss of the lands from the leasehold.

The form of lease attached to Circular No. 1401 is also amended by adding Paragraph (d) to the section under "The lessor expressly reserves:" as follows:

(d) The right to classify and permit entry, selection, or location of, under the provisions of section 7 of the act of June 28, 1934 (48 Stat. 1269), as amended by the act of June 26, 1936 (49 Stat. 1976), any part or all of the leased lands, provided that before the allowance of any application therefor the applicant shall agree, subject to the approval of the Commissioner of the General Land Office, to compensate the lessee in accordance with paragraph (23a) of the regulations approved July 28, 1936, as amended October 6, 1936.

FRED W. JOHNSON,
Commissioner.

Approved:

T. A. WALTERS,
First Assistant Secretary.

USE OF TIMBER UPON LANDS WITHIN ESTABLISHED GRAZING DISTRICT

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
October 21, 1936.

FROM THE ACTING COMMISSIONER OF THE GENERAL LAND OFFICE TO
THE DIRECTOR OF THE DIVISION OF GRAZING:

By letter of September 25, 1936, Acting Director Falck advised this office that programs of the Division of Grazing C. C. C. Camps called for a large amount of fencing and requested that the Division of Grazing be granted authority to take such timber as is necessary for such purposes from lands within established grazing districts without the formality of making application therefor to the special agent in charge.

As lands within grazing districts established under the Taylor Grazing Act are under the primary jurisdiction of the Director of Grazing who is authorized to do all things necessary to preserve the lands and to provide for the orderly use, improvement, and development of the range, it is considered that such authority carries with it the right to take such timber as may be necessary for such purposes from lands within established grazing districts, without making application therefor under the acts of June 3, 1878 (20 Stat. 88), or March 3, 1891 (26 Stat. 1093), as provided in Circular No. 1285.

The special agent in charge should, however, in each case, be promptly notified of the cutting, or intended cutting, in order that his records may show the facts and that he may be advised that such cutting was not done in trespass and that appropriate action may be taken by him on applications for timber-cutting permits under the

above-mentioned acts. The notice should show the kind and amount of timber cut, or to be cut, the date or approximate date that the cutting operations will be completed, and should contain a description of the lands from which the timber is to be cut.

I concur: October 21, 1936.

B. B. SMITH,

Acting Director of Investigations.

Approved: October 21, 1936.

T. A. WALTERS,

First Assistant Secretary.

ISSUANCE OF ONE-YEAR LEASES UNDER SECTION 15, TAYLOR GRAZING ACT

INSTRUCTIONS

[Circular No. 1412]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
October 22, 1936.

REGISTERS, UNITED STATES LAND OFFICES:

With a view to expediting the issuance of grazing leases under section 15 of the Taylor Grazing Act approved June 28, 1934 (48 Stat. 1269), as amended by the Act of June 26, 1936 (50 Stat. 1976), you will, until further instructed, take action on applications for such leases as herein directed.

In order that the procedure followed in each district land office may be as uniform as possible, the following instructions are issued:

Copies of all pending applications in this office, embracing lands in your district and outside of established or proposed grazing districts, are being forwarded to you under separate cover together with copies of reports that have been received from the special agents in charge.

You will immediately take up these and all other such cases for action in the order of their filing, insofar as practicable, and obtain the status of the lands involved as shown by the records of your office, noting all conflicting lease applications and other conflicts. When such status is obtained, you will not consider the applications as to any lands not properly subject to lease, thereby eliminating from consideration all but the vacant, unreserved, and unappropriated public lands. However, when it is found that any application for lease conflicts with an application under any other section of the Taylor Grazing Act as amended, regardless of the date of filing of such other application, or when it is found that the application for lease embraces withdrawn or reserved lands, the lease applica-

tion will be suspended as to such tract or tracts until such a time as a determination can be made by this office regarding the respective rights of the parties interested.

If it is found that any application embraces isolated or disconnected tracts of 760 acres or less you will, at the earliest date possible, direct publication in the manner hereinafter prescribed. When an application embraces tracts in excess of 760 acres no publication will be required, and where it is found that an application includes tracts of 760 acres or less and also tracts in excess of 760 acres, you will direct publication only as to the tracts of 760 acres or less. Care should be exercised in ordering publications in order that the same tract is not included in more than one publication. The expense of such publication will be paid for by the applicants.

Publication will be required on the senior application as to tracts of 760 acres or less. However, if a lease for all or any part of the tracts is awarded to an applicant on whose application publication was not required, such applicant, prior to the inclusion of such lands in a lease, will be required to furnish evidence to the effect that the applicant who paid the expense of publication has been reimbursed for such cost or part thereof.

The following form of notice will be used when ordering publication:

DEPARTMENT OF THE INTERIOR, U. S. Land Office _____
 _____, Notice is hereby given that
 _____, of _____
 (Applicant) (Post office address)
 has filed application _____ under the Taylor
 (Serial number)
 Grazing Act to lease _____

 (Description of land applied for)
 Said lands are offered for lease upon such terms and conditions as may be prescribed. Any and all persons desiring to lease all or any part thereof for grazing purposes under authority of said act, must file notice of their claims, or proper grazing lease applications, in this office within 90 days from date of the first publication of this notice.

Date of first publication: _____

Register.

In directing publication you will be guided by the instructions contained in paragraph 15 of Circular 1401, except that you will direct publication in all cases whether they are pending in this office or not.

To assist you in adjudicating applications there will be detailed to your office by the Division of Investigations a special agent or agents familiar with the land within your land district who will act in an advisory capacity to you especially regarding the carrying capacity of the land involved and as to any division of lands to be made between conflicting applications based upon information obtained by them

through previous investigations in the vicinity. This procedure will, for the time being, eliminate the submission of formal reports by the Division of Investigations as heretofore required under former instructions (Circular 1401).

As to applications for lease embracing a tract or tracts in excess of 760 acres which are properly subject to lease, you will in each case make a determination as to the lands which, in your opinion, the applicant is entitled to lease. In making this determination you will take into consideration all information contained in your records, together with such other information as the special agent is able to furnish. This course of action will also be followed on applications which include both tracts of 760 acres or less and tracts in excess of 760 acres except that you will not withhold the issuance of leases on such applications as to the tracts in excess of 760 acres, pending the expiration of the 90-day preference period allowed in the published notices.

In determining the rental to be charged, you will use as a basis the chart to be furnished you by this office which is self-explanatory. It indicates the theoretical number of acres per cow-month required under normal conditions. (You may also take into consideration the number of livestock the applicant or applicants state in their applications they desire to graze upon the land.) Based upon the seasonal use of the range in any particular area and a nominal charge of 5 cents per head per month or fraction thereof per each head of cattle or horses and 1 cent per month or fraction thereof for each sheep or goat, the rental charge for the area awarded in the lease will be arrived at.

When such determination is made as to the lands to be awarded and the rental to be charged, you will prepare and forward to the applicant by registered mail a proposed lease, in quadruplicate, on forms to be furnished you, advising him that he will be allowed 10 days from receipt thereof within which to execute the proposed lease and return the same to you accompanied with the amount due as rental as set forth therein.

In the event the applicant is not awarded all the lands applied for, your letter to him should set forth fully all reasons why the proposed lease does not embrace all the lands and that your action is subject to the right of appeal to the Commissioner of the General Land Office, advising him, however, whether or not an appeal is filed, his rights as to any lands applied for but not included in the proposed lease will, in due course, be adjudicated by the General Land Office and such lands included in a supplemental lease to him if warranted.

If, within the time allowed, the applicant returns the lease forms properly executed, together with the amount due as rental, you will date and sign the four copies and make appropriate notations on your

records. You will then forward one copy of the lease to the applicant, retain one copy for your files, and forward the original and one signed copy to this office, together with copies of all correspondence had in connection with the issuance of the lease.

If and when an appeal is filed from your award of the lease, you will immediately forward the same, together with copies of your correspondence to this office, and any decision rendered by this office will be subject to the right of appeal to the Secretary of the Interior.

Upon expiration of the 90-day period allowed in the published notices, relative to tracts of 760 acres or less, you will consider all protests, objections, and other lease applications for any or all the lands involved that may have been received in your office and proceed to make such determination as to the award of the lands as outlined above.

These regulations are not to be considered as a revocation of Circular 1401, as amended by Circular 1411, but are to be considered a temporary modification thereof in so far as said circular is inconsistent herewith.

ANTOINETTE FUNK,
Acting Commissioner.

I concur:

JULIAN TERRETT,
Acting Director, Division of Grazing.

I concur:

B. B. SMITH,
Acting Director of Investigations.

Approved:

T. A. WALTERS,
First Assistant Secretary.

FORM OF LEASE

[Form 4-722a. Approved October 22, 1936]

[To be executed by applicant in quadruplicate]

Serial-----

This indenture of lease, entered into by and between the United States of America, party of the first part, hereinafter called the lessor, acting in this behalf by _____, Register, United States Land Office, 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 June 28, 1934 (48 Stat. 1269), as amended by the act of June 26, 1936 (49 Stat. 1976), entitled "An Act to stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes," hereinafter referred to as the act, which is made a part hereof. WITNESSETH:

That the lessor, in consideration of the rents to be paid and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee an exclusive right and privilege of using for grazing purposes the following-described tract of land:

containing approximately ----- acres, together with the right to construct and maintain thereon all buildings or other improvements necessary to the full enjoyment thereof, for a period of one year from date hereof.

In consideration of the foregoing, the lessee hereby agrees:

(a) To pay the lessor a yearly rental -----

(b) To observe the laws and regulations for the protection of game animals, game birds, and nongame birds, and not unnecessarily disturb such animals or birds.

(c) That neither he nor his employees will set fires that will result in damage to the range or to wild life, and to extinguish all camp fires started by him or any of his employees before leaving the vicinity thereof.

The lessor expressly reserves:

(a) The right to permit prospecting, locating, developing, mining, entering, leasing, or patenting the mineral resources, and to dispose of such resources under any laws applicable thereto; the right to permit the use and disposition of timber on the lands embraced in this lease, under existing laws and regulations; and nothing herein contained shall restrict the acquisition, granting, or use of permits or rights under existing law.

(b) The right to classify and permit entry, selection or location of, under the provisions of Section 7 of the act of June 28, 1934 (48 Stat. 1269), as amended by the act of June 26, 1936 (49 Stat. 1976), any part or all of the leased lands, provided that before the allowance of any application therefor the applicant shall agree, subject to the approval of the Commissioner of the General Land Office, to compensate the lessee in accordance with paragraph (23a) of the regulations approved July 28, 1936, as amended October 6, 1936.

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, to-

gether 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, I, _____, party of the second part, have hereto affixed my signature this ____ day of _____, 19____.

IN WITNESS WHEREOF, and as representative of the United States of America, party of the first part, I have hereunto affixed my signature this ____ day of _____, 19____.

THE UNITED STATES OF AMERICA,

By _____,

Register, United States Land Office.

Form approved:

T. A. WALTERS,

First Assistant Secretary.

REGULATIONS GOVERNING MOTORTRUCK OR WAGON ROAD RIGHTS OF WAY UNDER THE ACT OF JANUARY 21, 1895 (28 STAT. 635), AS AMENDED BY THE ACT OF MAY 11, 1898 (30 STAT. 404)

[Circular No. 1413]

UNITED STATES DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

October 26, 1936.

REGISTERS, UNITED STATES LAND OFFICES:

For some years it has been the practice of the Department to approve maps filed under the act of January 21, 1895 (28 Stat. 635), as amended by section 1 of the act of May 11, 1898 (30 Stat. 404), showing rights of way for motortruck roads used in connection with logging operations and to approve maps showing rights of way for narrow-gauge railroads used in connection with such operations.

On May 21, 1936, the Department approved an office letter (1641472) addressed to the representative of a mining company holding that the said act as amended is applicable to rights of way for motortruck or wagon roads used in connection with the other businesses enumerated in the act of January 21, 1895, namely, mining or quarrying.

You will, therefore, accept applications under the said act, as amended, for rights of way for tramways, tramroads, motortruck and wagon roads to be used in connection with the businesses enumerated in the act.

Approved:

T. A. WALTERS,
First Assistant Secretary.

ANTOINETTE FUNK,
Acting Commissioner.

OIL AND GAS OPERATING REGULATIONS APPLICABLE TO LANDS OF THE UNITED STATES AND TO ALL RESTRICTED TRIBAL AND ALLOTTED INDIAN LAND (EXCEPT OSAGE INDIAN RESERVATION)

UNITED STATES DEPARTMENT OF THE INTERIOR,
GEOLOGICAL SURVEY.

INTRODUCTION

These operating regulations are issued to govern oil and gas operations, as follows:

On public lands and naval petroleum reserves: Under the act of February 25, 1920 (41 Stat. 437); act of June 4, 1920 (41 Stat. 812); act of March 4, 1923 (42 Stat. 1448); act of April 30, 1926 (44 Stat. 373); act of February 25, 1928 (45 Stat. 148); act of May 31, 1930 (46 Stat. 373); act of March 4, 1931 (46 Stat. 1523); act of February 9, 1933 (47 Stat. 798); act of May 23, 1934 (48 Stat. 796); act of June 16, 1934 (48 Stat. 977); act of August 21, 1935 (49 Stat. 674); and any amendments thereto or other applicable laws not cited herein.

On restricted Indian lands: Under the act of February 28, 1891 (26 Stat. 795); act of April 26, 1906 (34 Stat. 137); act of May 27, 1908 (35 Stat. 312); act of March 3, 1909 (35 Stat. 781-783); act of February 14, 1920 (41 Stat. 426); act of May 29, 1924 (43 Stat. 244); act of May 26, 1930 (46 Stat. 385); and any amendments thereto or other applicable laws not cited herein.

The following regulations will govern the development and production of oil, gas, and casing-head or natural gasoline, including propane, butane, and other hydrocarbons, on reserved and unreserved public lands of the United States, including naval petroleum reserves, and on restricted Indian lands, tribal and allotted.

DEFINITIONS

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

Supervisor.—A representative of the Secretary of the Interior, under direction of the Director of the United States Geological Survey, authorized and empowered to supervise and direct operations under oil and gas leases and prospecting permits, to furnish scientific and technical information and advice, to ascertain and record the amount and value of production, and to determine and record rentals and royalties due and paid pursuant to these regulations. As to lands in naval petroleum reserves within his district, a supervisor serves also as a representative of the Secretary of the Navy.

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

Officer in charge.—The supervisor or such other officer as the Secretary of the Interior may designate to supervise technical operations for the development and production of oil and gas on restricted Indian lands. Over such lands he shall exercise the authority and power and perform the duties of supervisor as provided in these regulations.

Superintendent.—The superintendent of an Indian agency, or other officer authorized to act in matters of record, law, and collections with respect to oil or gas leases for restricted Indian lands.

Lease.—A prospecting permit, lease, or other agreement authorized by law for the development and production of oil or gas on lands of the United States or on restricted Indian lands.

Leased lands, leasehold.—Lands or interests in lands or deposits covered by a lease as herein defined.

Lessor.—The party to a lease who holds title to the leased lands.

Lessee.—The party authorized by a lease to develop and produce oil or gas on the leased lands in accordance with these regulations.

Permittee.—A lessee whose rights are defined by an oil and gas prospecting permit.

JURISDICTION

Drilling and producing operations, handling and gaging of oil, and the measurement of gas or other products, rental and royalty liability and payments, and technical operations generally are under the jurisdiction of the supervisor or his representative in the district where the leased lands are located. Upon request, the district oil and gas supervisor or the Director, United States Geological Survey, Washington, D. C., will advise any person concerning these or any other matters relative to oil and gas development and operation on lands subject to these regulations.

SUPERVISION

The supervisor is hereby authorized to require compliance with lease terms, with these regulations, and with applicable law to the

end that all operations shall conform to the best practice and shall be conducted in such manner as to protect the deposits of the leased lands and result in the maximum ultimate recovery of oil and gas with minimum waste.

Inasmuch as conditions in one area may vary widely from conditions in another area, these regulations are general, and detailed procedure thereunder in any particular area is subject to the judgment and discretion of the supervisor.

SECTION 1. POWERS AND DUTIES OF SUPERVISOR

The supervisor directly or through his representatives shall have the authority and the obligation to perform the following duties:

(a) Inspect and supervise operations for the development and production of oil and gas or related products for the purpose of insuring compliance with these regulations; prevent waste of oil and gas, damage to formations or deposits containing oil, gas, or water or to coal measures or other mineral deposits, injury to life or property, or economic waste; and issue instructions necessary, in his judgment, to accomplish these purposes.

(b) Make reports to his superior administrative officer as to the general condition of leased lands and the manner in which operations are being conducted and departmental orders are being obeyed, and submit from time to time information and recommendations for safeguarding and protecting surface property and underlying mineral-bearing formations.

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

(d) Require that, in the manner prescribed or approved by him, adequate samples be taken and tests or surveys be made to determine (1) the identity and character of formations, (2) the presence or waste of oil, gas, or water, (3) the quantity and quality of oil, gas, or water, (4) the amount and direction of deviation of any well from the vertical, and (5) the proper conduct of operations with due regard to the interests of the lessor.

(e) Require correction, in a manner to be prescribed or approved by him, of any condition which is causing or is likely to cause damage to any formation containing oil, gas, or water or to coal measures or other mineral deposits, or which is dangerous to life or property or wasteful of oil, gas, or water; require substantially vertical drilling when necessary to protect interests in other properties; demand drilling in accordance with the terms of the lease or of these regulations; and require plugging and abandonment of any well or wells no longer used or useful in accordance with such plans as may be approved or prescribed; and, upon failure to comply with such requirement, perform the work at the expense of the lessee,

expending available public funds, and submit such report as may be needed to furnish a basis for appropriate action to obtain reimbursement.

(f) Fix the percentage of the potential capacity of any oil or gas well that may be utilized when, in his opinion, such action is necessary to protect the productive formations, and specify the time and method for determining the potential capacity of such wells.

(g) Approve a well-spacing and well-casing program for the proper development of the lease and assist and advise lessees in the planning and conduct of tests and experiments for the purpose of increasing the efficiency of operation.

(h) Compile and maintain records of production and of rentals and royalties due and paid, estimate drainage and compute losses to the lessor resulting therefrom, and estimate the amount and value of gas and other products wasted. The supervisor shall render monthly to the lessee or his agent statements showing the amount of oil, gas, casing-head or natural gasoline, propane, butane, or other hydrocarbons produced and the amount due to the lessor as royalty from each lease; the loss by drainage and the compensation due to the lessor as reimbursement; and, except as to any disposal of gas that shall have been determined by the Secretary of the Interior to be sanctioned by the laws of the United States and of the State in which it occurs, the amount and full value, computed at a price of not less than 5 cents per 1,000 cubic feet, of all gas wasted by blowing, release, escape into the air, or otherwise.

(i) Approve, subject to such conditions as he shall prescribe, division orders granting to pipe-line companies authority to receive oil or gas from leased lands in accordance with Government rules and regulations; sign run tickets or other receipts for royalty oil delivered to a representative of the lessor or to the lessor's account. Approve sales contracts, subject to any conditions, modification, or revocation that may be prescribed on review thereof by the Secretary of the Interior or by the Secretary of the Navy if for production from the naval petroleum reserves.

(j) On receipt of an application for relief from any drilling or producing requirement under a lease, (1) forward such application, with a report and recommendation, to the appropriate official and, pending action thereon, grant such temporary relief as he may deem warranted in the premises; or (2) reject such application, subject to the right of appeal as provided in section 6 hereof; and (3) terminate authorized relief after notice of intention to resume operations or upon his own initiative.

(k) Require, by written notice or otherwise, immediate suspension of any operation or practice contrary to the requirements of these regulations or to the written orders of the supervisor or his repre-

sentative, and, in his discretion, shut down any operation and place under seal any property or equipment necessary to assure compliance with such regulations or orders.

(1) Receive and transmit promptly for review all appeals from his written orders, together with his report in the premises.

SECTION 2. REQUIREMENTS FOR ALL LESSEES (INCLUDING PERMITTEES) AND THEIR AUTHORIZED AGENTS

(a) The lessee shall comply with the terms of the agreement, lease, or permit and of these regulations and with the written instructions of the supervisor or his representatives and shall take precautions to prevent waste of oil or gas, damage to formations or deposits containing oil, gas, or water or to coal measures or other mineral deposits, injury to life or property, or economic waste.

(b) The lessee, before he begins drilling or other operations, shall designate in writing for each permit, lease, or agreement, the name and post-office address of a local agent on whom the supervisor or other authorized representative of the United States may serve notice or communicate in obtaining compliance with these regulations.

If the local agent so designated shall at any time be incapacitated for duty or absent from his designated address, the lessee shall designate in writing a substitute to serve in his stead, and, in the absence of such agent or of written notice of the appointment of a substitute, any employee of the lessee who is on the leased lands or the contractor or other person in charge of operations will be considered the agent of the lessee for the service of written orders or notices as provided in these regulations, and service in person or by ordinary mail upon any such employee, contractor, or other person will be deemed service upon the lessee. All changes of address and any termination of the agent's authority shall be immediately reported, in writing, to the supervisor or his representative. In case of such termination or of controversy between the lessee and the designated agent, the Department will recognize the record title holder, but the agent, if in possession of the leasehold will be required to protect the interests of the lessor.

(c) The lessee must not drill any well within 200 feet of any of the outer boundaries of the leased lands except where necessary to protect those lands against wells on land the title to which is not held by the lessor, and then only on consent first had in writing from the supervisor. The lessee must not drill any well within 200 feet of the boundary of any legal subdivision without first submitting adequate reasons therefor and obtaining consent in writing from the supervisor, such consent to be subject to such conditions as may be prescribed by said official.

Lessees of Indian lands must not drill any well within 200 feet of any house or barn standing on the leased lands at the date of issuance of the lease without the lessor's written consent, approved by the officer in charge and the superintendent.

(d) The lessee shall submit before commencing any operations an adequate well-spacing and well-casing program. Such program must be approved by the supervisor and may be modified from time to time as conditions warrant, with the consent and approval of the supervisor.

The lessee shall not begin to drill, redrill, deepen, plug back, shoot, or plug and abandon any well, make water shut-off or formation test, alter the casing, stimulate production by vacuum, acid, gas, air, or water injection, change the method of recovering production, or use any formation or well for gas storage or water disposal without first notifying the supervisor or the supervisor's representative of his plan or intention and receiving approval prior to commencing the contemplated work.

The lessee shall drill diligently and produce continuously from such wells as are necessary to protect the lessor from loss of royalty by reason of drainage, or, in lieu thereof, with the consent of the supervisor, he must pay a sum estimated to reimburse the lessor for such loss of royalty, the sum to be fixed monthly by the supervisor.

The lessee or his agent or operator, when and as required by the supervisor or his representative, shall submit a copy of the daily drilling report.

The lessee, whenever drilling or producing operations are suspended for 24 hours or more, shall close the mouth of the well with a suitable plug or other fittings acceptable to the supervisor.

(e) The lessee shall mark each and every derriek or well in a conspicuous place with his name or the name of the operator, the serial number of the lease or the name of the lessor if on Indian land, and the number and location of the well, and shall take all necessary means and precautions to preserve these markings; and on public lands he shall place at all corners of the leased land substantial monuments appropriately marked so that the boundaries can be readily traced on the ground. When required by the supervisor or his representative, an abandoned well shall be marked with a permanent monument, on which shall be shown the number and location of the well. This monument shall consist of a piece of pipe not less than 4 inches in diameter and not less than 10 feet in length, of which 4 feet shall be above the ground level, the remainder being embedded in cement. The top of the pipe must be closed with a screw cap or cement plug.

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

plugging, or abandoning of all wells and of all alterations to casing, the records to show all the formations penetrated, the content and character of oil, gas, or water in each formation, and the kind, weight, size, and landed depth of casing used in drilling each well on the leased lands.

He shall take such samples and make such tests and surveys as may be required by the supervisor with a view to determining conditions in the well and obtaining information concerning materials (formations) encountered and shall furnish such characteristic samples of each formation penetrated or substance encountered as may be requested by the supervisor or his representative.

Within 15 days after the completion of any well and within 15 days after the completion of any further operations on it, the lessee shall transmit to the supervisor or his local representative copies of these records on forms (see section 5 of these regulations) furnished by the supervisor.

The lessee shall also submit such other reports and records of operations as may be required and in the manner and form prescribed by the supervisor.

Upon request and in the manner and form prescribed by the supervisor the lessee shall furnish a plat showing the location, designation, and status of all wells on the leased lands, together with such other pertinent information as the supervisor may require.

(g) When drilling in "wildcat" territory or in a gas or oil field where high pressures are likely to exist, the lessee shall take all necessary precautions for keeping the well under control at all times and shall provide at the time the well is started the proper high-pressure fittings and equipment; under such conditions the conductor string of casing must be cemented to the surface and all strings of casing must be securely anchored.

(h) When drilling with cable tools, the lessee shall provide at least one properly prepared slush pit, into which must be deposited mud and cuttings from clay or shale free of sand that will be suitable for the mudding of a well. When necessary or required, the lessee shall provide a second pit for sand pumpings and other materials obtained from the well during the process of drilling that are not suitable for mudding.

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

(j) The lessee shall drill substantially vertical wells, material deviation from the vertical being permitted only on written approval of the supervisor and where interests in other properties will not be unfairly affected.

(k) By approved methods, the lessee shall shut off and exclude all water from any oil- or gas-bearing stratum to the satisfaction of the supervisor, and to determine the effectiveness of such operations he shall make a casing and a water shut-off test before suspending drilling operations or drilling into the oil or gas sand and completing the well.

The lessee shall test for commercial productivity all formations that give evidence of carrying oil or gas, the test to be made to the satisfaction of and in a manner approved in advance by the supervisor or his representative. Unless otherwise specifically approved by the supervisor or his representative, formation tests shall be made at the time the formations are penetrated and in the absence of excessive back pressure from a column of water or mud fluid.

(l) The lessee shall not deepen an oil or gas well for the purpose of producing oil or gas from a lower stratum until all upper productive strata are protected to the satisfaction of the supervisor.

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

(n) The lessee shall complete and maintain his wells in such mechanical condition and operate them in such manner as to prevent, as far as possible, the formation of emulsion, or so-called B. S., and the infiltration of water. If the formation of emulsion, or B. S., or the infiltration of water, cannot be prevented or if all or any part of the product is unmarketable by reason thereof or on account of any impurity or foreign substance, the lessee shall put such unmarketable products into marketable condition, if commercially feasible. It is an obligation of the lessee to put into marketable condition all products produced from the leased land and pay royalty thereon, without recourse to the lessor for deductions on account of costs of treatment or of costs of shipping. To avoid excessive losses from evaporation while breaking down emulsions, emulsified oil shall not be heated to temperatures above the minimum required to put the oil into marketable condition. If excessive temperatures are required to break down an emulsion, then other means of dehydration must be utilized. Under such circumstances the supervisor or his representative must be consulted.

(o) B. S. and salt water from tanks or wells shall not be allowed to pollute streams or damage the surface or pollute the underground water of the leased or adjoining land. If the B. S. cannot be treated or burned or if the volume of salt water is too great for disposal by usual methods without damage, the supervisor or his representative must be consulted, and the B. S. or salt water disposed of by some method approved by him.

(p) All production run from leased lands shall be gaged or measured according to methods approved by the supervisor or his repre-

sentative. The lessee shall provide tanks suitable for containing and measuring accurately all crude oil produced from the wells and shall furnish to the supervisor or his representative at least two acceptable copies of all tank tables. Meters for measuring oil must be first approved by the supervisor, and tests of their accuracy shall be made when directed by that official. The lessee shall not, except during an emergency and except by special permission of the supervisor or his representative, confirmed in writing, permit oil to be stored or retained in earthen reservoirs or in any other receptacle in which there may be undue waste of oil.

(q) The lessee shall promptly plug and abandon or condition as a water well any well on the leased land that is not used or useful for the purposes of the lease, but no productive well shall be abandoned until its lack of capacity for further profitable production of oil or gas has been demonstrated to the satisfaction of the supervisor. Before abandoning a well the lessee shall submit to the supervisor or his representative a statement of reasons for abandonment and his detailed plans for carrying on the necessary work, together with duplicate copies of the log, if it has not already been submitted. A well may be abandoned only after receipt of written approval by the supervisor or his representative, in which the manner and method of abandonment shall be approved or prescribed.

(r) The lessee shall prevent the waste or wasteful utilization of gas and shall pay the lessor the full value of all gas wasted by blowing, release, escape, or otherwise, at a price not less than 5 cents for each 1,000 cubic feet, unless such waste of gas under the particular circumstances involved shall be determined by the Secretary of the Interior to be sanctioned by laws of the United States and of the State in which it occurs. The production of oil and gas shall be restricted to such amount as can be put to beneficial use with adequate realization of values, and in order to avoid excessive production of either oil or gas, when required by the Secretary of the department having jurisdiction over the leasehold, shall be limited by the market demand for gas or by the market demand for oil.

(s) The lessee shall take all reasonable precautions to prevent accidents and fires, shall notify the supervisor or his representative within 24 hours of all accidents or fires on the leased land, and shall submit a full report thereon within 15 days.

(t) The lessee shall file with the supervisor or his representative triplicate (quadruplicate for production of naval petroleum reserves) signed copies of all contracts for the disposition of all products of the leased land except that portion used for purposes of production on the leased land or unavoidably lost, and he shall not sell or otherwise dispose of said products except in accordance with a sales contract, division order, or other arrangement first approved.

(u) The lessee desiring relief from any operating or royalty requirement under a lease shall file, in triplicate (quintuplet for applications on naval petroleum reserve leases), with the supervisor or his representative an application therefor, including therein a full statement of the circumstances that render relief necessary or proper.

(v) The lessee shall tender all payment of rental and royalty (unless the lessor elects to take royalty in kind) by check or draft on a solvent bank, open for the transaction of business on the day the check or draft is issued, or by money order drawn to the order of the appropriate receiving officer. Payments shall be transmitted through the oil and gas supervisor, shall be accompanied by a statement by the lessee, in duplicate, showing the specific items of rental or royalty that the remittance is intended to cover, and shall be made at such time or times as the lease provides.

If the lessor elects to take royalty on production in kind, such royalty in kind shall be delivered on the leasehold by the lessee to the order of and without cost to the lessor. Upon the lessor's request, storage, free of charge for 30 days after the end of the calendar month in which the royalty accrues, shall be furnished for royalty oil taken in kind. Storage shall be provided on the leased lands or at a place mutually agreed upon by the supervisor or his representative and the lessee.

(w) Lessees of Indian land shall not use any timber from the land except under written agreement with the owner, such agreement to be subject to the prior approval of the superintendent of the Indian agency having jurisdiction. On demand of the supervisor, pipe lines on Indian land shall be buried below plow depth.

(x) Lessees of Indian land shall pay to the superintendent through the oil and gas supervisor, for the account of the lessor, all fines assessed under the provisions of section 4 of these regulations and shall pay direct to the superintendent the assessed value of all damage to lands, crops, buildings, and other improvements of the lessor occasioned by the lessee's operations. The amount of damage will be assessed by the superintendent.

SECTION 3. MEASUREMENT OF PRODUCTION AND COMPUTATION OF ROYALTIES

(a) *Measurement of oil.*—The volume of production shall be computed in terms of barrels of clean oil of 42 standard United States gallons of 231 cubic inches each, on the basis of meter measurements (meter must be approved by supervisor) or tank measurements of oil-level difference, made and recorded to the nearest quarter inch of 100 percent capacity tables, and of the following corrections:

(1) The percentage of impurities (water, sand, and other foreign substances not constituting a natural component part of the oil) shall

be determined to the satisfaction of the supervisor, and the observed volume of oil shall be corrected to exclude the entire volume of such impurities.

(2) The observed volume of oil shall be corrected to the actual volume at 60° F. in accordance with table 2 of Circular 154 of the National Bureau of Standards (May 29, 1924) or any revisions thereof and any supplements thereto, provided that the supervisor in his discretion may authorize computation of correction for temperature in terms of 1 percent for a specified number of degrees if closely approximating the computation in accordance with Circular 154 of the Bureau of Standards or its supplements.

(3) The gravity of the oil shall be determined in accordance with table 3 of Circular 154 of the National Bureau of Standards (May 29, 1924) or any revisions thereof and any supplements thereto.

(4) For the convenience of the lessor and lessee, monthly statements of production and royalty shall be based in general on production recorded in pipe-line runs or other shipments. When shipments are infrequent or do not approximate actual production, the supervisor may require statements of production and royalty to be made on such other basis as he may prescribe, gains or losses in volume of storage being taken into account when appropriate. Evidence of all shipments of oil shall be furnished by pipe-line or other run tickets signed by representatives of the lessee and of the purchaser who have witnessed the measurements reported and the determinations of gravity, temperature, and the percentage of impurities contained in the oil. Run tickets shall be filed with the supervisor or his representative within 5 days after the oil has been run.

(b) *Measurement of gas.*—The term "gas," as used in these regulations, shall be interpreted to mean any gas released by or produced from a well.

Gas of all kinds (except gas used for purposes of production on the leasehold or unavoidably lost) is subject to royalty, and all gas shall be measured by meter (preferably of the orifice-meter type) unless otherwise agreed to by the supervisor. All meters must be approved by the supervisor or his representative and installed at the expense of the lessee at such places as may be agreed to by the supervisor or his representative. For computing the volume of all gas produced, sold, or subject to royalty, the standard of pressure shall be 10 ounces above an atmospheric pressure of 14.4 pounds to the square inch, regardless of the atmospheric pressure at the point of measurement, and the standard of temperature shall be 60° F. All measurements of gas shall be adjusted by computation to these standards, regardless of the pressure and temperature at which the gas was actually measured, unless otherwise authorized in writing by the supervisor. In fields at high altitudes the absolute pressure of the

flowing gas may be taken as the gage pressure plus the actual average atmospheric pressure existing at the points of measurement, in order to reduce equitably the quantity of gas to the Government standard of 10 ounces above an atmospheric pressure of 14.4 pounds to the square inch.

(c) *Determination of natural-gasoline content.*—Tests to determine the gasoline content of gas delivered to plants manufacturing gasoline are required to check plant efficiency and to obtain an equitable basis for allocating the gasoline output of any plant to the several sources from which the gas treated is derived. The gasoline content of the gas delivered to each gasoline plant treating gas from leased lands shall be determined periodically by field tests as required by the supervisor, to be made at the place and by methods approved by him and under his supervision.

(d) *Quantity basis for computing natural-gasoline royalty.*—The primary quantity basis for computing monthly royalties on casing-head or natural gasoline is the monthly net output of the plant at which the gasoline is manufactured, "net output" being defined as the quantity of natural gasoline that the plant produces for sale.

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

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

If the net output of a plant is derived from gas obtained from several leaseholds producing gas of diverse gasoline content, the proportion of net output allocable to each leasehold as a basis for computing royalty will be determined by multiplying the amount of gas delivered to the plant from the leasehold by the gasoline content of the gas and dividing the arithmetical product thus obtained by the sum of the arithmetical products similarly obtained for all separate leaseholds.

The supervisor is authorized, whenever in his judgment the method prescribed in the last preceding paragraph is impracticable, to estimate the production of natural gasoline from any leasehold from (1) the quantity of gas produced from the leasehold and transmitted to the gasoline-extraction plant, (2) the gasoline content of such gas as determined by test, and (3) a factor based on plant efficiency and so determined as to insure full protection of the royalty interest of the lessor.

(e) *Price basis for computing royalties.*—The value of production, for the purpose of computing royalty, in the discretion of the Secre-

tary of the department having jurisdiction over the leasehold, may be calculated on the basis of the highest price per barrel, thousand cubic feet, or gallon, paid or offered (whether such price is established on the bases prescribed in these regulations or otherwise) at the time of production in a fair and open market for the major portion of like-quality oil, gas, natural or casing-head gasoline, propane, butane, and all other hydrocarbon substances produced and sold from the field where the leased lands are situated; but under no conditions shall the value of any of said substances for the purpose of computing royalty be deemed to be less than the gross proceeds accruing to the lessee from the sale thereof or less than such reasonable minimum price as shall be determined by said Secretary.

(f) *Royalty rates on oil.*—(1) Flat-rate leases: The royalty on crude oil shall be the percentage (established by the terms of the lease) of the value or amount of the crude oil produced from the leased lands.

(2) Sliding- and step-scale rates (public lands only): The sliding- and step-scale royalties for some Government leases are based on the average daily production per well. Such leases provide that only wells which yield a commercial volume of production during at least part of the month shall be considered in ascertaining the average production per well per day and that the Secretary of the Interior shall determine what are commercially productive wells. Ordinarily the average daily production per well for a lease is computed on the basis of a 28-, 29-, 30-, or 31-day month (as the case may be) and the number of wells on the leasehold counted as producing. (Tables for computing royalty on the sliding-scale basis may be obtained upon application to the supervisor or his representative.) The supervisor will determine which commercially productive wells shall be considered each month as producing wells for the purpose of computing royalty in accordance with the following rules:

Case 1. For a previously producing leasehold, count as producing for every day of the month each previously producing well that produced 15 days or more during the month, and disregard wells that produced less than 15 days during the month. Wells approved by the supervisor as input wells shall be counted as producing wells for the entire month if used 15 days or more during the month and shall be disregarded if used less than 15 days during the month.

Case 2. When the initial production of a leasehold is made during the calendar month, compute royalty on the basis of producing well-days.

Case 3. When a new well or wells are brought in on a previously producing leasehold and produce for 10 days or more during the calendar month in which they are brought in, count such new well or

wells as producing every day of the month, in arriving at the number of producing well-days. Do not count new well or wells that produce for less than 10 days during the calendar month.

Case 4. Consider "head wells" that make their best production by intermittent pumping or flowing as producing every day of the month, provided they are regularly operated in this manner.

Case 5. For previously producing leaseholds on which no wells produced for 15 days or more, compute royalty on a basis of actual producing well-days.

Case 6. For previously producing leaseholds on which no wells were producing during the calendar month but from which oil was shipped, compute royalty at the same royalty percentage as that of the last preceding calendar month in which production and shipments were normal.

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

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

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

In this example there are seven wells on the leasehold, but wells 4 and 6 are not counted in computing royalties. Wells 1, 2, 3, 5, and 7 are counted as producing for 30 days. The applicable royalty rate, based on the average production per well per day, is determined by dividing the total production of the leasehold for the month (including the oil produced by well 4), by 5, the number of wells counted as producing.

(g) *Royalty on gas.*—The royalty on gas, whether casing-head or natural gasoline has been extracted or not, shall be a percentage (established by the terms of the lease) of the value of the gas. See subdivision (e) of this section.

Royalty accrues on dry gas, whether produced as such or as residue gas after the extraction of gasoline.

For the purpose of computing royalty the value of wet gas shall be either the gross proceeds accruing to the lessee from the sale thereof or the aggregate value determined by the Secretary of the department having jurisdiction of all commodities, including residue gas, obtained therefrom, whichever is greater.

(h) *Royalty on casing-head or natural gasoline.*—A royalty as provided in the lease shall be paid on the value of one-third (or the lessee's portion if greater than one-third) of all casing-head or natural gasoline extracted from the gas produced from the leasehold. The value of the remainder is an allowance for the cost of manufacture, and no royalty thereon is required. The value shall be so determined that the minimum royalty accruing to the lessor shall be the percentage established by the lease of the amount or value of all casing-head or natural gasoline accruing to the lessee under an arrangement, by contract or otherwise, for extraction and sale that has been approved by the supervisor.

If the lessee derives revenue on gas from two or more sources from natural gasoline and dry (residual) gas, or from other hydrocarbon substances sold, a royalty will normally be collected on all the products. Therefore, if there is a market for the dry residual gas from the natural-gasoline plant, a royalty on this dry gas must be paid in conformity with subdivisions (e) and (g) of this section.

The present policy is to allow the use of a reasonable amount of dry gas for operation of the gasoline plant, the amount allowed being determined or approved by the supervisor.

(i) *Royalty on drip gasoline or other condensate, butane, propane, etc.*—The royalty on all drip gasoline or other natural condensate recovered from gas produced on the leased lands shall be the same percentage as provided in the lease for other crude oil. The royalty on butane, propane, and other substances not specifically provided for in these regulations shall be computed in accordance with a method approved by the supervisor.

SECTION 4. PENALTIES

The supervisor has authority to shut down any operation and place under seal any property or equipment in order to insure compliance with his orders and to enter upon the leased premises and perform at the expense of the lessee any required operation that the lessee fails to perform. The general penalties for failure to comply with the applicable law, regulations, and lease terms are cancellation of the lease and forfeiture under the bond.

The following specific fines are applicable only to leases for Indian lands, and in case of repeated violations of the regulations or disregard of notice from the officer in charge, the lease shall be subject to cancellation, and the lessee shall still be held liable for the payment of any

finer assessed under these regulations, in the discretion of the Secretary of the Interior; *Provided*, That the lessee shall be entitled to notice and hearing with respect to the terms of the lease or of the regulations violated. This hearing shall be held by the officer in charge, whose finding shall be conclusive unless an appeal is taken to the Secretary of the Interior within 30 days after notice of the decision. The finding of the Secretary of the Interior upon appeal shall be conclusive.

Fines that may be imposed for violations of certain provisions of these regulations applicable to oil and gas operations on restricted Indian lands

A. For failure to file preliminary notice of intention to drill, \$10 for the first violation and \$20 for each violation thereafter (section 2 (d)).

B. For failure to file notice and to obtain approval before re-drilling, deepening, plugging, or abandoning any well, \$100 for the first violation and \$200 for each subsequent violation (section 2 (d)).

C. For failure to mark derricks or wells, \$20 for each well or derrick and, after written notification, \$10 for each week for each well or derrick (section 2 (e)).

D. For failure to file completion reports, \$50 for the first violation and \$100 for each subsequent violation (section 2 (f)).

E. For failure to install required high-pressure fittings and equipment, cement conductor string, and anchor properly all strings of casing, \$100 for each well; and after 10 days' written notice an additional fine of \$200 may be assessed, and thereafter an additional sum of \$200 for each 20 days until the condition is remedied (section 2 (g)).

F. For failure to construct and maintain in proper condition slush or mud pits, \$10 for each day after drilling is so commenced on any well (sections 2 (h) and (i)).

G. For allowing pollution of streams or subsurface water or damage to the surface by B. S. and salt water, \$50 per day after 10 days' notice by an authorized representative of the Department (section 2 (o)).

Payment of any of the fines set forth above shall not relieve the operator from compliance with the provisions of the operating regulations. A waiver of any particular cause for fines shall not be construed as precluding the imposition of a fine for any other cause or for the same cause occurring at any other time.

Fines shall be imposed by the supervisor and shall be paid to the superintendent through the supervisor for credit to the lessor.

SECTION 5. REPORTS TO BE MADE BY ALL LESSEES (INCLUDING PERMITTEES) OR THEIR AUTHORIZED AGENTS

Certain information is essential to the proper handling of properties and for proper protection of the public interest. Sample

forms showing the type of information required are described in this section, and blank copies of these forms can be obtained from the supervisor or his representatives. These forms, unless others are specified by the supervisor, must be filled out completely and filed punctually with the supervisor or his local representative. Failure of the lessee to submit the information and reports required herein constitutes noncompliance with the terms of these regulations and is cause for cancellation of the lease.

Sundry Notices and Reports on Wells (Form 9-331A)

Form 9-331A covers all notices and all reports pertaining to individual wells except those for which special blanks are provided. This form may be used for any of the purposes listed thereon, or a special heading may be inserted in the blank to adapt it for use for similar purposes. Any written notice of intention to do work or to change plans previously approved must be filed in triplicate unless otherwise directed and must reach the supervisor or his representative and receive his approval before the work is begun. The lessee is responsible for receipt of the notice by the supervisor or his representative in ample time for proper consideration and action. If in case of emergency any notice is given orally or by wire, and approval is obtained, the transaction shall be confirmed in writing as a matter of record. The examples following illustrate some of the uses to which form 9-331A may be put and indicate the requirements with respect to each use.

Notice of Intention to Drill (Form 9-331A)

The notice of intention to drill a well must be filed in triplicate with the supervisor or his local representative and approval received before the work is begun. This notice must give the location, in feet and direction from the nearest lines of established public survey; the altitude of the derrick floor above sea level and how obtained; the geologic name of the surface formation; and estimate of the depth at which and the stratum or formation in which oil or gas is expected to occur; the approximate depths at which specified strings of casing will be set and cemented and the weight and sizes of casing proposed to be cemented at these depths; and a statement of any proposed cementing, mudding, or other special work.

Notice of Intention to Change Plans (Form 9-331A)

Where unexpected conditions necessitate any change in the plans of proposed work already approved in connection with either the drilling or the repair of wells, complete details of the changes must be submitted in triplicate to the supervisor or his representative on this form and approval obtained before the work is undertaken.

Notice of Date for Casing and Water Shut-Off Test (Form 9-331A)

The exclusion of water from oil- or gas-bearing formations is an important item of conservation, and the supervisor or his local representative will witness all casing and water shut-off tests. Notice on form 9-331A must be filed in triplicate with the supervisor or his local representative in advance of the date on which the lessee expects to make such test. Later by agreement the exact time shall be fixed. The casing test and the test of water shut-off must be approved by the supervisor or his representative before further drilling can proceed. In the event of failure, casing must be repaired or replaced or re-cemented, whichever the conditions may require.

Notice of Intention to Redrill, Repair, or Condition Well (Form 9-331A)

Before repairing, deepening, or conditioning a well, a detailed written statement of the plan of work must be filed in triplicate with the supervisor or his local representative and approval obtained before the work is started. In work that affects only rods, pumps, or tubing, or other routine work, such as cleaning out to previous total depth, no report is necessary unless specifically required by the supervisor or his representative.

Notice of Intention to Use Explosive or Chemicals (Form 9-331A)

Before using explosive or chemicals (shooting or acidizing), in any well, whether for increasing production or in drilling, repair, or abandonment, notice of intention shall be filed in triplicate with the supervisor or his local representative and approval obtained before the work is done. When such notice of intention forms a part of a notice of intention to redrill, repair, or abandon a well, the supervisor or his representative may accept such notice in lieu of a separate notice of intention to use explosive or chemicals.

The notice of intention to use explosive or chemicals (Form 9-331A) must be accompanied by the complete log of the well to date, provided the complete log has not previously been filed, and must state the object of the work to be done, the amount and nature of the material to be used, its exact location and distribution in the well (by depths), the method of localizing its effects, and the name of the company that is to do the work. The notice shall also contain an accurate statement of the dates and daily production of oil, gas, and water from the well for each of the last preceding 10 producing days.

Subsequent Record of Use of Explosive or Chemicals (Form 9-331A)

After using explosive or chemicals in any well a subsequent record must be filed in triplicate with the supervisor or his local representa-

tive. This record shall be filed separately on Form 9-331A within 15 days after the work is done, except where such record is included in the log (Form 9-330) or is a part of a record of other subsequent work done (Form 9-331A) or is a part of an abandonment record filed within that period.

The subsequent record of use of explosive or chemicals shall include a statement of the amount and the nature of the material used, its exact location and distribution in the well (by depths), and the method used to localize its effects. The record shall also contain an accurate statement of the dates and daily production of oil, gas, and water for each of the last 10 producing days preceding the use of explosive or chemicals and a similar statement of production after the work is done. In addition, this report must include other pertinent information, such as the depth to which the well was cleaned out, the time spent in bailing and cleaning out, and any injuries to the casing or well.

Record of Perforating Casing (Form 9-331A)

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

Notice of Intention to Pull or Otherwise Alter Casing (Form 9-331A)

If it is desired to pull a portion or all of a string of casing, or to rip, perforate, or otherwise alter casing that has excluded water from a well, a notice (Form 9-331A) of such work must be given in triplicate and the approval of the supervisor or his local representative obtained before the work is started.

Notice of Intention to Abandon Well (Form 9-331A)

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

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

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

Subsequent Report of Abandonment (Form 9-331A)

After a well is abandoned or plugged a subsequent record of work done must be filed in triplicate with the supervisor or his local representative. This record shall be filed separately (on Form 9-331A) within 15 days after the work is done.

The subsequent report of abandonment shall give a detailed account of the manner in which the abandonment or plugging work was carried out, including the nature and quantities of materials used in plugging and the location and extent (by depths) of the plugs of different materials; records of any tests or measurements made and of the amount, size, and location (by depths) of casing left in the well; and a detailed statement of the volume of mud fluid used, the pressure attained in mudding, and the names and positions of employees who carried on the work. If an attempt was made to part any casing, a complete report of the methods used and results obtained must be included.

Supplementary Well History (Form 9-331A)

A report of all work done on any well since the filing of the log form (Form 9-330) or the last report covering work on the well must be filed in triplicate with the supervisor or his local representative on Form 9-331A within 15 days after completion of the particular work, or before, if called for by the supervisor or his representative.

Log and History of Well (Form 9-330)

The lessee shall furnish in duplicate, on Form 9-330, to the supervisor or his representative, not later than 15 days after the completion of each well, a complete and accurate log and history, in chronologic order, of all operations conducted on the well. If a log is compiled for geologic information from cores or formation samples, duplicate copies of such log shall be filed in addition to the regular log.

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

Lessee's Monthly Report of Operations (Form 9-329)

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

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

(1) The lease be identified by inserting the name of the United States land office and the serial number, or in the case of Indian lands the lease number and lessor's name, in the space provided in the upper right corner;

(2) Each well be listed separately by number, its location be given by 40-acre subdivision ($\frac{1}{4}$ $\frac{1}{4}$ Sec. or lot), section number, township, and range;

(3) The number of days each well produced, whether oil or gas, and the number of days each input well was in operation be stated;

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

(5) The "Remarks" column show the name, character, and depth of each formation in wells being drilled (active or suspended), the date such depth was reached, the date and reason for every shut-down, the names and depths of important formation changes and contents of formations, the amount and size of any casing run since last report, the dates and results of any tests such as production, water shut-off, or gasoline content, and any other noteworthy information on operations not specifically provided for in the form.

It is intended that this form shall be a report of all operations conducted on each well during the month and that it shall show status of operations in progress on the last day of the month.

The information required in the footnote must be given in barrels of oil, thousands of cubic feet of gas, and gallons of gasoline. If no runs or sales were made during the calendar month, the report must so state.

When oil and gas, or oil, gas, and gasoline are concurrently produced from the same lease, separate reports on this form should be submitted for oil and for gas and gasoline, unless otherwise authorized or directed by the supervisor.

The lessee must report accurately the status of all wells on the leased lands.

Daily Report of Gas-Producing Wells (Form 9-352)

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

Lessee's Statement of Oil and Gas Runs and Royalties (Form 9-361)

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

Royalty and Rental Remittance Form (Form 9-614)

This form shall be submitted to the supervisor in duplicate and shall accompany each remittance covering payments of royalty or rental and shall show the specific items being paid.

Special Forms

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

SECTION 6. APPEALS

The lessee, after complying with any order intended to carry out the terms and spirit of these regulations, shall have the right to appeal therefrom to the Secretary of the department having jurisdiction over the lands of the leasehold. Such appeal must be filed by the lessee with the official from whose order appeal is made, within 30 days after the order has been served.

These regulations shall supersede all prior operating regulations applicable to oil and gas lands of the United States or to restricted Indian lands. They shall be administered under the Director of the

United States Geological Survey, except that as to lands within naval petroleum reserves they shall be administered under such official as the Secretary of the Navy shall designate.

Recommended for approval.

W. C. MENDENHALL,
Director of Geological Survey.

To become effective the 1st day of November 1936.

Approved: October 30, 1936.

HAROLD L. ICKES,
Secretary of the Interior.

Approved: November 7, 1936.

CLAUDE A. SWANSON,
Secretary of the Navy.

ALASKA, MINING CLAIMS WITHIN GLACIER BAY NATIONAL MONUMENT

(Circular No. 1415)

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
December 28, 1936.

REGISTER, ANCHORAGE, ALASKA:

The act of June 22, 1936 (49 Stat. 1817), an act to extend the mining laws of the United States to the Glacier Bay National Monument in Alaska, provides as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in the area within the Glacier Bay National Monument in Alaska, or as it may hereafter be extended, all mineral deposits of the classes and kinds now subject to location, entry, and patent under the mining laws of the United States shall be, exclusive of the land containing them, subject to disposal under such laws, with right of occupation and use of so much of the surface of the land as may be required for all purposes reasonably incident to the mining or removal of the minerals and under such general regulations as may be prescribed by the Secretary of the Interior.

Under this act, the lands in the Glacier Bay National Monument, reserved by proclamation of February 26, 1925 (43 Stat. 1988), or as it may be extended hereafter, are open to prospecting for the kinds of mineral now subject to location under the United States mining laws, and, upon discovery of any such mineral, locations may be made in accordance with the provisions of the mining laws and regulations thereunder. Such locations, duly made, will carry all the rights and incidents of mining locations, except that they will give to the locator no title to the land within their boundaries or claim thereto except the

right to occupy and use so much of the surface of the land as required for all purposes reasonably necessary to mine and remove the minerals, such occupation and use to be under general regulations prescribed by the Secretary of the Interior.

The owner of a mining location may cut such timber within the boundaries of his claim as is necessary for mining purposes. Prospectors may cut timber for their necessary mining and domestic uses only with the permission of the custodian of the monument or his representative who will designate the timber to be cut. All slash, brush, or debris resulting from the cutting of timber upon mining claims or by prospectors shall be disposed of by the claimant or prospector in such manner and at such time as may be designated by the National Park Service officer in charge so as to prevent the creation of fire hazards, or conditions conducive to the development of infestation by timber-destroying insects.

Prospectors or miners shall not open or construct roads or vehicle trails without first obtaining a permit from the Director of the National Park Service. Applications for such permits may be made through the officer in charge of the monument upon submitting a map or sketch showing the location of the mining property to be served and the location of the proposed road or vehicle trail. The permit may be conditioned upon the permittee maintaining the road or trail in a passable condition so long as it is used by the permittee or his successors.

Occupation and use of the surface of an unpatented mining claim is restricted by the general law to such as is reasonably incident to the exploration, development, and extraction of the minerals in the claim. Accordingly, any locator or patentee of a mining claim located under this act will be entitled to such right. Upon written permission of the Director of the National Park Service or his representative, the surface of such claim may be used for other specified purposes, the use to be on such conditions and for such period as may be prescribed when permission is granted.

Prospectors and miners shall at all times conform to any rules now prescribed or which may be made applicable by the Director of the National Park Service to the national monument.

Attention is called to the park regulations for the protection of wildlife which provides:

The national monument is a sanctuary for wildlife of every sort, and all hunting, or the killing, wounding, frightening, capturing or attempting to capture at any time of any wild bird or animal, except dangerous animals when it is necessary to prevent them from destroying human lives or inflicting personal injury, is prohibited.

Firearms, traps, seines, and nets are prohibited within the boundaries of the monument, except upon written permission of the custodian or his representative.

The right of occupation and use of the surface of the land embraced in the boundaries of a location, entry or patent pursuant to this act will terminate when the minerals are mined out or the claim is abandoned. Any owner of an unpatented location who fails to perform annual assessment work on his claim for any assessment period will be assumed to have abandoned his claim, and his right of occupation and use of the surface of the claim considered at an end.

Applications for patents and final certificates issued thereon for mining claims in this monument should be noted "Glacier Bay National Monument Lands," and all patents issued for claims under the act will convey title to the minerals only, and contain appropriate reference to the act and these regulations.

FRED W. JOHNSON,
Commissioner.

I concur:

ARNO B. CAMMERER,
Director, National Park Service.

Approved:

T. A. WALTERS,
First Assistant Secretary.

GRAZING FEES: CEDED INDIAN LANDS

[Circular No. 1417]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
January 19, 1937.

REGISTERS, UNITED STATES LAND OFFICES:

Section 11 of the Grazing Act of June 28, 1934 (48 Stat. 1269), provides for the use for range improvements (when appropriated by Congress) of 25 percent of receipts from Indian lands, payment of 25 percent to the State in which the lands are located, and the deposit of 50 percent to the credit of the Indians.

The prescribed receipt account title for receipts under this section is "6284 Receipts from Indian Ceded Lands under Grazing Act of June 28, 1934 (6017)," the first number being the old symbol and the number in parenthesis the new.

In addition to this title it will be necessary to have the Indian tribe (name and State) shown.

The record fails to show that any register has applied, deposited, or scheduled for transfer any moneys under the above quoted title although it is quite evident that some of the receipts under the grazing act include payment for the use of Indian lands.

Immediately on receipt hereof each register will prepare and transmit a statement as to whether any moneys already applied (or scheduled for transfer) under the title "6280 Receipts from Public Lands under Grazing Act of June 28, 1934 (6016)," represent payments for grazing Indian lands and if so, what tribe or tribes, with the amounts (month by month to December 31) to be credited to the Indian title.

Understanding that licenses to graze on Indian lands will not generally be limited to such lands but will include public lands also, it will be necessary to determine the percentage of the area that is Indian and to report that percentage of the receipts under the Indian title.

Beginning with January 1937, abstracts of moneys applied (when Indian lands are involved) will show the percentage that is Indian (district by district) and the schedule of transfers (summary on Form 1046) will show the Indian and public lands amounts separately.

FRED W. JOHNSON,
Commissioner.

I concur: January 19, 1937.

WILLIAM ZIMMERMAN, JR.,
Assistant Commissioner of Indian Affairs.

USE OF TIMBER ON LANDS EMBRACED IN GRAZING LEASES

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
February 12, 1937.

FROM THE COMMISSIONER OF THE GENERAL LAND OFFICE TO THE
DIRECTOR OF THE DIVISION OF INVESTIGATIONS:

Receipt is acknowledged of your memorandum of January 22, with enclosed copy of a letter from Special Agent in Charge Lausen at Billings, Montana, in regard to the issuance of timber permits on lands embraced in grazing leases issued under section 15 of the Taylor Grazing Act. The Special Agent in Charge requests to be advised on the following points:

1. Is the lessee permitted to cut timber from lands embraced in his lease without making application to the Special Agent in Charge for a permit?

2. Are lands embraced in a lease issued under section 15 of the said act subject to the issuance of timber permits to persons other than the lessee?

While the regulations issued 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), are silent as to the use of timber on lands embraced in grazing leases, the lease forms, which have been approved by the Department and are considered as part of the regulations and are used in leases issued by the Department under said section 15, provide as follows (page 2) :

The lessor expressly reserves :

(a) The right to permit prospecting, locating, developing, mining, entering, leasing, or patenting the mineral resources, and to dispose of such resources under any laws applicable thereto; the right to permit the use and disposition of timber on the lands embraced in this lease, under existing laws and regulations; and nothing herein contained shall restrict the acquisition, granting, or use of permits of rights of way under existing law.

(Page 3) :

It is further understood and agreed :

* * * * *

(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.

Before taking timber under section (b) of the lease, the lessee should file application for and procure a permit in accordance with the regulations issued under the acts of June 3, 1878 (20 Stat. 88), and March 3, 1891 (26 Stat. 1093), contained in Circular 1285.

Where application is made by a person other than the lessee to take timber from lands embraced in a grazing lease issued under section 15 of the said act, investigation should be made to ascertain the facts in the case and whether or not the cutting of the timber applied for would adversely affect the lands for grazing purposes. If no objection appears, the permit may issue but should contain a provision that the timber cutting thereunder must be done in such manner as will not interfere with the rights of the lessee.

All applications for timber should be filed with the Special Agent in Charge of the lands from which the timber is to be cut and should comply with the regulations contained in Circular 1285. The Special Agent in Charge may issue permits not exceeding \$200.00 in stumpage value as provided in the said regulations, but timber in excess of \$200.00 in stumpage value may only be granted upon direct approval by the Secretary of the Interior.

Approved :

T. A. WALTERS,

First Assistant Secretary.

**GRAZING LEASES—LANDS WITHDRAWN OR CLASSIFIED FOR
POWER SITES**

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

March 11, 1937.

REGISTERS, UNITED STATES LAND OFFICES:

Your attention is directed to that part of paragraph 4 of Circular No. 1412 which reads as follows:

* * * or when it is found that the application for lease embraces withdrawn or reserved lands, the lease application will be suspended as to such tract or tracts until such a time as a determination can be made by this office regarding the respective rights of the parties interested.

This Department is in receipt of a determination of the Federal Power Commission dated February 16, 1937, wherein consent is given to the issuance of grazing leases under section 15 of the Taylor Grazing Act, as amended, for lands withdrawn, classified or reserved for power purposes under the act approved June 10, 1920 (41 Stat. 1063), subject to certain specified conditions.

The records in connection with applications for grazing leases which heretofore have been suspended in whole or in part because of withdrawn lands under the act of June 10, 1920, are being returned and you will consider all lease applications for lands so withdrawn and proceed to make a determination between the conflicting applications and award such lands in leases or supplemental leases as outlined in Circular No. 1412 and office letter of February 27, 1937.

When a determination is made as to the award of such lands you will prepare lease forms or supplemental lease forms in quadruplicate, inserting after paragraph (i) page 4 thereof, "(k) See back of page 3," and on the reverse side of page 3 you will type the following stipulation:

That the issuance of this grazing lease shall in no wise diminish or affect the jurisdiction of the Federal Power Commission at any time to issue permits or licenses pursuant to the provisions of the Federal Power Act; and that the issuance by the Federal Power Commission of a license shall immediately and automatically terminate this grazing lease as to all lands within the project area described in such license.

When new leases or supplemental leases are executed by you embracing lands withdrawn, classified or reserved for power-site purposes, you will immediately forward to this office by special letter the records in connection with such leases together with copies of all correspondence relative to the issuance of the leases. Your letter of transmittal should set forth a description of the lands included in the lease and withdrawn for power-site purposes, in order that the Federal Power Commission may be properly advised.

These instructions will apply only to lands withdrawn, reserved, or classified for power-site purposes under the act approved June 10, 1920. For your information a copy of the determination of the Federal Power Commission is enclosed.

FRED W. JOHNSON,
Commissioner.

Approved:

T. A. WALTERS,
First Assistant Secretary.

**OIL AND GAS APPLICATIONS FOR LANDS IN PATENTED PRIVATE
LAND CLAIMS**

[Circular No. 1420]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
March 19, 1937.

REGISTERS, LOS ANGELES AND SACRAMENTO, CALIFORNIA:

Where an application for an oil and gas lease is presented at your office containing a description by fictitious subdivisions not shown on the official township plat, and the land is segregated as in a confirmed private land claim, and has been patented as such by the United States, you will stamp the following notation in the upper right-hand corner of the application:

U. S. Land Office ----- California.

Application refused and returned because land has been patented by United States as a confirmed private land claim, and because of fictitious description of the land.

----- Register.

No serial number will be assigned and no receipt will be issued. The application and money tendered therewith will be returned to the applicant, if present, or to the post-office address given in his application. You will enclose a copy of these instructions with the application.

FRED W. JOHNSON,
Commissioner.

Approved:

T. A. WALTERS,
First Assistant Secretary.

ASSIGNMENTS OF OIL AND GAS PERMITS AND LEASES

[Circular No. 1423]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

March 26, 1937.

REGISTERS, UNITED STATES LAND OFFICES:

There will be required in the future a separate assignment of each oil and gas permit and lease when transfers of interests involve record titles, whether the interests are of the entire permit or lease, title to specific tracts, or undivided title interests.

When transfers to the same person, association, or corporation, involving more than one oil and gas lease or permit, are filed for Departmental approval, one request for the approval thereof and one showing as to the qualifications of the assignee will be sufficient.

FRED W. JOHNSON,
Commissioner.

Approved:

CHARLES WEST,
Acting Secretary.

MINERAL PERMITS AND LEASES—AMENDMENT OF REGULATIONS GOVERNING INDIVIDUAL SURETY BONDS

[Circular No. 1293, revised]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

April 1, 1937.

REGISTERS, UNITED STATES LAND OFFICES:

Hereafter where bonds are furnished, with individuals as sureties, in connection with permits and leases under the general leasing act, such individuals must be residents of the State and the United States Judicial District in which the lands involved are located.

Evidence of such residence must be furnished by affidavits of the sureties.

Attention is directed to the forms of affidavit of justification required to be furnished by individual sureties and certificate of competency, which forms should be followed strictly.

Existing circulars relating to such bonds are hereby modified only to the extent above stated.

FRED W. JOHNSON,
Commissioner.

Approved:

T. A. WALTERS,
First Assistant Secretary.

SUGGESTED FORM OF AFFIDAVIT OF JUSTIFICATION TO BE FURNISHED BY INDIVIDUAL SURETIES

State of _____
County of _____, ss.

I, _____, of _____, do hereby swear
(Name of surety) (City or town) (State)
that I am the same person who appears as individual surety on the bond
furnished in connection with application _____, filed
(Land office) (Serial number)
by _____, that I am worth in real property not exempt
(Name of applicant)
from execution double the sum specified in the undertaking, over and above
my just debts and liabilities; that the real property is situated in
_____, _____, and is valued at \$_____; that said real
(City or town) (State) (Amount)
property is unencumbered by mortgage, lien, or otherwise, except in the sum
of \$_____; that I am not a surety on other bonds to the United States,
(Amount)
except in the sum of \$_____, filed in the cases of _____,
(Amount) (Land office)
_____,
(Serial number) (Names of principals)
_____ L. S.

Subscribed and sworn to before me this _____ day of _____,
nineteen hundred and _____, at _____
[SEAL]

SUGGESTED FORM OF CERTIFICATE TO BE FURNISHED BY A JUDGE OR CLERK OF A COURT OF RECORD, A UNITED STATES DISTRICT ATTORNEY, A UNITED STATES COMMISSIONER, OR A UNITED STATES POSTMASTER

State of _____
County of _____, ss.

I, _____, do hereby certify that
(Name) (Title)
_____ and _____, who appear as sure-
ties on the bond of _____, are known to me personally, and
(Name of applicant)
that each is a resident of the State and the United States Judicial District in
which the lands applied for are located, and that each is worth, in real prop-
erty not exempt from execution, double the sum specified in the undertaking,
over and above his just debts and liabilities, and that the signatures appearing
on the bond and affidavits of justification are in fact the signatures of said
parties.

_____, 19____.
(Date) (Signature)
_____,
(City or town) (State)
Form approved:

First Assistant Secretary.

**GRAZING DISTRICTS—ACCOUNTS, COLLECTIONS BY REGISTERS
UNDER TAYLOR GRAZING ACT**

[Circular No. 1424, amending Circulars Nos. 1382 and 1392]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

April 14, 1937.

REGISTERS, UNITED STATES LAND OFFICES:

Circular No. 1382 approved March 28, 1936, as amended by Circular No. 1392 approved June 11, 1936, relative to the manner of collecting grazing fees is hereby amended to read as follows:

Where the license is for three months or less, the fees must be paid in full in advance for the period of the license. A fraction of a month will be charged for on a 30-day month basis, one-thirtieth of the monthly rate being charged for each day. Where the license is for more than three months, the licensee may elect to make payment in full or in two equal installments, each payable in advance, provided, however, when the total fee is \$10 or less, payment must be made in full in advance.

FRED W. JOHNSON,
Commissioner.

I concur:

JULIAN TERRETT,
Acting Director, Division of Grazing.

Approved:

T. A. WALTERS,
First Assistant Secretary.

PUBLIC SALES UNDER THE TAYLOR GRAZING ACT

[Circular No. 1425, supplements Circulars Nos. 684, 1401, 1412]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

April 16, 1937.

REGISTERS, UNITED STATES LAND OFFICES:

Circular 684, approved November 23, 1934, relates to the sale of isolated or disconnected tracts of unreserved public lands as authorized by section 14 of the Taylor Grazing Act.

It directs the procedure the Register should follow in the handling of such applications "if the status of the lands is such that a sale might properly be ordered."

Section 15 of the circular states:

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.* [Italics supplied.]

The Department under date of April 1, 1937, responding to a request made by this office for instructions as to whether lands covered by a lease, granted under section 15 of the Taylor Grazing Act, should be considered as appropriated to the extent that it helps to isolate, for the period covered by the lease, an adjoining tract of vacant public land stated as follows:

It is not advisable to consider temporary or one-year leases as an appropriation which will have the effect of isolating or helping to isolate adjoining public land.

As I view the matter the question you have asked is administrative. Lands which are leased under said section 15 for three years or more, the leases being subject to renewal, are held to be so appropriated that they help to isolate adjoining public land to make it subject to sale under section 14 of the Taylor Grazing Act.

It seems to me that lease applicants should not ordinarily omit from their applications small tracts which will become isolated or disconnected on the granting of leases pursuant to the applications. Whenever possible lease applicants should be advised so to make their applications as not to leave isolated or disconnected tracts which will only be fit for disposal under said section 14.

In view of the above in determining, in connection with an application for public sale, whether or not the status of the land is such that a sale might properly be ordered, you will bear in mind these instructions of the Department and take appropriate action on the applications.

FRED W. JOHNSON,
Commissioner.

**REGULATIONS GOVERNING THE LEASING OF PUBLIC LANDS,
EXCLUSIVE OF ALASKA, FOR THE GRAZING OF LIVESTOCK**

[Circular No. 1401 Revised]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

April 30, 1937.

REGISTERS, UNITED STATES LAND OFFICES:

DIRECTOR, DIVISION OF INVESTIGATIONS:

Section 15 of the act of June 28, 1934 (48 Stat. 1269), as amended by section 5 of the act of 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.

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.

The Registers of the district land offices will continue to adjudicate all applications for grazing leases received in their offices prior to the date of approval of these regulations in accordance with the instructions contained in Circular No. 1412.

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 April 30, 1937, 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 triplicate, except where it embraces lands within the jurisdiction of more than one district land office, in which event it must be furnished in quadruplicate 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 an isolated or disconnected 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 complete 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. Such statement shall not prejudice the application, and the applicant may amend it to conform to any objection or requirement made by the Secretary of the Interior as to the kind or number of stock, seasons of use, or grazing plans.

(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 anyone 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 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 will not segregate the land applied for from application by other applicants for grazing lease. Conflicting or junior grazing-lease applications will be received, noted, and disposed of in the same manner as senior or prior grazing-lease applications.

(8) 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.

(9) 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.

(10) 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.

(11) Any person receiving a temporary one-year lease based on an application filed prior to the date of approval of these regulations, who desires to continue to lease the lands involved, will not be required to file a new application for lease on Form 4-721 but will be required to file a petition in triplicate for the renewal of his lease on a form to be furnished. No filing fee will be required in connection with petitions for such renewals.

(12) Action on petitions for renewals will be governed by the instructions contained in the following section II hereof except that new serial numbers will not be assigned to the same.

II. ACTION ON APPLICATIONS AND PETITIONS FOR RENEWALS

(13) 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, and the duplicate to the Special Agent in Charge of the Division of Investigations for the division in which the lands are situated. The original and duplicate applications

should be accompanied with a status report by the Register of all the lands applied for.

(14) The triplicate copy will be retained by the Register for his files. In case the application embraces land in two land districts, the quadruplicate copy will be forwarded to the appropriate land office for notation and for a serial number.

(15) The Register of the land office receiving the quadruplicate copy will furnish a report to this office and the Special Agent in Charge 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.

(16) All instructions heretofore issued regarding publication of notices offering lands for lease are hereby rescinded. A general order by this Department relative to the offering of all public lands, including those now embraced in temporary one-year leases, will be issued in due course.

(17) Upon receipt of the duplicate copy of an application or petition for renewal 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 and extent thereof are involved.

(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, due regard being given to the number and kind of livestock to be grazed. It should also recommend the rental value to be charged, the term of the lease to be granted, and any other recommendations which may be helpful in the adjudication of the application.

III. ISSUANCE OF OR RENEWAL OF LEASES

(19) If, after receipt of an application or petition for renewal and upon consideration of the facts presented, it is decided by this office that the applicant is entitled to a lease for all or any 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 and conflicting applications will be disposed of, subject to the right of appeal to the Secretary of the Interior.

(20) 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 lands is necessary, except that such conflicting applicants will be afforded an opportunity to agree to the division of such lands. If an acceptable adjustment cannot be made by the parties in interest, the award of a lease, or leases, will be determined by the Commissioner of the General Land Office, on the basis of all the facts presented, subject to the approval of the lease, or leases, by the Secretary of the Interior.

IV. LEASED LANDS SUBJECT TO CLASSIFICATION

(21) Lands embraced in a grazing lease shall be subject to classification and disposal under the provisions of section 7 of the act of June 28, 1934 (48 Stat. 1269), as amended by the act of June 26, 1936 (49 Stat. 1976), provided that before the allowance of any entry, selection, or location under said section 7 evidence must be furnished that the applicant has agreed to compensate the lessee for any grazing improvements placed on the lands entered, selected, or located, under the authority of the lease and for any injury caused to the lessee's grazing operations by reason of the loss of the leased lands from his leasehold. If the interested parties are unable to reach an agreement as to the amount of such compensation the amount shall be fixed by the Commissioner of the General Land Office subject to the right of appeal to the Secretary of the Interior, whose decision shall be final. All such agreements, to be effective, must be approved by the Commissioner of the General Land Office. The failure of the applicant to pay the lessee in accordance with the agreement shall be just cause for cancellation of the entry, selection, or location. All subsequent annual rental charges will be proportionately reduced for the loss of the lands from the leasehold.

V. RENTAL

(22) Each lessee shall pay to the proper district land office, such annual rental as may be determined to be a fair compensation to be charged for the grazing of livestock on the leased land.

VI. DURATION OF LEASES

(23) When the necessary basic information has been secured by the Division of Investigations, leases may be issued in the discretion of the Secretary of the Interior for periods of not more than ten years. However, when the facts and circumstances are such as to warrant limiting the leases to five years or less, the leases will be so limited. In the absence of necessary basic data the leases will be limited to one year. When a lease expires it may be renewed, in the

discretion of the Secretary of the Interior, upon such terms and conditions as he may prescribe.

VII. USE OF LANDS

(24) After the issuance of a lease, the lessee may fence the lands 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 cancellation of a lease for any reason or upon termination of a lease except when a renewal is requested, the Secretary of the Interior may, in his discretion and upon a written petition filed by the lessee within 30 days from date of the cancellation, require a subsequent lessee, prior to the execution of a new lease, to reimburse the former lessee a reasonable amount for any grazing improvements of a permanent nature that may have been placed upon the leased lands during the period of the lease. When an agreement cannot be reached between the interested parties as to the amount to be paid, the decision of the Secretary of the Interior shall be final and conclusive. As to any improvements not disposed of in the manner set forth above, the lessee will be allowed 3 months from the date of cancellation of the lease within which to remove such improvements, but, if not removed or other disposition made within the said period, such improvements shall become the property of the United States.

(a) The lessee will be required to comply with the provisions of the laws of the State in which the leased lands are located with respect to the cost and maintenance of partition fences.

VIII. CAUSES FOR CANCELATION

(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.

(f) If the lessee assigns or subleases all or any part of the leased area without obtaining the approval of the Secretary of the Interior.

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. No decision will, however, be rendered until the lessee has been formally advised of the cause for cancellation and afforded a timely opportunity to make a showing as to why the lease should not be canceled.

IX. 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.

X. ASSIGNMENT

(27) Proposed assignments of a lease, in whole or in part, must be submitted to the Secretary of the Interior, on a form to be provided, 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 regulations supersede all instructions previously issued under said section 15 of the act approved June 28, 1934, as amended June 26, 1936.

(30) Forms of application and lease are attached and made a part hereof.

FRED W. JOHNSON,
Commissioner.

I concur:

B. B. SMITH,
Director, Division of Investigations.

Approved:

T. A. WALTERS,
First Assistant Secretary.

FORMS

UNITED STATES DEPARTMENT OF THE INTERIOR

[Form 4-721, approved April 30, 1937]

APPLICATION FOR GRAZING LEASE¹

United States Land Office _____, Serial No. _____

Receipt No. _____

Dated _____, 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 quadruplicate. 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 purpose? _____ 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 _____

¹To be filed in triplicate if the lands applied for are all in one land district; in quadruplicate if in more than one land district.

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? -----

(11) How many head of livestock do you own? ----- Cattle ----- ;
Horses ----- ; Sheep ----- ; Goats -----

(Signature of applicant)

Subscribed and sworn to before me this the ----- day of -----,
19---

(Official designation of Officer.)

UNITED STATES DEPARTMENT OF THE INTERIOR

[Form 4-722, approved April 30, 1937]

LEASE OF LANDS FOR GRAZING LIVESTOCK¹

[Sec. 15 of the act of June 28, 1934 (48 Stat. 1269), as amended by the act of June 26, 1936 (49 Stat. 1976)]

Serial -----

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

(Name of applicant)

of -----, party of the second part, hereinafter called the lessee,

(Post office address)

under, pursuant, and subject to the terms and provisions of the act of Congress approved June 28, 1934 (48 Stat. 1269), as amended by the act of June 26, 1936

¹To be executed by applicant in quadruplicate.

(49 Stat. 1976), entitled "An Act to stop injury to the public grazing lands by preventing over-grazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes," hereinafter referred to as the act, which is made a part hereof.

WITNESSETH:

That the lessor, in consideration of the rents to be paid and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee an exclusive right and privilege of using for grazing purposes the following-described tract of land:

 containing approximately ----- acres, together with the right to construct and maintain thereon all buildings or other improvements necessary to the full enjoyment thereof, for a period of ----- years, and if at the end of said period the Secretary of the Interior shall determine that a new lease should be granted, the lessee herein will be accorded a preference right thereto upon such terms and for such duration as may be fixed by the lessor.

In consideration of the foregoing, the lessee hereby agrees:

(a) To pay the lessor as annual rental the sum of \$----- for the first year of the lease and a like sum per year for the second and third years of the lease. The rental may be adjusted at the end of the third year of the lease and at three-year intervals thereafter. If at the date of any adjustment of the rental, the lease will expire within less than three years, such adjustment shall be effective for the unexpired term of the lease. Annual rental shall reasonably conform to but in no case be in excess of the rental charged by the State or individuals for grazing privileges on lands of similar character in the immediate vicinity of the leasehold. When the annual rental amounts to \$10.00 or more, the lessee may elect to make payment in two equal installments. One-half of the first year's rental to be paid prior to the execution of the lease and the remaining one-half to be paid within six months after the date of execution. For the second and each succeeding year of the lease one-half of the rental to be paid on the anniversary of the lease and the unpaid balance to be paid within six months from said anniversary. When the annual rental is less than \$10.00 it must be paid in full prior to the execution of the lease and annually thereafter on the anniversary of the lease.

(b) To observe the laws and regulations for the protection of game animals, game birds, and nongame birds, and not unnecessarily disturb such animals or birds.

(c) That neither he nor his employees will set fires that will result in damage to the range or to wild life, and to extinguish all camp fires started by him or any of his employees before leaving the vicinity thereof.

(d) To comply with the provisions of the laws of the State in which the leased lands are situated with respect to the cost and maintenance of partition fences.

The lessor expressly reserves:

(a) The right to permit prospecting, locating, developing, mining, entering, leasing, or patenting the mineral resources, and to dispose of such resources under any laws applicable thereto; the right to permit the use and disposition of timber on the lands embraced in this lease, under existing 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, town sites, mining claims, and for feeding grounds near villages for the use of draft animals or near the slaughtering or shipping points for use of stock to be marketed. However, a proportionate reduction will be made in the annual rental charges.

(d) The right to classify and permit entry, selection or location under the provisions of section 7 of the act of June 28, 1934 (48 Stat. 1269), as amended by the act of June 26, 1936 (49 Stat. 1976), of any part or all of the leased lands, provided that before the allowance of any application therefor the applicant shall agree, subject to the approval of the Commissioner of the General Land Office, to compensate the lessee in accordance with paragraph (21) of these regulations.

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) The lessee may fence the lands 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 cancellation of this lease for any reason or upon termination thereof except when a renewal is requested, the Secretary of the Interior may, in his discretion and upon a written petition filed by the lessee within 30 days from date of the cancelation, require a subsequent lessee, prior to the execution of a new lease, to reimburse the former lessee a reasonable amount for any grazing improvements of a permanent nature that may have been placed upon the leased lands during the period of the lease. When an agreement cannot

be reached between the interested parties as to the amount to be paid, the decision of the Secretary of the Interior shall be final and conclusive. As to any improvements not disposed of in the manner set forth above, the lessee will be allowed 3 months from the date of cancelation of the lease within which to remove such improvements, but, if not removed or other disposition made within the said period, such 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 enclose roads or trails commonly used for public travel so 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.

(j) That the lessee shall not assign this lease or any interest therein, nor sublet any portion of the lease premises without the written consent of the Secretary of the Interior.

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 and assigns of the respective parties hereto.

IN WITNESS WHEREOF:

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

Lessee.

Witness to signature of Lessee:

OIL AND GAS—LEASES FOR LANDS WITHIN UNITIZED AREAS

[Circular No. 1439]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
May 8, 1937.

REGISTERS, UNITED STATES LAND OFFICES:

Any oil and gas lease for lands within the boundaries of a unitized area, issued subsequent to the approval of the unit agreement for

such area, will contain appropriate provisions making the lease immediately subject to the unit agreement. The lease applicant must file, prior to the issuance of such lease, evidence that he has entered into an agreement with the unit operator for the development and operation of the lands in his lease under and pursuant to the terms and provisions of the approved unit agreement, or an affidavit giving satisfactory reasons for the failure to enter into such agreement.

In case an application for lease or application to exchange a permit for a lease is filed under the act of August 21, 1935 (49 Stat. 674), amending the act of February 25, 1920 (41 Stat. 437), which embraces lands partly within and partly without the exterior boundaries of a unitized area, and is found allowable, separate leases will be issued, one embracing the lands within the unit area, and one for the lands outside of such unitized area.

FRED W. JOHNSON,
Commissioner.

I concur: May 25, 1937.

W. C. MENDENHALL,
Director, Geological Survey.

Approved: June 15, 1937.

T. A. WALTERS,
First Assistant Secretary.

STATE GRANTS AND SELECTIONS UNDER TAYLOR GRAZING ACT

[Circular No. 1428]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.

REGISTERS, UNITED STATES LAND OFFICES:

Paragraph 1 of the regulations, Circular No. 1398, approved by the Department July 22, 1936, contains the following statement:

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.

Said circular is hereby amended by substituting the following paragraph for the one above quoted:

State-owned lands, as well as school sections surveyed and unsurveyed the title to which has not yet vested in the State, located within national forests, national parks and monuments, Indian or other reservations or withdrawals, may be offered as a basis for an exchange under said section 8 of the Taylor Grazing Act as amended, where the selected lands are not within a grazing

district. Such exchanges may be based either upon equal areas or upon equal values, excepting those cases in which unsurveyed school sections and school sections surveyed after their inclusion within a reservation are offered as a basis, in which cases the exchange must be based upon equal areas.

FRED W. JOHNSON,
Commissioner.

Approved: May 17, 1937.

T. A. WALTERS,
First Assistant Secretary.

AMENDMENT TO CIRCULAR OF AUGUST 11, 1909, RELATING TO
PUBLICATION OF PUBLIC LAND NOTICES

[Circular No. 1429]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
June 3, 1937.

REGISTERS, U. S. LAND OFFICES:

Paragraph 2 of the Instructions of August 11, 1909 (38 L. D. 131), relative to the selection of newspapers for the publication of public land notices is hereby amended to read as follows:

Second. The notice must, in all cases, be published in the newspaper which is published at a place nearest to the lands which the notice affects. The word "published" as herein used does not necessarily mean the actual printing of the paper at the place of publication, but the fact that the paper is not printed at the place of publication is a circumstance which may be taken into consideration in determining the efficiency of such newspaper as a medium of publication. By the word "nearest" as here used it is not intended that geographical proximity shall be measured on an air line drawn between the land and the place of publication, but by the length of the shortest and principally travelled thoroughfare between such places, being the highway ordinarily used and employed for travel by vehicles of any kind. But this qualification shall not be construed as authorizing any manifest perversion of the spirit of the rule, but simply to dispense with any strict rule based on geographical distance.

FRED W. JOHNSON,
Commissioner.

Approved:

T. A. WALTERS,
First Assistant Secretary.

INTERPRETATION OF OIL AND GAS REGULATIONS

UNITED STATES DEPARTMENT OF THE INTERIOR,

OFFICE OF THE SECRETARY,

June 7, 1937.

INSTRUCTIONS

Leases issued under the act of February 25, 1920 (41 Stat. 437), contemplate that a single royalty may be collected upon the value of the natural gas in the condition it comes from the well, or that separate royalties may be collected on the values of the constituent elements.

The act of February 25, 1920, requires the payment of a per centum in amount or value of the production, and regulations which would authorize acceptance of a royalty on less than the value or amount of the production would be void because contrary to the express provisions of the law.

In computing royalties due the United States on natural gas, including its derivative products, Government oil and gas lessees should be charged royalty either on the basis of the combined value of such products as measured by the lessee's gross field realizations less his actual extraction costs, or on the basis of the section 4 (d) formula of the Regulations of July 1, 1926, whichever may result in the higher valuation.

Where the lessees have heretofore paid royalties on natural gas or its derivative products charged on the basis of the section 4 (d) formula, the accounts are considered as closed and will not be disturbed except under circumstances which clearly establish that computation of royalty on such basis was substantially erroneous.

WEST, *Acting Secretary*, TO THE DIRECTOR OF THE GEOLOGICAL SURVEY:

I refer to the matter of computing royalties on natural gas, including its derivative products, under oil and gas leases issued pursuant to the act of February 25, 1920 (41 Stat. 437), and the regulations approved March 11, 1920 (Circular No. 672), and subsequent operating regulations.

Leases issued under this act contemplate that a single royalty may be collected upon the value of the natural gas in the condition in which it comes from the well, or that separate royalties may be collected on the values of the constituent elements. The leases further provide that such royalties shall be computed on the basis provided for in the operating regulations.

In the operating regulations approved June 4, 1920 (47 L. D. 552), it is provided:

For computing the royalties provided for in the lease the value of all casing-head gas produced shall be assumed to be one-third of the value of the marketable casing-head gasoline extracted from such gas, but if the lessee receive a higher price for casing-head gas than the equivalent of one-third of the value of the casing-head gasoline manufactured from such gas the royalties shall be computed on that price.

The operating regulations of July 1, 1926 (52 L. D. 1), are in part as follows:

Section 4 (c.) *Royalties on Natural Gas.*—

* * * * *

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

(d) *Royalties on Natural-Gas Gasoline.*—

A royalty of 16½ percent shall be paid on the value as fixed by the Secretary of the Interior of one-third of all natural-gas gasoline extracted and sold from the natural gas produced on the leased land.

Natural-gas gasoline (also known as casing-head gasoline) is a manufactured product. The value of this product is contingent upon the value of the raw material and the cost of its manufacture. The Government does not wish to collect royalty on that part of the value which is derived from the cost of manufacturing, inasmuch as the Government's equity is confined to the value of the raw material involved. In computing royalty on natural-gas gasoline the value of the raw gasoline in the natural gas as produced is assumed to be one-third the value of the marketable natural-gas gasoline extracted from such gas, the remaining two-thirds being allowed to the lessee for the cost of manufacture. Thus the Government collects 16½ percent of one-third of the market value as its royalty share of the natural-gas gasoline produced (or in effect one-eighteenth of the market value).

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

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

Example of Method for Computing Natural-Gas Gasoline Royalties:

Assume—

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

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

Then—

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

The Government's royalty on gasoline in this case is ¼ (=16½ per cent) × 1 (gallon) × 18 cents = 3 cents (on each 1,000 cubic feet of natural gas treated).

(e) *Relief Measures*—

Adverse climatic and economic conditions in certain portions of the Rocky Mountain district result in unusually high operating and marketing costs. In order to encourage the most complete practicable utilization of natural gas under such conditions the Secretary of the Interior will, in his discretion and on proper showing of the necessity therefor, modify by specific order the method of computation of royalty on natural-gas gasoline set forth in subsection (d) hereof, to provide for a royalty of 16% percent of the value of not less than one-fifth of all natural-gas gasoline extracted and sold from the natural gas produced on the leased land, such modification to be effective in specific areas and for a definite period to be fixed by him in each order.

(f) *Royalty on Drip Gasoline*—

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

The act of February 25, 1920, requires the payment of a per centum in amount or value of the production and regulations which would authorize acceptance of a royalty on less than the value or amount of the production would be void because contrary to the express provisions of the law.

The regulations as drafted provide alternative methods of computing royalties on natural gas. In section 4 (c) of the 1926 regulations, provision is made for computing Government royalty on the amount which the lessee actually receives for his natural gas when such amount is greater than aggregate valuations of the dry gas and gasoline computed on the basis of the section 4 (d) formula. The two-thirds allowance formula has been used because of the simplicity of its administration and because its basis has generally been in accordance with the facts. It has come to my attention, however, that due to improved methods and equipment and to physical conditions the assumption in section 4 (d) of the regulations "that the value of raw gasoline in the natural gas as produced is one-third the value of the marketable natural-gas gasoline" is, in certain areas, palpably erroneous and that consequently said formula in many cases no longer gives a result that is even approximately correct.

It is fundamental that a lessee's natural-gas production cannot be valued for royalty purposes at less than the net amount which the lessee actually realizes from his current disposals of such natural gas in the field. This principle is specifically recognized and illustrated in section 4 (c) of the regulations of July 1, 1926, and also in the regulations of June 4, 1920. It follows that the net field realization method of computing royalties so provided for and illustrated must be considered as placing a minimum limitation upon valuations arrived at by any other method of computation, and it follows also that a lessee may and should be required to pay his natural gas royalties upon the basis of the actual money value of

such gas to him in the field whenever such actual values exceed valuations arrived at by using in the section 4 (d) formula the prices for dry gas, casinghead gasoline, and drip gasoline as fixed by the Secretary of the Interior.

You are therefore instructed in computing royalties due the United States on natural gas, including its derivative products, to charge Government oil and gas lessees royalty either on the basis of the combined value of such products as measured by the lessee's gross field realizations less his actual extraction costs (net field realization value), or on the basis of the section 4 (d) formula, whichever may result in the higher valuation.

Where the lessees have heretofore paid royalties on natural gas or its derivative products charged on the basis of the section 4 (d) formula, the accounts are considered as closed and will not be disturbed except under circumstances which clearly establish that computation of royalty on such basis was substantially erroneous. As to royalties on natural gas or its derivative products past due and unpaid you will ascertain the net field realization value and where you find the amount billed the lessees to be less than the amounts due on the basis of such net field realization value, you will revise the account and demand payment of the full amount found to be due.

**REGULATIONS UNDER SECTION 7 OF THE TAYLOR GRAZING ACT,
GOVERNING THE FILING OF APPLICATIONS FOR ENTRY, SELEC-
TION, OR LOCATION**

[Circular No. 1353, revised]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

June 29, 1937.

REGISTERS, U. S. LAND OFFICES:

Section 7 of the act of June 28, 1934 (48 Stat. 1269), as amended by the act of June 26, 1936 (49 Stat. 1976), provides:

That the Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (No. 6910), and amendments thereto, and Executive order of February 5, 1935 (No. 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this act, or proper for acquisition in satisfaction of any outstanding lien, exchange, or scrip rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public land laws, except that homestead entries shall not be allowed for tracts exceeding 320 acres in area. Such lands shall not be subject to disposition, settlement, or occupation

until after the same have been classified and opened to entry: *Provided*, That locations and entries under the mining laws, including the act of February 25, 1920, as amended, may be made upon such withdrawn and reserved areas without regard to classification and without restrictions or limitation by any provision of this act. Where such lands are located within grazing districts reasonable notice shall be given by the Secretary of the Interior to any grazing permittee of such lands. The applicant, after his entry, selection, or location is allowed, shall be entitled to the possession and use of such lands: *Provided*, That upon the application of any applicant qualified to make entry, selection, or location, under the public land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select, or locate such lands if opened to entry as herein provided.

1. LANDS SUBJECT TO CLASSIFICATION AND OPENING.—The purpose of the act of June 26, 1936, in amending section 7 of said act of June 28, 1934, is to authorize and empower the Secretary of the Interior to classify and open to entry, selection or location under any of the public land laws, upon application or otherwise, any of the public lands withdrawn or reserved by Executive orders of November 26, 1934, and February 5, 1935, as amended, also lands within grazing districts, and, as to such lands, after reasonable notice has been given to any permittee or permittees entitled to participate in the grazing use of the land. Lands embraced in a grazing lease shall be subject to classification and disposal thereunder, provided that before the allowance of an entry, selection, or location under said section 7 evidence must be furnished that the applicant has agreed to compensate the lessee for any grazing improvements placed on the lands entered, selected, or located, under the authority of the lease and for any injury caused to the lessee's grazing operations by reason of the loss of the leased lands from his leasehold. In event the interested parties are unable to reach an agreement as to the amount of such compensation the amount shall be fixed by the Commissioner of the General Land Office subject to the right of appeal to the Secretary of the Interior, whose decision shall be final. All such agreements, to be effective, must be approved by the Commissioner of the General Land Office. It must be determined that the application is an allowable one before payment by the applicant is required, and no application will be allowed in the absence of satisfactory evidence that payment has been made. The failure of the applicant to pay the lessee in accordance with the agreement shall be just cause for rejection of the application for entry, selection, or location. The authority granted by this act may be exercised by the Secretary of the Interior on his own initiation at any time.

2. EXECUTION AND FILING OF APPLICATIONS TO ENTER.—Any person, State, or company qualified to make entry, selection, or location under

any of the public land laws may file in the district land office an application, *in duplicate*, to make entry, selection, or location for land located either within or without a grazing district, which is otherwise subject to disposition under the law under which the application is made, accompanied with the necessary filing fee and commissions, and the affidavits required by Circulars 1066 and 1231 and the law under which the application is filed. The entire amount paid will be carried in the "unearned money" account and will be repaid by Treasury check, if the application be not allowed. The original of the application only need be sworn to. The act precludes the entry under the homestead laws of a greater area than 320 acres.

3. EXECUTION AND FILING OF PETITIONS FOR CLASSIFICATION.—The petition for classification and opening to entry, selection, or location, must set forth all material matter whereby it may be determined whether the lands sought are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this Act, or proper for acquisition in satisfaction of any outstanding lien, exchange, or scrip rights or land grant, and proper for acquisition under the law as applied for. All applications for entry, selection, or location must be accompanied by the applicant's petition for classification and opening to entry of the lands applied for 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. The original of the petition only need be sworn to. 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 8½ by 11 inches in size. The petition should set forth in detail the character of each subdivision included in the application to make 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, or by any other person. If any part or parts of the land 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, the relation of the same and whether the land is 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 lands applied for, 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 former 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.

4. ACTION ON APPLICATIONS AND PETITIONS FOR CLASSIFICATION IN HOMESTEAD CASES.—In all cases of applications to make entries, selections, or locations of public lands accompanied by the petition for classification and opening of the land to entry, selection, or location, and necessary fees and commissions, such applications should be received, assigned a serial number, and noted upon your records, and if your records show no objections you will, if the application is one for homestead entry, regardless of whether the land is within or without a grazing district, transmit the duplicate copy of the application for entry and petition for classification and opening 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 make his reports and recommendations to the Commissioner of the General Land Office as to the character and classification of the lands involved; that is, whether they may be classified and opened to homestead entry without detriment to the beneficial use of the land by local interests, to the protection, orderly use, and regulation of the public ranges, to the creation and maintenance of grazing districts or to the conservation and development of natural resources.

If the land applied for is inside of a grazing district, the Director, Division of Grazing, will include in his report a statement as to whether or not there are any allowed privileges in the form of licenses or permits to graze on specified lands in the form of allotments and, if so, will give the names and addresses of all citizens, groups, associations, or corporations entitled to exercise such exclusive grazing privileges. Where the license or permit is to graze in common with others, the Division of Grazing will report that fact.

If the report from the Division of Grazing indicates that there is no objection to the classification and opening of the land and that there are no grazing allotment licensees' or permittees' rights

involved, the General Land Office, through the Division of Grazing, will recommend to the Secretary of the Interior that the lands be classified and opened to entry as applied for. If the recommendation is approved by the Secretary of the Interior, the General Land Office will fix a date for the opening of the land to entry, and on that date the petitioner's application for entry will be allowed, in the absence of record objections. *

If the lands are within a grazing district and the Division of Grazing reports that there is no objection to the classification and opening of the lands, as applied for, and it appears that the rights of allotment licensees or permittees are involved, the General Land Office through its proper district land offices will cause proper notice to be given by registered mail of the contemplated classification and opening to entry to all allotment licensees or permittees entitled to exercise grazing privileges. Where the license or permit is to graze in common with others, notice will be given by publication in some newspaper of general circulation in the locality for the area affected. Such notice should allow a period of at least thirty days for the filing of objections to the proposed opening. If no objection be filed or if objection is made and found to be without merit, the classification and opening will be recommended by the General Land Office to the Secretary of the Interior, through the Division of Grazing and, upon approval thereof, a date will be fixed by the General Land Office for the opening of the land to entry. At least thirty days' notice shall be given by the register to all allotment licensees or permittees that by that date their use of the land must be discontinued.

If the land involved is in a grazing lease, the General Land Office, through its proper district land office, will cause proper notice to be given to the lessee, by registered mail, of the contemplated classification and opening to entry. The lessee will be afforded due opportunity for the filing of protests, the same as is hereinabove provided for in the case of applications for lands in grazing districts. The procedure with respect to the opening of the lands to entry will also be the same as is hereinabove outlined.

5. ACTION ON APPLICATIONS AND PETITIONS FOR CLASSIFICATION, IN CASES NOT UNDER HOMESTEAD LAWS.—Where the application for entry is not under the homestead laws, the Director, Division of Investigations will be requested to cause a field examination to be made and report thereof submitted to the Commissioner of the General Land Office as to whether any reason exists why such land should be retained in Federal ownership in aid of conservation and the development of the natural resources or whether it may be classified and opened to entry as requested, without detriment to the public interests.

In addition, the report should give whatever information is required by the applicable laws and regulations.

If the land is inside of a grazing district, the Division of Grazing will be requested by the General Land Office to report as to whether there is any objection to the classification and opening of the land as applied for and whether or not there are any rights of allotment licensees or permittees involved and, if so, the said Division will include in its report the names and addresses of all such licensees or permittees. Where the license or permit is to graze in common with others, the Division of Grazing will report that fact. The General Land Office, through the proper district land office, will notify all such allotment licensees or permittees of the pending application. The procedure with respect to notice to allotment licensees, permittees, and lessees and to the classification and opening of the lands to entry will be the same as in homestead cases.

6. ACTION ON APPLICATIONS, AFTER CLASSIFICATION OF LANDS.—If the Secretary of the Interior approves the classification of the land as subject to disposal under the public land laws, the General Land Office will pass upon the qualifications of the applicant and determine whether he may be allowed to acquire title to the land under the application. If it should be determined that the land may not be disposed of under the law specified by the applicant, the application for entry, selection, or location will be rejected and the applicant allowed thirty days from receipt of notice within which to file response to the notice of the report furnished him. 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 further showing will be forwarded by you to this office. If the evidence submitted warrants it, favorable action may be taken, but if the conclusion be still adverse, it will be transmitted to the Secretary of the Interior with report. 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 thirty days allowed, or where the Secretary refuses to open the land to disposition, 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.

7. RIGHTS SECURED BY FILING OF APPLICATION.—The filing of an application for classification and opening of the land, accompanied by application to make entry, selection, or location, does not give the applicant the right to occupy or settle upon the land applied for, but will segregate the lands applied for from other disposition under the public land laws, subject to 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. The applicant shall be entitled to the possession and use of the land only after his entry, selection, or location has been allowed.

8. PREFERENCE RIGHTS AND RESTORATION OF LANDS TO ENTRY BY GENERAL PUBLIC.—Lands classified as subject to homestead or desert-land entry, under section 7 of the act of June 28, 1934, as amended, shall be opened to entry: First, by the qualified applicant on whose application the lands were classified; and, 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), under the homestead or desert-land laws; and, third, by the general public. If entry, selection, or location by the person, State, or company upon 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 is classified secures the preference right. While the preference right period of ex-service men of the war with Germany begins ninety days prior to the date of the opening of the lands to homestead or desert-land entry, filings may be presented during the twenty days preceding such preference right period; that is, from the 110th 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 of the party responsible for the classification is not allowable on or after the date of the opening. Applications may be filed by the general public within twenty 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 section 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.

9. GOVERNING LAWS, TO EARN TITLE.—Upon allowance of an application to make entry, location, or selection under this act, all the laws and regulations governing the particular kind of entry, location, or selection applied for must be complied with in order to earn title to the land sought.

10. GOVERNING REGULATIONS IN CASES OF CONFLICTS WITH PRIOR MINERAL APPLICATIONS.—In all proper cases of applications to make non-

mineral entries or selections of public lands, filed subsequent to applications for mineral prospecting permits or leases, the instructions in Circulars Nos. 1021 (51 L. D. 167), 1031 (51 L. D. 202), and 1136 (52 L. D. 241), must be observed.

11. **PRIOR INSTRUCTIONS SUPERSEDED.**—These instructions supersede those of May 16, 1935 (55 I. D. 257), and the further revision approved October 26, 1936.

FRED W. JOHNSON,
Commissioner.

I concur:

F. R. CARPENTER,
Director, Division of Grazing.

I concur:

R. R. SMITH,
Director, Division of Investigations.

Approved:

T. A. WALTERS,
First Assistant Secretary.

SUPPLEMENTAL REGULATIONS AFFECTING OIL AND GAS LEASES IN ALASKA

[Circular No. 1431]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
July 3, 1937.

REGISTERS, U. S. LAND OFFICE IN ALASKA:

The act of August 21, 1935 (49 Stat. 674), and the regulations thereunder approved May 7, 1936, Circular 1386, are applicable to Alaska as well as to the States. However, these regulations do not deal with the provisions of the act of February 25, 1920, especially applicable to Alaska and still in force, for which reason additional regulations amending and supplementing the regulations now applicable to Alaska are necessary.

Section 13 of the act of February 25, 1920 (41 Stat. 437), authorizes the granting of not exceeding five permits in Alaska to the same applicant. While section 27 of the act was amended by the act of April 30, 1926 (44 Stat. 373), to provide an acreage limitation of holdings, this amendment did not change the right to hold five permits in Alaska. Section 22 of the act provides that leases in Alaska, whether as a result of prospecting permits or otherwise, shall be upon such rental and royalty as shall be fixed by the Secretary of the Interior and specified in the lease and be subject to readjustment

at the end of each twenty-year period of the lease, and that for the purpose of encouraging production of petroleum in Alaska, the Secretary of the Interior may, in his discretion, waive the payment of any rental or royalty not exceeding the first five years of any lease.

The act of August 21, 1935, amended section 13 to provide that no prospecting permits shall be issued except upon applications filed 90 days or more prior to the date of the amendatory act, and that applications filed thereafter shall be considered as applications for leases, but as no amendment was made of section 22 or 27, it is apparent that Congress did not intend to make any change in the provisions of the law applicable only to Alaska.

Accordingly, existing oil and gas regulations applicable to Alaska are hereby amended and supplemented as follows:

1. A person, association, or corporation is authorized to hold oil and gas permits and leases for not exceeding 2,560 acres in the same geologic structure and not exceeding five permits and leases in the Territory; but for development purposes, assignments of permits and leases not exceeding five in number in any nonproducing structure may be presented by the same person, association, or corporation for consideration by the Secretary of the Interior and his approval if he shall find the same to be in the public interest. Leases operated under a cooperative or unit plan prescribed or approved by the Secretary of the Interior are excepted from any acreage limitation fixed by the leasing act.

2. Upon leases granted in Alaska under section 14 of the act as the result of discovery under prospecting permits, the rentals and royalties will be those provided by Circular 845 (49 L. D. 207) (the regulations in force January 1, 1935), except in cases where different rentals and royalties have been fixed prior to discovery.

3. Upon leases granted under section 17 of the act as amended for lands in Alaska and leases acquired by exchange of prospecting permits, or granted on applications for permits filed after May 23, 1935, and prior to August 21, 1935, the royalties shall be equal to one-half of the royalties fixed by section 17 of Circular 1386, except that any lessee who shall drill and make the first discovery of oil or gas in commercial quantities in any geologic structure shall be exempted from the payment of royalty on production under the lease for the first five years thereof, or should discovery be first made under an approved unit plan the exemption herein provided shall for the purpose of computing royalty due the United States inure to the benefit of the land within the participating (productive) area established by reason of such discovery.

The rental payable on such leases shall be 25 cents per acre or fraction thereof for the first year of the lease, payable prior to execution of the lease, and 25 cents per acre each year thereafter until oil or gas in commercial quantities is discovered on the leased lands, except that where leases are granted in exchange for prospecting permits or pursuant to applications for permits filed after May 23, 1935, and prior to 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 leases. Rentals after dis-

covery shall be \$1 per acre or fraction thereof as prescribed by section 15 of Circular 1386, any rental paid for any one year to be credited against the royalties as they accrue for that year.

FRED W. JOHNSON,
Commissioner.

I concur:

W. C. MENDENHALL,
Director, Geological Survey.

Approved:

CHARLES WEST,
Acting Secretary.

MINERAL PERMITS AND LEASES

[Circular No. 1416]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
July 6, 1937.

REGISTERS, UNITED STATES LAND OFFICES:

There are being received numerous applications for leases of lands within known geologic structures of producing oil and gas fields as defined by the Geological Survey, some of which applications are assigned serial numbers and filing fees collected, while others are treated as requests that the tracts be offered for lease.

Such lands are subject to leasing only at public auction under section 17 of the mineral leasing act as amended by the act of August 21, 1935 (49 Stat., 674), and no provision of the law or regulations authorize applications to be filed for lease of such lands, nor are any rights gained by filing applications therefor.

In order that the practice may be uniform, you will treat such applications for lands shown by your records to be within defined oil and gas fields as requests that the lands be offered for lease, and assign no serial number, nor accept filing fees therefor. You will forward the applications to this office by separate letter and advise the applicant by ordinary mail of the action taken.

FRED W. JOHNSON,
Commissioner.

Approved: January 6, 1937.

T. A. WALTERS,
First Assistant Secretary.

EXTENSIONS OF TIME FOR HOMESTEAD AND DESERT LAND PROOFS

[Circular No. 1432]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

July 9, 1937.

REGISTERS, UNITED STATES LAND OFFICES:

The act of June 16, 1937 (50 Stat. 303), 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, 1935" and inserting in lieu thereof "December 31, 1936."

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 1936 and the following should be added to the title:

Amended by act of June 16, 1937 (50 Stat. 303), so as to apply to final proofs becoming due on or prior to December 31, 1936.

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:

OSCAR L. CHAPMAN,
Assistant Secretary.

INSTRUCTIONS RE MINERAL RIGHTS IN FOREST EXCHANGES

[Circular No. 1433]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

July 9, 1937.

REGISTERS, UNITED STATES LAND OFFICES.

Section 2 of the act of February 28, 1925 (43 Stat. 1090), reads as follows:

Either party to an exchange may make reservations of timber, minerals, or easements, 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 Agriculture; where mineral reservations are made in lands conveyed by the United States it shall be so stipulated in the patents, and that any person who acquires the right to mine and remove the reserved 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: *Provided*, That all property, rights, easements, and benefits authorized by this section to be retained by or reserved to owners of lands conveyed to the United States shall be subject to the tax laws of the States where such lands are located.

On May 13, 1937, the Secretary of Agriculture approved rules and regulations governing the exercise of mineral rights reserved in conveyances to the United States in forest exchange cases and by letter dated May 20, 1937, the Acting Chief, Forest Service, advised this office as follows:

In view of the fact that the form in which formal applications and deeds conveying lands offered to the United States in land exchanges under the provisions of the act of March 20, 1922 (42 Stat. 465), as amended by the act of February 28, 1925 (43 Stat. 1090), are prepared is a matter which comes under your jurisdiction, it is requested that the attached mimeographed copies of the rules and regulations governing the exercise of mineral rights reserved by proponents in such exchanges be distributed to your local land offices, with instructions that a copy thereof be attached to all formal applications and that the rules and regulations in question be expressed in and made a part of the deeds conveying lands to the United States in cases of this nature. * * *

In the case of each and every application for exchange made under the act of March 20, 1922 (42 Stat. 465), as amended by the act of February 28, 1925 (43 Stat. 1090), where the exchange applicant reserves the rights to any or all minerals in lands offered to the United States in such an exchange, the applicant will be required to attach to and incorporate as a part of the formal application for exchange the rules and regulations referred to above. Such an applicant will also be required to incorporate the rules and regulations in question in the deed of reconveyance of the offered land to the United States.

FRED W. JOHNSON,
Commissioner.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

SUSPENDING ANNUAL ASSESSMENT WORK ON MINING CLAIMS

[Circular No. 1434]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

July 22, 1937.

REGISTERS, U. S. LAND OFFICES:

For your information, and in order that you may inform inquirers relative thereto, your attention is called to the act of June 24, 1937 (50 Stat. 306), 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, 1936, and ending at 12 o'clock meridian July 1, 1937: 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 1936: 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, 1937, 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 1936: 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 1936, and who file on or before 12 o'clock noon July 1, 1937, 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 1936.

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.

NOTICE OF OFFER OF LANDS FOR GRAZING LEASE

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,

July 31, 1937.

WEST, *Acting Secretary:*

Section 15 of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269), as amended by the act of June 26, 1936 (49 Stat. 1976), provides that in the issuance of leases 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 land 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.

Notice is hereby given that the vacant, unreserved, and unappropriated public lands of the United States, exclusive of Alaska, and not included in any grazing district established under the provisions of section 1 of said Taylor Grazing Act, and all lands included in outstanding one-year grazing leases issued pursuant to departmental instructions of October 22, 1936 (Circular No. 1412), are hereby offered for lease for grazing purposes.

Said outstanding one-year leases will expire on various dates and upon their expiration, the lands embraced therein will become subject to new leases without prejudice, however, to the rights of the present lessees to file timely renewal applications.

Any and all persons desiring to lease any part thereof for grazing purposes under the authority of said section 15 of the Taylor Grazing Act, as amended, or those having adverse or conflicting claims to such lands should file proper grazing lease applications or notice of their claims in the appropriate United States District Land Office or in the General Land Office for lands in States in which there are no District Land Offices. Anyone desiring to assert a preference right to lease isolated or disconnected tracts of seven hundred and sixty acres or less will be allowed 90 days from the date of this notice within which to file proper application for lease.

The holders of one-year leases issued under said departmental instructions of October 22, 1936, should not file new applications to lease lands embraced in their applications upon which such leases were based but instead should file petitions for renewals on forms provided. Said one-year leases will in no way be disturbed as a result of this action, nor will the preference rights of the holders of such leases be jeopardized thereby.

Notice is also hereby given that all lands not on the date hereof subject to lease under this section of the act, by reason of their appropriation or reservation, but which become subject to lease at a later date, are hereby offered for lease as of the date they become subject to such appropriation and anyone desiring to assert a preference right to lease isolated or disconnected tracts of seven hundred and sixty acres or less of such lands will be allowed 90 days from the date they become subject to lease within which to file proper lease application.

**REGULATIONS FOR THE SALE OF LOTS IN THE TOWN OF TULELAKE
WITHIN THE KLAMATH IRRIGATION PROJECT, CALIFORNIA**

[Circular No. 1435]

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
August 2, 1937.

TO THE COMMISSIONER OF THE GENERAL LAND OFFICE:

On May 18, 1937, the Department approved instructions submitted by the Commissioner of Reclamation that a sale of certain lots situated in Tulelake, California, be held. It is, therefore, directed that in accordance with said instructions and pursuant to the acts of April 16, 1906, and June 27, 1906 (34 Stat. 116, 519), and the general regulations issued under section 2381, United States Revised Statutes, Circular No. 1122, the following-described lots in the Townsite of Tulelake, California, within the Klamath Irrigation Project, shall be offered for sale at public auction at not less than their appraised value at 10:00 A. M., September 21, 1937, at Tulelake, California:

Block No.	Lot No.	Area (sq. ft.)	Valuation	Block No.	Lot No.	Area (sq. ft.)	Valuation
5.....	6	6,600	\$200.00	14.....	7	5,000	\$250.00
5.....	7	6,600	225.00	15.....	3	3,942.6	250.00
12.....	1	6,600	225.00				
12.....	2	6,600	200.00	Total.....			1,350.00

B. E. Hayden has been designated as superintendent of the sale and Fred W. Gilbert as auctioneer.

Full payment for the lots may be made in cash on the date of the sale or one-fourth in cash and the balance in three equal annual installments with interest on the deferred payments at 6 per cent per annum.

The Superintendent conducting the sale is authorized to reject any and all bids for any lot and to suspend, adjourn, or postpone the sale of any lot or lots to such time and place as he may deem proper. After all the lots have been offered, the Superintendent will adjourn the sale indefinitely and will make report to the Commissioner of the General Land Office showing the sale price of each lot sold. In addition he will make recommendation as to whether the unsold lots, if any, should be reappraised, and such lots reoffered at public sale at a future date, or whether the sale should be closed and the lots made subject to private sale at the appraised prices.

If any person who has made partial payment on the lot purchased by him fails to make any succeeding payment required under these regulations at the date such payment becomes due, the money deposited by such person for such lot will be forfeited. In case any of the sold lots should be forfeited, the sale price will thereafter be considered the appraised price of such lot.

All persons are warned against forming any combination or agreement which will prevent any lot from selling advantageously or which will in any way hinder or embarrass the sale, and all persons so offending will be prosecuted under Section 59 of the Criminal Code of the United States.

T. A. WALTERS,
First Assistant Secretary.

STATE GRANTS AND SELECTIONS UNDER TAYLOR GRAZING ACT

[Circular No. 1436]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
September 16, 1937.

REGISTERS, UNITED STATES LAND OFFICES:

In order to provide that upon the filing of State-exchange applications under section 8 of the Taylor Grazing Act, as amended, copies of such applications be forwarded directly to the proper Special Agents in Charge, Division of Investigations, paragraphs 2

and 3 of Circular No. 1398, approved July 22, 1936, are hereby amended to read as follows:

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 copy of the application to the General Land Office, together with a report as to any conflicts of record, transmitting the triplicate copy of each application to the proper Special Agent in Charge, Division of Investigations, together with a carbon copy of his report as to conflicts of record. If the selected lands are within a grazing district the register 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 insofar 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 request the Director 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 anyone 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 minerals or springs or water holes, the Director of Investigations will be requested to have a field investigation made for either or both of such purposes.

FRED W. JOHNSON,
Commissioner.

Approved:

T. A. WALTERS,
First Assistant Secretary.

ACCOUNTS—COMMISSIONS UNDER GRAZING ACT

[Circular No. 1437]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

September 27, 1937.

REGISTERS, UNITED STATES LAND OFFICES:

The Comptroller General having held in a decision dated August 30, 1937, that, in connection with the administration of the Grazing Act of June 28, 1934, registers are entitled to claim 2 percent on grazing license fees and grazing lease rentals, registers will hereafter include such commissions in their monthly statements of earnings and on the vouchers for compensation.

Those registers whose earnings have been under maximum and whose compensation would be increased by claiming commissions on such fees and rentals heretofore applied may state supplemental vouchers and forward them to this office for administrative action.

ANTOINETTE FUNK,
Acting Commissioner.

Approved:

T. A. WALTERS,

*First Assistant Secretary.*TAYLOR GRAZING ACT—PATENTS TO STATES UNDER EXCHANGES
SUBJECT TO PRIOR GRAZING LEASES

[Circular No. 1438]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

October 13, 1937.

REGISTERS, UNITED STATES LAND OFFICES:

The Act of Congress approved August 24, 1937 (50 Stat. 748), reads as follows:

That the Secretary of the Interior in adjudicating State exchanges, under section 8 of the Act of June 28, 1934 (48 Stat. 1269), as amended by the Act of June 26, 1936 (49 Stat. 1976), involving lands embraced in outstanding leases under section 15 of said Act issued prior to the filing of the State exchange application, is hereby authorized upon the request of any State to issue patent to the State, subject to such outstanding lease: *Provided*, That the United States shall not by reason of the issuance of any such patents be required to account to the State for any money due and collected prior thereto as rent for any part of the then-current annual rental period except as is now provided by law.

In accordance with the provisions of this Act, where a State application for exchange under the provisions of the Taylor Grazing Act approved June 28, 1934 (48 Stat. 1269), as amended by the act of June 26, 1936 (49 Stat. 1976), is found to embrace lands included in an outstanding lease issued under section 15 of said Act, before final action is taken by this office with a view to the issuance of patent on such application, the State will be afforded an opportunity to request the issuance of patent for the land involved subject to such outstanding lease, and upon receipt of such a request by the State, further action will be taken with a view to the issuance of patent, should no objection appear of record.

Accordingly, any application for lease, or for the renewal of a lease, under section 15 of the Grazing Act, found to be in conflict with a pending State application under section 8 of the Act, will be suspended and held in this office awaiting final action on the State's application.

When an application by the State has been approved for patenting, any such conflicting application for lease, or for the renewal of a lease, will be finally rejected and the case closed by this office. Should the State's application be finally rejected, the application for lease, or for renewal of a lease, will be considered upon its merits.

In accordance with the proviso to said act of August 24, 1937, in cases where the United States has, prior to the issuance of such a patent, received payments for an unexpired portion of the then current annual rental period, no payment other than that provided for by section 10 of the Grazing Act, as amended, will be required to be made to the State by the United States.

ANTOINETTE FUNK,
Acting Commissioner.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

LEASING OF LANDS WITHDRAWN FOR RECLAMATION PURPOSES

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

October 13, 1937.

REGISTERS, U. S. LAND OFFICES:

This office is in receipt of instructions signed by the First Assistant Secretary, October 8, 1937, relative to the leasing for grazing purposes pursuant to section 15 of the Taylor Grazing Act as amended June

26, 1936 (49 Stat. 1976), lands withdrawn for reclamation projects under authority of section 3 of the act of June 17, 1902 (32 Stat. 388).

These instructions specify that all leases of lands withdrawn for reclamation purposes should be made under the authority of subsection (1) of the act of December 5, 1924 (43 Stat. 703), rather than under the authority of section 15 of the Taylor Grazing Act, as amended, and the proceeds disposed of accordingly, that all such leases should be made in the form approved June 18, 1934. These instructions also direct that whatever moneys may yet be received from grazing leases issued under section 15 of the Taylor Grazing Act for lands withdrawn for reclamation purposes should be disposed of in accordance with subsection (1) of the act of December 5, 1924, rather than in the manner provided in section 10 of the Taylor Grazing Act, as amended.

In the future where applications are proffered for and in answering inquiries relative to leasing for grazing purposes lands withdrawn for reclamation projects, you will specify that the leasing of such lands is under the jurisdiction of the Bureau of Reclamation and not this office.

FRED W. JOHNSON,
Commissioner.

EXCHANGES WITH ARIZONA FOR EXTENSION OF PAPAGO INDIAN RESERVATION

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.

REGISTER, PHOENIX, ARIZONA:

The act of July 28, 1937 (50 Stat. 536), entitled "An Act to extend the boundary of the Papago Indian Reservation in Arizona," provides:

That whenever all privately owned lands except mining claims within the following-described area have been purchased and acquired as hereinafter authorized, the boundary of the Papago Indian Reservation in Arizona shall be extended to include the west half of section 4; west half of section 9, township 17 south, range 8 east; all of township 18 south, range 2 west, all of fractional township 19 south, range 2 west; and all of fractional townships 18 and 19 south, range 3 west, except sections 6, 7, 18, 19, 30, and 31 in township 18 south, range 3 west, Gila and Salt River meridian. This extension shall not affect any valid rights initiated prior to the approval hereof nor the reservation of a strip of land sixty feet wide along the United States-Mexico boundary made by proclamation of the President dated May 27, 1907 (35 Stat. 2136). The lands herein described when added to the Papago Indian Reservation as provided in this Act shall become a part of said reservation in all respects and upon all the

same terms as if said lands had been included in the Executive order issued by the President on February 1, 1917: *Provided*, That lands acquired hereunder shall remain tribal lands and shall not be subject to allotment to individual Indians.

SEC. 2. That the Secretary of the Interior be, and he is hereby, authorized to purchase for the use and benefit of the Papago Indians with any available funds heretofore or hereafter appropriated pursuant to authority contained in section 5 of the Act of June 18, 1934 (48 Stat. 984), all privately owned lands, water rights, and reservoir site reserves within townships 18 and 19 south, ranges 2 and 3 west, together with all grazing privileges and including improvements upon public lands appurtenant to the so-called Menager Dam property, at the appraised value of \$40,016.37.

SEC. 3. The State of Arizona may relinquish in favor of the Papago Indians such tracts within the townships referred to in section 1 of this Act as it may see fit and shall have the right to select other unreserved and nonmineral public lands within the State of Arizona equal in area to those relinquished, said lieu selections to be made in the same manner as is provided for in the Enabling Act of June 20, 1910 (36 Stat. 558), or in the discretion of the State of Arizona under the provisions of section 8 of the Act of June 28, 1934 (48 Stat. 1269), as amended and supplemented by the Act of June 26, 1936 (49 Stat. 842). The payment of fees or commissions is hereby waived in all lieu selections made pursuant to this section.

Selections by the State of Arizona under section 3 of the act may be made either in accordance with the regulations governing the selections of lands by States and Territories, approved June 23, 1910 (39 L. D. 39), so far as they apply to indemnity school land selections, except that no fees or commissions will be required, or under section 8 of the act of June 28, 1934 (48 Stat. 1269), as amended by the act of June 26, 1936 (49 Stat. 1976), referred to in the act as 49 Stat. 842, and the regulations thereunder dated July 22, 1936, Circular No. 1398, as amended by the regulations of May 17, 1937, Circular No. 1428. No fee will be charged in connection with any exchange made under section 8 of the act of June 28, 1934, as amended, but the State will be required to pay one-half of the cost of publication thereof.

FRED W. JOHNSON,
Commissioner.

Approved: November 1, 1937.

OSCAR L. CHAPMAN,
Assistant Secretary.

**REGULATIONS GOVERNING THE LOCATING AND MAINTAINING OF
MINING CLAIMS IN THE PAPAGO INDIAN RESERVATION**

[Circular No. 1347—Revised November 13, 1937]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
November 13, 1937.

REGISTER, PHOENIX, ARIZONA:

Section 3 of the act of June 18, 1934 (48 Stat. 984-988) as amended by the act of August 28, 1937 (50 Stat. 862), provides:

(a) The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however,* That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: *Provided further,* That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation.

(b) (1) 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 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 the 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,* That damages shall be paid to the superintendent or other officer in charge of the reservation for the credit of the owner thereof, 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 to be the fair and reasonable value of such improvements: *Provided further,* That a yearly rental not to exceed 5 cents per acre shall be paid to the superintendent or other officer in charge of the reservation for deposit in the Treasury of the United States to the credit of the Papago Tribe for loss of the use or occupancy of any land withdrawn by the requirements of mining operations.

(2) 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 pay to the superintendent or other officer in charge of the reservation, for deposit in the Treasury of the United States to the credit of the Papago Tribe, the sum of \$1 per acre in lieu of annual rental, as hereinbefore provided, to compensate for the loss of the use or occupancy of the lands withdrawn by the requirements of mining operations; but the sum thus deposited, except for a deduction of rental at the annual rate hereinbefore provided, shall be refunded to the applicant in the event that patent is not acquired: *Provided,* That an applicant for patent shall also pay to the superintendent or other officer in charge of the said reservation for the credit of the owner thereof, damages for the loss of improvements not theretofore paid, in such a sum as may be determined by the Secretary of the Interior to be the fair value thereof.

(3) Water reservoirs, charcos, water holes, springs, wells, or any other form of water development by the United States or the Papago Indians shall not be

used for mining purposes under the terms of this Act, except under permit from the Secretary of the Interior approved by the Papago Indian Council: *Provided*, That nothing herein shall be construed as interfering with or affecting the validity of the water rights of the Indians of this reservation: *Provided further*, That the appropriation of living water heretofore or hereafter affected by the Papago Indians is hereby recognized and validated subject to all the laws applicable thereto.

(4) 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, as amended by the act of August 28, 1937, 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 June 18, 1934, 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 or other officer in charge of the reservation, within 90 days of such location, a copy of the location notice, together with a sum amounting to 5 cents for each acre and 5 cents for each fractional part of an acre embraced in the location for deposit with the Treasury of the United States to the credit of the Papago Tribe 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. The payment of annual rental must be made to the superintendent or other officer in charge 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 to the superintendent or other officer in charge of the reservation damages for the loss of any improvements on the land in such a sum as may be determined by the Secretary of the Interior to be a fair and reasonable value of such improvements, for the credit of the owner thereof. 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, a statement from the superintendent or other officer in charge of the reservation, that he has deposited with the proper official in charge of the reservation for deposit in 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 a statement from the superintendent or other officer in charge of the reservation 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 August 28, 1937, and prior hereto may be validated upon full compliance with the foregoing provisions within 90 days of the approval of these regulations.

Water reservoirs, charcos, water holes, springs, wells, or any other form of water development by the United States or the Papago Indians shall not be used for mining purposes under the terms of the said act of August 28, 1937, except under permit from the Secretary of the Interior approved by the Papago Indian Council.

A mining location may not be located on any portion of a ten-acre legal subdivision containing water reservoirs, charcos, water holes, springs, wells or any other form of water development by the United States or the Papago Indians except under a permit from the

Secretary of the Interior approved by the Papago Indian Council, which permit shall contain such stipulations, restrictions, and limitations regarding the use of the land for mining purposes as may be deemed necessary and proper to permit the free use of the water thereon by the United States or the Papago Indians.

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.

FRED W. JOHNSON,
Commissioner.

I concur: November 6, 1937.

JOHN COLLIER,
Commissioner of Indian Affairs.

Approved: November 13, 1937.

T. A. WALTERS,
First Assistant Secretary.

TERMINATION OF OIL AND GAS PROSPECTING PERMITS

[Circular No. 1440]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
December 2, 1937.

REGISTERS, DISTRICT LAND OFFICES:

The act of August 26, 1937 (50 Stat. 388) provides in part that "All oil and gas prospecting permits shall cease and terminate without notice of cancelation on the final date of their current term, including any extension herein granted, and no extension of any permit beyond December 31, 1939, shall be granted under the authority of this Act or any other Act."

Under this provision of the act, certain oil and gas prospecting permits have already been terminated, or will hereafter be terminated by operation of law.

In the case of *Martin Judge* (49 L. D. 171), decided July 12, 1922, the Department held that:

Prior to the cancelation by the Commissioner of the General Land Office of an outstanding oil and gas prospecting permit and notation thereof upon the records of the local land office, no other person will be permitted to gain any right to a permit for the same class of deposits by the filing of an application or by the posting of a notice of intention to apply for such a permit.

The rule enunciated in the above decision has been consistently adhered to and followed by the Department. Notwithstanding that permits have already been terminated, or will hereafter be terminated by operation of law under the above-cited provision of the act of August 26, 1937, the long-continued policy of the Department expressed in the Martin Judge decision will continue to be followed.

Therefore, until you are advised of the termination or cancelation of a permit and such termination or cancelation is noted on the records of your office, no person will be permitted to gain any right to a lease for the same class of deposits by the filing of his application therefor.

FRED W. JOHNSON,
Commissioner.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

COAL MINING METHODS AND THE SAFETY AND WELFARE OF MINERS ON LEASED LANDS ON THE PUBLIC DOMAIN

Regulations (Second Edition)

UNITED STATES DEPARTMENT OF THE INTERIOR,
GEOLOGICAL SURVEY,
December 23, 1937.

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Secs. 31, 32, and 33 of the act of Congress approved February 25, 1920 (41 Stat. 437) and amendments thereto, provide as follows:

SEC. 31. That any lease issued under the provisions of this Act may be forfeited and canceled by an appropriate proceeding in the United States district court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of this Act, of the lease, or of the general regulations promulgated under this Act and in force at the date of the lease, and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions thereof.

SEC. 32. That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act.

SEC. 33. That all statements, representations, or reports required by the Secretary of the Interior under this Act shall be upon oath, unless otherwise specified by him, and in such form and upon such blanks as the Secretary of the Interior may require.

DEFINITIONS

The following expressions wherever used in these regulations shall have the meaning here indicated:

SEC. i. *Mining supervisor*.—The agent appointed by and acting for the Secretary of the Interior to supervise all coal-mining operations coming under these regulations.

SEC. ii. *District mining supervisor*.—An agent appointed by the Secretary of the Interior to supervise coal-mining operations in one or more of the coal fields of the United States, acting under the direction of the mining supervisor.

SEC. iii. *Deputy mining supervisor*.—An agent appointed by the Secretary of the Interior, acting under the direction of the mining supervisor or the district mining supervisor.

SEC. iv. *Lessee*.—Any person or persons, partnership, association, firm, corporation, municipality, or State which has made application

for or to which has been issued a coal-mining lease, permit, or license under the act of February 25, 1920, and amendments thereto.

SEC. v. *Leased land or tract*.—Any land or coal deposit owned by the United States and under lease, permit, license, or application for lease, permit, or license, in accordance with the act of February 25, 1920, for the purpose of mining coal therefrom.

SEC. vi. *Coal*.—Coal of all ranks from lignite to anthracite.

SEC. vii. *Mine*.—An underground excavation and all parts of the property of a mining plant either on the surface or underground that contribute directly or indirectly to the mining and preparation of coal.

SEC. viii. *Stripping operation*.—The term "stripping operation" or "strip pit" shall mean a mining excavation or development by means of a surface pit or quarry in which the surface or cover over the coal bed is first removed and the coal itself is then excavated.

SEC. ix. *Slope*.—An inclined entry in a dipping coal bed or an inclined tunnel to a coal bed.

SEC. x. *Shaft*.—A mine opening, the axis of which is approximately vertical, extending from the surface to develop one or more coal deposits.

SEC. xi. *Panel*.—A unit area in a system of mining by which the mine is divided into areas isolated or surrounded by solid pillars of coal into which a pair of entries are driven for the development of rooms and the extraction of pillars.

SEC. xii. *Working place*.—Any underground place where men are assigned to mine or load coal or rock by hand or mechanically.

SEC. xiii. *Rock dusting*.—The distribution or application underground of fine noncombustible dust in such a manner as to prevent, check, control, or extinguish coal-dust explosions.

SEC. xiv. *Wet coal dust*.—Coal dust in a mine shall be considered wet only when the fines contain sufficient water to permit molding by hand pressure.

SEC. xv. *Gas*.—Used in the sense employed by coal miners to mean "fire damp," or flammable or explosive gas, usually methane. When such gas is mixed with air in certain proportions the mixture is explosive.

SEC. xvi. *Gassy mine*.—A mine shall be deemed "gassy" if so determined by appropriate State authority, or if a methane cap can be obtained with an approved safety lamp in any working place or places on any 3 days within a period of 30 days, or if the return air from any split contains 0.25 percent or more of flammable gas.

SEC. xvii. *Black damp*.—The excess of nitrogen and carbon dioxide in an oxygen-deficient atmosphere.

SEC. xviii. *Permissible*.—Applied to explosives, safety lamps, electric machinery, rescue apparatus, and other devices, means, apparatus, and materials officially listed as "permissible" by the United States

Bureau of Mines and approved as having met its requirements for the respective specified uses.

SEC. xix. *Fan*.—A revolving machine placed on the surface and used to create a positive air current in a mine.

SEC. xx. *Booster fan*.—A revolving machine placed underground for increased circulation in the specific airway in which it is placed.

SEC. xxi. *Auxiliary fan*.—A revolving machine used to force air through tubing or ducts for the ventilation of a specific working place or places.

PURPOSE OF SUPERVISION

SEC. xxii. The purpose of supervision is to assure the orderly and efficient development of publicly owned coal lands and coal deposits, without waste or avoidable loss of coal or damage to coal-bearing formations; to promote the safety, health, and welfare of workmen involved; to obtain a proper record and accounting of all coal produced; to determine rent and royalty liability; and to maintain a record of rent and royalty payments.

POWERS AND DUTIES OF MINING SUPERVISOR, DISTRICT MINING SUPERVISOR, AND DEPUTY MINING SUPERVISOR

It shall be the duty of the mining supervisor, district mining supervisors, and deputy mining supervisors:

SEC. 1. To visit from time to time leased lands where coal mining or prospecting operations are being conducted or contemplated; and to inspect and supervise such operations and plants connected therewith in order to prevent injury to life, wastage of coal, damage to or from wells drilled through the coal beds, and damage or threatened damage to property or to equipment from fire, oil, gas, or water, or otherwise, and in order to insure that operations are being conducted and that the welfare of the miners is being provided for in accordance with the act and these regulations.

SEC. 2. To ascertain and report the nature and amount of damages, if any, to the leased premises or to adjacent property belonging to the Government; to report the amount and value of any coal avoidably lost or wasted; and to make recommendations to the Secretary of the Interior on the action to be taken for insuring compliance with the provisions of the lease and these regulations.

SEC. 3. To examine the mines, mine maps, records, and books of the lessee and determine the amount of coal mined from Government coal land; to make a report to the Secretary of the Interior each quarter showing the production and the accrued royalties and rentals; to receive, record, and transmit payments of royalties and rentals;

and to place seals at the entrance of leased lands on orders of the Secretary when the lessee is delinquent in royalty and rental payments.

SEC. 4. To prescribe or approve the methods of protection from wells or prospect holes drilled for any purpose through the coal measures and mines on leased lands and on coal lands subject to lease, with a view to the prevention of leakage of oil, gas, water, or other fluid substances that might endanger the lives of employees; and to prescribe or approve methods of obtaining the ultimate extraction, so far as practicable, of coal in the vicinity of such wells.

SEC. 5. To specify in writing under what conditions a mine or panel or other section of a mine, from which the coal has or has not been extracted, may be abandoned by the lessee, and how a section of a mine so abandoned should be sealed off or otherwise separated from the other parts of the mine, and to cause a survey of operations on leased lands to be made at the lessee's expense upon failure of the lessee to provide accurate maps as required.

SEC. 6. If these operating regulations or the State mining laws are not being complied with, and in the opinion of the district mining supervisor or the deputy mining supervisor, the mine or the lives of workmen are in jeopardy, such supervisor may give notice in writing to stop operations on all or a part of the leased land and may apply Department of the Interior seals to the haulage tracks or across the entrance to the strip pit, mine, or section of the mine affected. Should any such notice or seal be violated, the district mining supervisor shall recommend the penalty to be imposed upon the lessee.

SEC. 7. The mining supervisor, the district mining supervisor, and the deputy mining supervisor may issue such orders and notices in writing as may be appropriate to insure compliance with these regulations, and may order the discontinuance or modification of any operation or method that is causing or likely to cause any endangerment of life or property or is in violation of the provisions of the lease or regulations: *Provided*, That such orders are not in conflict with the laws of the State in which the leased land is situated: *And further provided*, That if any such order or notice issued by the deputy or district mining supervisor does not contain a statement that immediate danger of loss of life or property is involved and if the lessee appeals therefrom within 10 days, execution of said order or notice may be delayed pending review by the mining supervisor and, on further appeal, pending review by the Secretary of the Interior.

DUTIES AND OBLIGATIONS OF LESSEE

SEC. 8. The lessee shall observe and carry out the terms of the act of February 25, 1920 (41 Stat. 437), as amended, of his lease, of these regulations, and of the orders and written notices of the mining su-

pervisor, district mining supervisor, or deputy mining supervisor issued in accordance with the regulations and terms of the lease that are not in conflict with the laws of the State in which the leased land is situated: *Provided*, That if any order or notice does not specify that immediate action must be taken for the protection of life or property, an appeal may be taken as provided in section 7 of these regulations.

Upon failure of the lessee to take appropriate action to protect the deposits from damage or threatened damage by fire, water, oil, gas, or subsidence, and upon failure of the lessee properly to protect the property upon abandonment or cancelation of the lease, the lessee shall be liable for the expense of labor and supplies used by the district mining supervisor or his associates for the protection of the property.

SEC. 9. (a) The lessee shall keep a correct record of coal produced in a manner that such records can readily be checked, and he shall report accurately, on mine-run basis, within 30 days after the expiration of the period covered by the report, all coal mined from the leased land during each calendar quarter and such other data as may be required on the form provided for quarterly reports; and on the anniversary of the lease he shall report the yearly production and such other data as may be required on the form provided for annual reports. Permittees shall report monthly and licensees quarterly, giving the amount of coal mined and the amount disposed of during the period covered by the report, a description of the work done, the cost of the work, the results of prospecting, and such other information as may be requested.

(b) The lessee shall cause an audit of his books and accounts pertaining to the leased land to be made annually within 30 days after the expiration of the lease year or at such times as directed by the district mining supervisor, to whom he shall furnish, free of cost, a copy of the said audit. The eligibility of the accountant making such audit is to be subject to approval by the Secretary of the Interior.

SEC. 10. The lessee shall report promptly to the district mining supervisor by telephone or telegraph the occurrence in or about the leased land of fatal accidents, serious outbursts of gas, explosions, inundations, fires, extensive squeezes, collapses of roof, or other serious conditions causing or threatening the loss of life or property.

SEC. 11. The lessee shall report promptly in writing to the district mining supervisor each accident that results in the loss of more than one shift for the injured person, giving the date of the accident, the name, age, and occupation of the injured person, the actual work being performed when the injury occurred, the cause and nature or result of the injury, the probable length of disability, and the name

and location of the mine, with outline sketches or maps when pertinent. Copies of reports to the State inspector or industrial commission and outline sketches or maps will fulfill the requirements of this section.

PERSONNEL AND THEIR DUTIES

SEC. 12. (a) Superintendents, foremen, assistant foremen, mine examiners, fire bosses, hoistmen, electricians, and foremen of rescue and first-aid work must be qualified for and experienced in the duties of their respective positions and must be certified by competent State authority, or, in the absence of State certification requirements, appointments to such positions shall be subject to the approval of the district mining supervisor, who shall require the highest qualifications in vogue in the mining region concerned for similar positions.

(b) In the absence of personnel qualified as mentioned in this section, the duties of such positions may be performed by others on written consent of the appropriate State official, or, should no State official have jurisdiction over mine officials, on written consent of the district mining supervisor.

SEC. 13. (a) The lessee shall appoint for any mine employing more than 5 men underground on any shift a qualified mine foreman, who shall visit and inspect from time to time all accessible parts of the mine, and who shall be in responsible charge of the mine underground.

(b) If 25 men or less are employed underground on any shift, the superintendent may serve also as mine foreman, provided he is qualified to do so under the applicable State regulations.

(c) If more than 75 men are employed underground on any shift, the lessee shall appoint at least one experienced assistant mine foreman, with qualifications and duties similar to those of foreman, and an additional assistant mine foreman for every additional 75 men or fractional part of that number.

SEC. 14. (a) The lessee shall appoint a sufficient number of fire bosses or mine examiners, certified by the State, to examine every underground working place and nearby open place within 3 hours prior to the entrance of any shift of miners, and to determine if every place is free from a dangerous quantity of flammable or noxious gas, if the air is properly coursed, and if the roof and other conditions are safe for the workmen, and they shall record the date of examination at each working place.

(b) The fire bosses or mine examiners shall also examine every accessible part of the mine each third day, omitting Sunday, make the determinations mentioned in paragraph *a*, and record the date of the examination at each place examined. Any place which has

been undercut by a machine or in which the coal or roof has been blasted or has fallen shall be examined by a fire boss or mine examiner and determined to be safe before workmen are permitted to reenter.

(c) For every group of 75 men or fraction thereof employed underground in any gassy mine at least 1 fire boss or mine examiner shall be appointed, who shall be subjected to a physical and optical examination at least once each calendar year.

SEC. 15. (a) The fire bosses or examiners shall fence and mark off all dangerous places to warn men and prevent their entrance into such places, shall list on a blackboard or its equivalent at the entrance to the mine or entrance to each section of the mine and places therein which have been marked off, and shall station themselves at the entrance to such a section or near the mouth of the mine to warn miners who normally would work in places found dangerous and prevent them from entering until the dangerous conditions have been remedied under the supervision of a duly accredited mine official and the place has been declared safe.

(b) The reports of the fire bosses or mine examiners shall be assembled and copied once a day, in ink or indelible pencil, in a record book kept in the office of the mine and signed each day by the fire bosses or examiners and by the mine foreman.

(c) The foreman or an assistant foreman, if duly qualified in accordance with State regulations and if his other duties permit, may also serve as fire boss or mine examiner.

SEC. 16. At a mine where electricity is used underground for generating power, the lessee shall appoint a man to be in charge of the electrical equipment who is fitted for his position by ability, training, and experience and is familiar with the hazards of mine gases and coal dust and with the operation and maintenance of the equipment in his charge.

SEC. 17. (a) Hoistmen shall be familiar with the operation of hoisting engines, able to read and write English, and not less than 18 years of age.

(b) Hoistmen who hoist or lower men must have a physical examination annually and present a certificate of health from a reputable physician.

WEIGHING OR MEASURING COAL

SEC. 18. (a) All coal mined shall be accurately weighed or measured, truly accounted for, and recorded by the lessee, including a record of all sales of coal and of coal disposed of otherwise. If the miners are paid either by weight or by measurement, a record of correct daily weights or biweekly measurements shall be posted or displayed in a conspicuous place. Test weights shall be kept at the scales, so that the accuracy of the scales can be tested at any time.

(b) The weighman or person appointed to weigh or measure the coal where the miners are paid upon the basis of his figures shall be required before entering upon his duties to subscribe to an affidavit, before a person duly authorized to administer oaths, that he will keep a true record of the coal so weighed or measured and credit each miner accordingly; such affidavit shall be posted at his place of duty.

(c) Nothing contained herein shall be construed to prevent the lessee from separately weighing and deducting the amount of bone coal or other impurities, loaded by a miner with the coal, from the weight of the coal accredited to the miner.

(d) If rock or bone is removed from the coal after weighing, an allowance for such waste material may be authorized by the mining supervisor, provided the cleaning is done with a minimum loss of coal.

(e) If deductions are allowed for impurities in the coal under section 18 (c) or (d), under no circumstances shall the royalty be based on less than the weight credited to the miners, plus that loaded by day labor, nor shall it be based on less than the shipping weight, plus coal stored, coal used on the premises, and coal otherwise accounted for.

(f) If a lessee records or reports less than the true weight of the coal mined, he shall be subject to a penalty, at the option of the Secretary, of double the amount of royalty on the shortage or the full value of the shortage. Repetition of the showing of a shortage in weight after warning shall be sufficient cause for cancellation of the lease.

GEOLOGIC AND BORE-HOLE REPORTS

SEC. 19. (a) The lessee shall submit detailed reports upon completion or suspension of any prospect bore hole, prospecting operation, or geologic investigation. The report on each bore hole shall give the location, altitude, and log, including the occurrences of water. In surface prospecting the location and occurrences of coal shall be shown on a map, and copies of geologic reports on the lands leased shall be furnished by the lessee.

(b) All bore holes made to prospect formations shall upon completion be fully and promptly filled with a mud fluid or cement or filled otherwise, as prescribed by the district mining supervisor. While holes are being drilled they shall be properly cased and cemented to prevent migration of oil, gas, or water to the coal-bearing beds, and after serving their purpose they shall be abandoned as prescribed for prospect holes.

APPROACHING OIL, GAS, OR WATER WELLS

SEC. 20. When mining operations approach wells or bore holes that may liberate oil, gas, water, or other fluid substances, the lessee shall present his plans for mining the coal in proximity to such holes to the mining supervisor and obtain his approval before proceeding with the work planned. The plans shall provide that the coal be extracted as completely as practicable with safety and in such manner that the well will not be damaged, and that precautions be taken against the sudden liberation of a body of oil, gas, water, or other fluid. The mine ventilation shall be so arranged that any gaseous substance liberated shall enter the return air current and not be circulated through the active workings of the mine. In approaching such holes, the instructions in section 66 shall be followed.

SURFACE STRUCTURES, THEIR LOCATION, CONSTRUCTION, AND FIRE PROTECTION

SEC. 21. A lessee employing more than 10 men underground shall not construct or maintain on the surface any structure of combustible material within 75 feet of any opening, nor permit such a structure to be connected to any noncombustible building within that distance except as follows:

(a) An open timber framework or headframe of timber may be constructed over a shaft, slope, drift, or tunnel. The posts and rafters of any such structure may be of wood if the covering or lining is made of fireproof material, but under no circumstances shall wood flooring be used except in tipples, trestles, and storage bins. Fire doors shall be erected at effective points where smoke or fire from outside sources may endanger men working underground.

(b) Flammable material shall not be stored or placed within 75 feet of any mine opening except while such material is being sent into or removed from the mine and except for a day's supply of oil for lubricating machinery in the surface structure.

(c) At mines in which more than 50 men are employed underground on any shift, the building or buildings containing the hoisting engine and power plant shall not have floors, ceilings, and side walls or roofs constructed of combustible material, but wood may be used for roof trusses, purlins, and rafters, and for side-wall studs or frames if covered on both sides with noncombustible material.

DEVELOPMENT PLANS

SEC. 22. After necessary prospecting has been done on any lease and before permanent operating shafts have been sunk or slopes, drifts, or tunnels driven, the lessee shall prepare and submit to the

district mining supervisor for approval a preliminary plan, together with vertical sections to indicate, so far as known, the position, dip, and thickness of each coal bed. The plan shall be on a scale of not more than 500 feet to the inch and shall show in outline the principal prospect and proposed entries, airways, shafts, and structures, including fan or fans, and the proposed method of underground development and ventilation, with a description thereof.

SEC. 23. The lessee shall develop and mine the coal in accordance with plans approved in advance, so far as natural conditions permit; and, if conditions necessitating radical changes are encountered, he shall immediately submit modified plans, accompanied by an explanation, to the district mining supervisor for approval.

MINING WHERE MORE THAN ONE BED OF COAL OCCURS

SEC. 24. (a) Where practicable, by reason of either commercial or mining conditions, the available coal in the upper beds shall be worked out before the coal in the lower beds is mined; otherwise, the workings in the upper coal bed shall be kept in advance of the workings in each lower bed. The decision as to practicability rests with the mining supervisor. Where more than one bed of coal is known to exist in the leased lands, the lessee shall not draw or remove the pillars in any lower bed before mining the available coal in each known upper bed of such thickness that it can be mined under the then existing commercial conditions, either alone or in combination with thicker beds. The mining supervisor shall decide whether or not the workings or conditions for subsequent mining in any or all of the upper beds will be seriously injured by the extraction of the pillars in the lower workings.

(b) Where mining operations are in progress in a bed that lies either below or above another bed in which mining has been or is being carried on, the lessee shall, if the room-and-pillars system is employed, superimpose the pillars in the respective beds. Modifications of this provision may be necessary in steeply dipping beds and may be approved by the mining supervisor where conditions make them advisable.

DEVELOPING THROUGH ADJOINING MINES

SEC. 25. A lessee may develop a mine on his leased tract from an adjoining mine not on the public domain, or from adjacent leased lands, under the following conditions:

(a) The mine that is not on the public domain shall conform to all sections in these regulations that relate to the safety of the mines and employees.

(b) The only connections between the mine not on public domain and the mine on public domain shall be the main haulageways, the ventilationways, and the escapeways. Substantial concrete frames and fireproof doors that may be closed in an emergency and opened from either side shall be installed in each such connection. Unnecessary connections through the boundary pillars shall not be made until both mines are about to be exhausted and abandoned. The district mining supervisor may waive such of these requirements when, in his judgment, such waiving does not affect adversely the safety of the employees or entail loss of coal.

(c) Free access for inspection of said connecting mine not on the public domain shall be given at all hours to the mining supervisor or other representative of the Secretary of the Interior.

SEC. 26. If a lessee operating on a lease through a mine not on public domain does not maintain the mine in accordance with the operating regulations, operations on the leased land may be ordered stopped or departmental seals applied by the district mining supervisor or deputy mining supervisor, and the operations on leased lands shall be stopped.

PROVISIONS FOR DISPOSAL OF WASTE

SEC. 27. (a) The lessee shall dispose of waste, slack, refuse, and water from a mine and waste and sludge of any washery in such a manner as not to cause private or public damage or inconvenience, be a nuisance, or obstruct any stream, right of way, or other means of transportation or travel.

(b) All waste containing practically no coal shall be deposited separately and apart from coal for which no immediate market exists and from waste containing coal in such quantity that it may be later separated from the waste by washing or other means.

(c) Royalty on slack coal accrues when the coal is mined and is due and payable on the next payment date thereafter.

SURVEYS AND MAPS

SEC. 28. (a) Accurate surveys of new workings shall be made at least every 6 months and a map prepared thereof on a scale of 50 feet, 100 feet, or 200 feet to the inch. The mine-office maps of the workings in each coal bed shall be extended to show the advancement of all the mine workings and all other changes of a permanent character that have taken place during the period between successive surveys. Before any mine or section of a mine is abandoned, closed, or becomes inaccessible, a survey of such mine or section shall be made and recorded on the map.

(b) In addition to the information required by the lease, maps shall bear the name of the mine, the name of the lessee, and the serial number assigned by the district land office, and shall show the true north or meridian, the public survey land lines with indication of corners found, the distance and direction from the mine opening to a land corner, the boundary barrier pillars, the scale to which the map is drawn, and an explanatory legend.

(c) The surface map shall show in outline the location of all structures or buildings and the surface location and depth of each bore hole, appropriately numbered. The map shall also show the altitude at the surface, the altitude and section of each coal bed penetrated by boring, and any other pertinent information, including the angle and direction of prospect drilling where not vertical.

(d) The mine map shall show at each face the date of extension and at each entry face the coal sections and altitude, also the location of all pillars and the parts of pillars not extracted in pillar work; the position of all fire walls, dams, main pumps, fire pipe lines, permanent ventilating stoppings, doors, overcasts, undercasts, and regulators; the direction of the ventilating current in the various parts of the mine at the time of making latest surveys; fire areas; known bodies of standing water either in or above the workings of the mine; areas containing flammable gas; areas affected by squeezes.

(e) Where the dip of the coal bed or beds exceeds 45° , profiles or vertical cross sections parallel with the approximate average direction of the dip and not more than 1,000 feet apart shall be made on the same scale as the mine maps, with marked reference points, and a vertical view of the mine workings shall be prepared on the same scale as the general mine map to show the mine workings in that bed on a vertical plane parallel with the average strike of the bed or beds, with appropriately marked reference points.

(f) Blueprints or reproductions in duplicate of the maps and drawings prescribed in the preceding subsections and such other maps as may be required shall be submitted to the district mining supervisor annually without his special request, or semiannually on request.

SEC. 29. (a). In the event of the failure of the lessee to furnish the maps required, the mining supervisor or district mining supervisor shall employ a competent mine surveyor to make a survey and maps of the mine, and the cost thereof shall be charged to and promptly paid by the lessee.

(b) If any map submitted by a lessee is believed to be incorrect, the district mining supervisor may cause a survey to be made, and if the survey shows the map submitted by the lessee to be substantially incorrect in whole or in part, the cost of making the survey and preparing the map shall be charged to and promptly paid by the lessee.

MINING BY STRIPPING

SEC. 30. (a) No strip pit will be permitted on the outcrop of any dipping coal bed until the workable coal at lower altitude in that bed and underlying beds has been extracted, unless there is free natural or artificial drainage from the pit that will prevent seepage underground down the dip.

(b) Accumulations of slack coal or combustible waste that may, if fired, endanger the coal deposit shall not be permitted at or near coal or carbonaceous material in place.

(c) Overhanging banks or ledges must be shot down promptly to eliminate danger to employees from falling rock or dirt.

(d) Upon completion or indefinite suspension of mining operations in all or any part of a strip pit, the face of the coal shall be covered with noncombustible material that will effectively prevent the coal bed from becoming ignited.

(e) The driving of underground working places from the face of a strip pit for the purpose of getting cheap coal is contrary to conservation principles and is prohibited.

MANWAYS AND EXITS

SEC. 31. (a) In every mine the lessee shall provide an escapeway or second means of egress to the surface, which, if a drift, slope, or tunnel exit, shall be separated at the surface from the first exit by not less than 50 feet of rock or coal in place; if either is a shaft or both are shafts, the exits shall be not less than 200 feet apart.

(b) During the course of development of a shaft mine not more than 10 men shall be employed underground on any shift until connections are made to the second exit.

(c) If the escapeway is a slope and more than 25° from the horizontal, steps or a stairway shall be provided. If the floor is slippery or wet, steps may be required where the dip is less than 25°.

SEC. 32. (a) In every shaft mine, unless escape is available by drift, tunnel, or slope, one shaft shall be equipped with hoist and cage suitable for hoisting or lowering men: *Provided*, That if less than 10 men are employed underground and the shafts are less than 50 feet in depth, a well-maintained ladder in each shaft will suffice as a means of entering and leaving the mine.

(b) Where the main shaft and escape shaft are less than 300 feet in depth, one shall be equipped for the hoisting and lowering of men and the other shall be equipped with a substantial stairway of approved design. The pitch of the flights shall not exceed 45°, the flights shall have suitable landings at each turn, and the hand rails and stairs shall be maintained in good order.

(c) The escape shaft and main shaft, if more than 300 feet in depth shall each be provided with an adequate hoist and cage suitable for hoisting and lowering men, an efficient signaling system, and a qualified hoistman who shall be available on appropriate signal. The hoisting equipment and cages in each of the two shafts shall have sufficient capacity, independently of each other, to hoist out of the mine all persons on any shift in 30 minutes and with due regard to safety. A stairway or emergency ladderway of approved design shall be provided in at least one of the shafts. If a ladderway is constructed, it shall be provided with landings not more than 20 feet vertically apart, and the pitch shall not exceed 80°.

SEC. 33. At each shaft landing there shall be a passageway at least 6 feet high and 4 feet wide, free of obstruction, that will enable persons to go from one side of the shaft to the other side without passing through any compartment of the shaft: *Provided*, That a shaft compartment may be used for a passageway if properly floored and roofed over by a bulkhead sufficiently strong to withstand the fall of heavy bodies.

SEC. 34. The roof and sides of every traveling road and working place shall be maintained in a safe condition, and no one shall be permitted, unless appointed for the purpose of exploring or repairing, to travel on or work in any traveling or working place which is not in safe condition.

SEC. 35. The shafts of all mines designed for the employment of more than 50 men, if the lining or facing thereof is combustible, shall be fireproofed within 6 months after completion by lining, guniting, or coating with cement or other noncombustible material. Such fireproofing shall be maintained over all combustible material, except guides, ladderways, and stairways, as long as said shafts form the principal means of egress.

SEC. 36. In every mine designed for the employment of more than 50 men underground on any shift, the roofs and walls of entries and passageways within 300 feet of the bottom of each shaft, if in coal or timbered, shall be fireproofed with a cement coating or the equivalent within 1 year after said entries and passageways have been driven, and such fireproofing shall be maintained in good condition so long as the shaft is used.

SEC. 37. The lessee shall arrange, so far as practicable, manways free from regular haulage for the passage of underground employees to and from their working places. Such manways shall be maintained in safe condition, and signs with arrows shall be provided showing direction toward the escapeways on each side of crossing or intersecting passages. The lessee shall require his employees to use the manways, so far as practicable, in going to and from their working places.

HOISTS, HOISTING EQUIPMENT, AND SHAFT LANDINGS

SEC. 38. (a) All hoisting equipment used in shafts and slopes shall be of ample capacity and of a standard design commercially recognized as safe and in accordance with State requirements.

(b) The drums or cable reels of hoists shall be provided with flanges that extend at least 2 inches radially beyond the last layer of rope or cable when fully coiled on the drum or reel.

(c) All hoists shall have sufficient power to hoist the loaded unbalanced cage or skip and shall be equipped with brakes adequate to stop and hold the fully loaded unbalanced cage or skip at any point in the shaft or slope.

SEC. 39. (a) A metal hoisting cable of recognized standard character shall be used for hoisting or lowering men. When newly installed in the shaft or slope, it shall have a safety factor of not less than 6 as rated by the manufacturer, based on the maximum load including the weight of the cable, or, if the hoistway is inclined, the calculated component of the weights parallel with the incline.

(b) No cable shall be used for hoisting and lowering men if on inspection it is found that the number of broken wires exceeds six in any single pitch length or lay of the rope, that the crowns of the strands are worn down to less than 65 per cent of their original diameter, or that a dangerous amount of corrosion or distortion exists: *Provided, however,* That when such broken wires are reduced by wear more than 30 per cent in cross section, the number of breaks in any lay of the rope shall not exceed three.

(c) Cages, skips, or cars used in hoisting or lowering men shall be connected to the hoisting cable or ring by standard babbitted or zinc-filled sockets or by clamps. The cable shall be resocketed or re-clamped at intervals not exceeding 4 months, and at least 4 feet of the cable shall be cut off from the end to be socketed or clamped, and clamping shall be so done that at least 80 per cent of the breaking strength of the cable shall be retained.

(d) Hoisting cable shall be firmly clamped to the drum or reel and at least two turns of the cable shall remain on the drum or reel at all times when the cable is extended to the lowest landing.

SEC. 40. In shafts and slopes where men are hoisted or lowered, there shall be at least 20 feet of hoistway clearance above the surface landings at which men enter or leave the cages or cars; and at mines in which more than 50 men are employed underground on any shift, overwinding and overspeeding preventers or equivalent devices, approved by the district mining supervisor, shall be connected with the hoists and so maintained as to prevent the cages from being overwound or from falling if overwound and to prevent overspeeding.

considering the character of the hoisting equipment and the depth of hoisting.

SEC. 41. (a) Cages for hoisting men shall have bonnets extending over the space on which the men stand, metal sides extending not less than 5 feet above the floor of the cage or of each deck of a multiple-deck cage, and gates or doors at least 4 feet high closing the entrances to the cage on each deck. Each deck of a cage used for hoisting men shall have overhead or side bars so arranged that every man on the cage may have an easy and secure handhold. Self-dumping cages shall be so designed that the platform cannot overturn in the shaft.

(b) Cages used for hoisting or lowering men shall be provided with safety catches capable of bringing the fully loaded cage to a stop within a distance of 10 feet in any part of the shaft or head frame should the cable or cable connection break.

(c) Cage rests or chairs shall be provided at all shaft landings regularly used in the hoisting or lowering of men unless their omission is authorized in writing by the district mining supervisor.

SEC. 42. (a) Gates 4 feet high or covers shall be used at the top or ground landings of vertical or inclined shafts, and the gates shall be kept closed except when the cage is at the landing and attended.

(b) The track at the surface landing of a shaft or slope shall have a derailing device which shall always be kept open except when a car is being taken from or placed on the cage at said landing, or when a car is entering the slope under control.

SEC. 43. Shafts when not in use for hoisting men and slopes or sumps that extend below the floor of a mine passage or excavation shall be adequately guarded to prevent men from falling therein.

SEC. 44. Buckets or cans used for shaft sinking shall be provided with self-locking safety hooks and, if the shaft is more than 200 feet in depth, with cross heads and guides. When rock is being dumped or material loaded or unloaded, the mouth of the shaft shall be covered by safety doors or the equivalent of a safe design and construction.

SEC. 45. Where men are employed in a mine or required to enter or depart from a mine between sunset and sunrise, sufficient light shall be maintained at the top landing of each shaft to enable them to see the landing. At each underground landing used for caging men, a light shall be maintained on each side of and within 10 feet of the shaft or slope whenever men are in the mine. Each underground landing, if not naturally lighted, shall be kept white with paint or whitewash.

SEC. 46. (a) The hoist shall be operated only when properly provided with brakes and indicators and when every person not on duty in the hoist room is excluded from the room, except visitors permitted by the lessee.

(b) The hoistman shall not hold conversation with anyone while his engine is in motion nor hoist or lower men at a speed greater than the rate posted in the engine room as a safe speed, and he shall bring the hoist to a dead stop at a landing before turning over the control to a relief hoistman.

(c) After any stoppage of hoisting for repairs or for any other purpose exceeding 2 hours in duration, a cage or other conveyance shall be run up or down the shaft at least once before hoisting or lowering men.

(d) No hoisting shall be done in any compartment of a shaft while repairs are being made in that compartment except such hoisting as may be necessary to make such repairs.

SEC. 47. (a) Competent representatives of the lessee shall make daily a general examination of all hoisting equipment and electrical and mechanical apparatus used for the hoisting or transportation of men in and about the mine, including skips, cages, guides, ropes, sheaves, hoists, motors, engines, and boilers; and once each week a more detailed examination shall be made. A memorandum of the condition found on examination shall be entered in a record book kept in the mine office, and any defective condition that may endanger the safety of the employees or others shall be remedied without delay.

(b) Any boiler used for generating steam shall be equipped with a safety valve, pressure gage, and water glass and shall be inspected semiannually by a competent boiler inspector.

(c) If an inspection discloses a defective condition or arrangement of any apparatus, appliance, or device, which endangers the safety of employees or others, such condition or arrangement shall be remedied without delay.

SIGNALS AND TELEPHONES

SEC. 48. A code of hoisting signals shall be kept posted in a manner easily read at the top of each hoisting shaft or slope, at each landing, and in the hoisting-engine house. Said code shall be in accordance with the requirements of the mining laws of the State in which the mine is situated, and if not otherwise specified, the following code of signals shall be used: (a) when the engine is at rest, one signal, hoist; (b) when the engine is in motion, one signal, stop; (c) when the engine is at rest, two signals, lower; (d) when the engine is at rest, three signals, men ready to get on the cage or cars to ascend; when this is followed by return signal from the hoistman, the men get on the cage or into cars and then the proper signal shall be given. Other signals to suit the local conditions may be added by the lessee.

SEC. 49. (a) In mines where 20 or more men are employed underground on any shift, there shall be at least two effective methods of signaling between the engine room and each of the shaft or slope landings, one of which shall be a telephone or speaking tube. The signals shall be so arranged that the cager or person in charge of each landing can signal directly to the hoistman and the hoistman can also signal directly to each of the landings. If the shaft is more than 50 feet deep, calling or rapping on metal shall not be accepted as a substitute method of signaling.

(b) Electric signal circuits shall not use current of more than 30 volts.

SEC. 50 (a) The lessee shall provide and maintain at each mine where more than 50 men are employed underground on any shift, or where 20 or more men are employed more than 1,500 feet from the surface, a telephone system connecting with the hoisting engine room, the ground landing of the shaft or slope or the principal mine exit of a drift mine, and such other points on the surface as may be advisable for the safety of the employees, and telephones shall be placed on each shaft or slope landing in use and at the inside siding of each of the main haulage roads. The underground telephones shall be so placed that no 20 men shall be more than 1,000 feet from the nearest telephone station. A code of calls shall be kept at each telephone.

(b) The telephones inside a mine shall be of standard underground type. The telephone wires shall be carefully installed, and should any power lines be on the entry, the telephone wires shall be installed along the side of the entry opposite the power lines. Only permissible telephones shall be used in gassy mines for the installation of new telephones and the replacement of existing telephones.

PILLARS AND CROSSCUTS

SEC. 51. (a) The lessee shall separate intake and return airways and any adjacent parallel entries or rooms by not less than 50 feet of coal in place, except when a thinner pillar is permitted by written consent of the district mining supervisor, who may also in his discretion require a greater thickness than 50 feet.

(b) The distance apart of crosscuts or break-throughs between parallel entries or rooms shall be not greater than the maximum allowed by the regulations of the State in which the leased land is situated and shall be not more than 100 feet except in entries or tunnels where special arrangements are made to carry an adequate ventilating current to the face of each entry or tunnel, the adequacy of such arrangements to be approved by the district mining supervisor. Rooms shall not be turned ahead of the last crosscut nearest

the face, nor shall branch entries be started ahead of the last crosscut, except when approved by the district mining supervisor to obtain a circuit of air, a second means of egress, or a space for the laying of switches.

(c) A face shall not be driven more than 30 feet beyond the inby rib of the crosscut until said crosscut is connected to an adjoining airway, and if, in the opinion of the district mining supervisor, adequate ventilation does not reach the face, such changes as he may direct shall be made in the ventilation.

(d) Room necks shall not be wider than 9 feet for the first 18 feet, unless the lessee is given permission in writing by the district mining supervisor to make the room necks wider and shorter.

(e) The coal in chain pillars and room stumps and panel boundary pillars provided under paragraphs *b*, *c*, and *d* of this section shall be left standing until in the proper course of mining operations the time shall arrive for their removal, after or during the extraction of the room pillars in the adjacent workings.

(f) Before abandoning any room, entry, slope, or drift, a crosscut shall be driven and connection made with the adjoining room, entry, slope, or drift at the face thereof, in order to give a boundary airway around workings.

SEC. 52. (a) Where the room and pillar or other system of mining requires advance workings in the solid coal, including entries, rooms, and crosscuts or break-throughs, the lessee, except with the written consent of the mining supervisor, shall not extract by such advance workings or first mining more than 60 percent of the total area of the coal bed within any particular tract or panel entered by said advance workings where the cover is less than 500 feet; nor more than 50 percent where the cover is more than 500 feet and less than 1,000 feet; nor more than 40 percent where the cover is more than 1,000 feet and less than 1,500 feet; nor more than 30 percent where the cover is more than 1,500 feet and less than 2,000 feet; nor more than 20 percent where the cover is more than 2,000 feet. A greater percentage may be required to be left where unfavorable roof or floor conditions exist or where the coal bed is or may be affected by mining elsewhere.

(b) The size of pillars shall be in proportion to the thickness of the coal bed, and all pillars shall be systematically mined and removed as rapidly as proper mining will permit.

(c) The percentages of the total area mined and unmined in a tract on advance mining shall be figured on the basis of the area and not on the basis of the calculated tonnage mined. The total area of the tract under consideration is to be comprised within lines bounding the faces of advance workings within the tract, excluding the area from which pillars have been systematically removed.

SEC. 53. (a) A pillar proportionate in size to the depth below the surface and the thickness of coal being excavated shall be left in each coal bed for the support of each shaft, main slope, or egress.

(b) Shaft pillars shall be not less in radius than one-half the thickness of cover over the pillar. A pillar, not less in width at any point than one-fourth the thickness of cover above it, shall be left on each side of the center line of each main slope or entry. Pillars around shafts shall be not less than 100 feet in radius, and those on each side of slopes shall not be less than 100 feet in width except by written consent of the district mining supervisor.

(c) Shaft and slope landings, sidings, and entries for haulage, ventilation, manways, and shops may be excavated in a pillar provided the area of such places does not exceed 15 percent of the area of the pillar and that no rooms or other openings are made therein for the sole purpose of obtaining quick production.

SEC. 54. (a) The lessee shall not, without the prior consent of the district mining supervisor, mine any coal, drive any underground workings, or drill any lateral bore holes within 50 feet of any of the outside boundary lines of the leased lands, nor within any greater distance of said boundary lines than the district mining supervisor may prescribe. Payment not exceeding \$1 a ton or the full value of the coal mined may be required for coal mined within such distances of the boundary without the written consent of the district mining supervisor.

(b) If the coal on public domain beyond any barrier pillar has been worked out and the water level beyond the pillar is below the lessee's adjacent operations, the lessee shall, on the written demand of the mining supervisor, mine out and remove all available coal in such barrier, both in the lands covered by the lease and in the adjoining premises, if it can be mined without hardship to the lessee.

(c) If the coal-mining rights in adjoining premises are privately owned, an agreement may be made with the owner for the extraction of the coal in the boundary pillars.

(d) Narrow strips of coal between leased lands and the outcrop on public lands and small blocks of coal adjacent to leased lands that would otherwise be isolated or lost may be mined under the provisions specified in paragraphs *b* and *c* of this section.

VENTILATING FANS AND AIR DISTRIBUTION

SEC. 55. (a) Fans shall be installed if any part of the mine is 500 feet from an opening. All parts of the fan housing, including the power unit and the fan drift to the mine opening, shall be constructed of noncombustible material.

(b) The main fan of a mine shall be situated on the surface at an offset distance of not less than 25 feet from the projection of the nearest side of the opening of the mine to the fan wheel, and shall be protected with explosion-relief doors having the full area of the air shaft or airway and in direct line therewith.

(c) Fans must be so arranged that the ventilating current can be reversed quickly, and they shall not be stopped or changed in speed, or the air current reversed, except by order of the official in charge of the underground operations.

(d) The main fan or fans used to ventilate a gassy mine, if electrically driven, shall be equipped with permissible motors and provided with auxiliary power and suitable belt or driving connections that can be quickly connected and operated should the electric power fail.

(e) Each fan used to ventilate a mine in which 25 or more men are employed underground on any shift shall be equipped with a recording instrument by which the ventilation pressure is continuously registered. The registration chart for each day, with the date thereon, shall be kept in the office of the mine for at least 1 year. Each fan shall also be equipped with an automatic signal to give warning of slowing down and stopping. These requirements may be waived only by written consent of the district mining supervisor.

(f) While a mine is being opened and less than 15 men are employed underground on any shift, a temporary fan may be set up, on the written approval of the district or deputy mining supervisor, before the permanent fan is installed.

(g) A mine on leased land may be ventilated by means of a fan not on the leased land if the fan is installed in compliance with paragraph b of this section or if it has been previously installed in conformity with State laws.

(h) If a fan used in ventilating a gassy mine has accidentally stopped or has been shut down or the ventilation otherwise interrupted, all the men in the area affected shall be warned immediately and withdrawn until the fire boss has made an examination and declared all places in that area to be free from standing gas. If such a fan has stopped for a period of more than 15 minutes in a gassy mine or more than 4 hours in a nongassy mine, no men other than mine examiners shall be permitted to enter the mine until the fan has been in operation for at least 2 hours and the fire bosses or mine examiners have thereafter inspected the mine and reported to the mine foremen that they have examined all the places and found them safe for any or all of the men to enter.

SEC. 56. Booster and auxiliary fans may be used only with the written permission of the district mining supervisor, who may permit their use only under the following conditions:

(a) Use of a "booster" fan may be permitted if the coal ribs are adequately protected against fire and no flammable material is within 10 feet of the fan and motor, and if the fan is equipped with an automatic starter and timing device that will prevent it from starting after being stopped for a period considered sufficient to permit an accumulation of gas, and with a recording device that shows the continuity of operation.

(b) Use of an auxiliary fan may be permitted if it is situated in an intake air current and at least 16 feet out by the last open crosscut or entrance to the place ventilated and if the motor and switch are permissible: *Provided*, That in gassy mines an experienced gas inspector or fire boss shall be in attendance in the vicinity of the fan at all times while the fan is running and shall make hourly inspections to determine if methane in dangerous quantities, as defined in section 60, is passing the fan, and if the fan is oiled and running properly: *And further provided*, That at all times the ventilating current shall be so directed and of sufficient velocity to keep the working places clear of gas. Auxiliary fans shall not be used for the purpose of moving bodies of gas.

SEC. 57. A booster fan shall not be operated where more than 10 per cent of the air is recirculated by the fan; and an auxiliary fan shall not be operated if it uses more than 40 per cent of the passing air current.

SEC. 58. The lessee shall provide a ventilating current of not less than 100 cubic feet of air a minute for each person employed underground on any shift and 500 cubic feet a minute for each mule or horse or such larger amounts as may be required by the regulations of the State in which the leased land is located; and said ventilating current shall be measured for the number of men and mules served by each split of air at the entry, crosscut, or break-through nearest the face. Not more than 75 men shall be employed on any split of air current unless written permission to employ a larger number temporarily is given by the district mining supervisor.

SEC. 59. The quantity of air in the main current and in the last open crosscut on every split shall be measured with an anemometer or approved equivalent at least once every week by the mine foreman or fire bosses, and the measurements shall be entered with ink or indelible pencil in a record book kept at the mine.

SEC. 60. A working place, entry, or passageway shall not be deemed normally in a fit condition for the presence of men if the air therein, as determined by approved methane detectors, chemical analysis, or a safety lamp, contains on a moisture-free basis any carbon monoxide or more than 2 per cent of methane at the working place or 0.75 per cent in the general body of the air or less than 19.5 per cent of

oxygen. Upon finding the air in unfit condition in any working place, entry, or passageway, or receiving notification of such finding, the lessee shall immediately withdraw the workmen from the area until the quality of the air therein has been improved sufficiently to meet the foregoing requirements.

SEC. 61. (a) If, in a mine declared to be gassy, a gas cap has not been detected during a period of 6 months and 2 percent of methane has not been found with a methane detector, and flammable gas in excess of 0.10 percent has not been detected in any return airway, the district mining supervisor, at the written request of the lessee, may make a series of tests and, if he finds the mine to be not "gassy" as hereinbefore defined and no more hazardous than the nongassy mines in the region, he may rate the mine as nongassy and so notify the lessee.

(b) From the time any mine is first declared to be gassy until declared by the district mining supervisor to be nongassy according to these regulations, unless it is rated nongassy by the State mine-inspection department, the lessee shall not permit any portable lights to be used in the mine except "permissible" safety lamps, either flame or electric, approved by the United States Bureau of Mines.

SEC. 62. (a) If at any time in any place in a mine a gas cap is detected on a flame safety lamp, or 2 percent or more of gas is detected by other means, the electric current shall be cut off from that place and shall not be switched on again until the place has been examined and found safe or has been cleared of gas. Telephones, signal wires, and open motors are potential sources of igniting flammable gases.

(b) The moving of bodies of flammable or noxious gases during the working period is prohibited, and on the return of a body of gas all men shall be withdrawn until the place has been cleared by approved methods of ventilation.

SEC. 63. If a mine has been determined to be gassy, the lessee shall not permit men to enter carrying open lamps, open lights, matches, smoking material, tobacco, cigarettes, or cigars, and permissible safety lamps shall be furnished by the lessee.

SEC. 64. If the extraction of any part of the coal on a lease requires main slopes, levels, or entryways for ventilation and escapeways more than 4,000 feet in length beyond the nearest air shaft or place of egress, the entries and airways extending to such section or area shall be not less than four in number: *Provided*, That where only two passageways are driven out by the 4,000-foot section or area, a pillar shall be left of sufficient width to permit the driving of the two additional passageways. Separated pairs of parallel entries entering such area, properly maintained, will fulfill the fore-

going requirements; and if coal on leased lands is to be mined from a mine already existing either on public domain or on private land and in the opinion of the district mining supervisor the ventilation passageways and escapeways are adequate, said requirements may be waived.

SEC. 65. (a) Crosscuts or break-throughs between main haulage entries which are no longer needed for ventilation shall be closed with stoppings made of incombustible material and sealed as air-tight as possible.

(b) Overcasts and undercasts shall be of fireproof construction, preferably of the same cross-sectional area as that of the entry, with a maximum area requirement of 100 square feet.

(c) No doors shall be permitted on main haulage roads where it is practicable to eliminate them. Where doors are necessary on main haulage roads, they shall be self-closing and placed in pairs with an air lock of sufficient length between them so that two doors are never open at the same time. All permanent doors set between the main intake and return airways shall be self-closing and substantially built.

(d) Line brattices shall be used to conduct the ventilating current from the last crosscut in sufficient quantity to sweep the face and remove the gas from working faces. Brattice cloth may be employed for temporary closing of openings until a more satisfactory stopping can be placed.

APPROACHING ABANDONED WORKINGS AND SEALING ABANDONED AREAS

SEC. 66. In any working place within 100 feet of supposedly dangerous proximity to an abandoned mine or an abandoned section of a mine not known to be free of dangerous quantities of flammable or noxious gases or water, at least two drill holes shall be maintained not less than 20 feet in advance of the face. Such working place shall not be more than 10 feet wide. On each side thereof drill holes not more than 8 feet apart shall be drilled to a depth of 20 feet at an angle of 45° with the line of the working place. In addition to said drill holes, brattice shall be carried within 12 feet of the face at all times. Gas from an abandoned mine or any abandoned part of a mine may be tapped only when all employees not engaged at such work are out of the mine, and such tapping shall be done under the immediate instructions and directions of the mine foreman by workmen equipped with permissible safety lamps.

SEC. 67. All worked out area or areas abandoned permanently or temporarily that cannot be so ventilated as to prevent the accumulation of explosive and noxious gases or that cannot be inspected daily by duly authorized mine officials, and all unused openings into adja-

cent mines shall be sealed off by fireproof stoppings constructed of strong concrete or masonry of solid, substantial character built to withstand a pressure of 50 pounds to the square inch on each side. If well constructed with good clean sand and gravel and hitched into the floor and side walls, the thickness should be not less than 1 inch for each foot of maximum span; a minimum thickness of 12 inches is required. When workings are sealed, a pipe with locked valve shall be so placed as to extend through the stopping, for the purpose of testing the gases behind the stopping, such tests to be made only by the foremen or mine examiners.

ELECTRICAL EQUIPMENT, ITS INSTALLATION AND MAINTENANCE

SEC. 68. (a) Where the difference of potential between any two points of an electrical circuit does not exceed 300 volts, the current shall be deemed low voltage.

(b) Where said difference of potential exceeds 300 volts and does not exceed 500 volts, the current shall be deemed medium voltage.

(c) Where said difference of potential exceeds 500 volts, the current shall be deemed high voltage.

SEC. 69. (a) High-voltage current may be used underground only for the transmission to and the operation of transformers, stationary motors, or other apparatus in which the whole of the high-voltage winding is stationary.

(b) All high-voltage power lines installed underground shall be in the form of approved insulated, lead-covered cables, armored or otherwise effectively protected against abrasion, the armor to be electrically continuous throughout and effectively grounded. Such armored cable may be placed underground or supported on the rib along the roof. High-voltage power lines shall not be installed in the main haulage roads.

SEC. 70. Only low-voltage current shall be used on locomotives, portable pumps, coal-cutting machinery, and other portable electrical machinery in or about working places that are near the face of the mine and on roadways traveled by men.

SEC. 71. (a) All underground electrical power cables and wires shall be supported by efficient insulators unless provided with grounded metallic covering or as specified in section 69 (b). Overhead cables or wires on the traveling side of entries or that men pass under, if less than 6½ feet above the rail or 7 feet above the floor where there are no tracks, shall have troughs or sideboard guards, or shall be placed in channels in the roof. Guards, if used, shall extend 2 inches below the sag between the supports and be so arranged that a man's head or cap will not come into contact with the cable or wire.

Power wires along the rib in traveling ways shall be fenced or otherwise protected.

(b) All trolley wires shall be placed at least 6 inches outside of the rail of the track and, wherever possible, on the opposite side of the passageway from that used by men for traveling on foot and on the side opposite the room necks; and the trolley wire shall be protected by troughs or sideboard guards as specified above, if less than 6½ feet above the rail and on the same side of the entry or passageway used for travel or where men pass under it. Motor roads on which men do not walk but travel in cars are not considered traveling ways within the meaning of this section.

(c) When insulation is removed from wires to make connections, the wires must be reinsulated as soon as the connection is completed.

SEC. 72. Tracks used as electrical conductors shall be effectively bonded at all rail joints, cross-bonded at intervals of not less than 300 feet, and effectively cross-bonded at all switches.

SEC. 73. (a) All underground electric stations shall be fireproofed, and at least one fire extinguisher of a kind approved by the district mining supervisor shall be kept at each station for use in the event of a fire in the electric apparatus. The transformer stations shall be so constructed that oil cannot escape therefrom and so equipped that the openings will automatically close in the event of fire.

(b) Insulated platforms or mats shall be placed in front of switches, motor starters, and all metallic frames, casings, and coverings of stationary equipment. The metallic frames or casings or coverings of all stationary electrical equipment and power lines shall be effectively grounded.

(c) Where high voltage is used, fixed warning signs shall be conspicuously posted, and the color of the insulation used on high-voltage wires in electric stations at transformers and switches shall be different from that used on the medium- or low-voltage wires. Yellow is suggested.

SEC. 74. (a) No electric drills and pumps; or electric undercutting, shearing, and loading machines; or other electric machines; or electric switches and connections shall be used in a gassy mine or a gassy section of a mine unless approved by the United States Bureau of Mines as permissible.

(b) Where permissible electric cutting machines and drills are used in a gassy mine, the lessee shall require a fire boss or mine examiner to make tests for flammable gas within half an hour preceding their use and every half hour during their use.

SEC. 75. In gassy mines electric-lighting circuits may be used only at the foot of the intake shafts and in the intaking main roads in which the air current contains not more than one-quarter of 1 percent of flammable gas.

SEC. 76. (a) In every mine in which electric cutting machines or other portable electric machines are used, the portable cables shall be connected to the power line by plug and plug receptacles or interlocking safety switches accessible to the working places where the machines are used, and within 500 feet of the point of each installation of a pump or auxiliary fan.

(b) Cut-out switches in the trolley lines and lighting circuits shall be placed at the mouth of each branch entry and elsewhere at distances not exceeding 2,000 feet.

(c) Electric current shall be cut off by means of cut-out switches from sections of the mine where men are not working and wires permanently disused shall be disconnected from the source of current.

INTERNAL-COMBUSTION ENGINES

SEC. 77. Nonpermissible internal-combustion locomotives, engines, pumps, hoists, and other such machines shall not be used in a mine on leased lands without the written consent of and under conditions imposed in writing by the district mining supervisor. No gasoline or internal-combustion engine shall be used in a mine not continuously ventilated by a fan; nor shall such equipment, unless approved as permissible, be used where the ventilating current passes over the engine into any working place. Gasoline or other highly flammable fuel used in such equipment when taken into a mine must be in tight containers to replace the empty containers of the respective engine, and in no event shall such flammable liquid be poured from one container into another in a mine.

HAULAGEWAYS

SEC. 78. Every mine locomotive shall be provided with an efficient headlight and a gong or bell, and the front end of every trip of cars in transit shall be provided with a light of no less intensity than that of lights used by miners. A red light shall be displayed on the rear end of every trip in transit except on the rope end of a trip while being lowered on a slope.

SEC. 79. In any mine which is termed gassy or in which more than one-fourth of 1 percent of flammable gas is found in the moving air current, nonpermissible locomotives may be used only in entries or passageways ventilated by intake air, and for hauling coal from the face of the back or parallel entry.

SEC. 80. (a) In any mine in which more than 10 men are employed underground on any shift, all haulageways used for the travel of men, unless a clearance of 4 feet or more exists on one side and is kept free from debris, shall be provided with shelter holes on the

side of the roadway opposite the trolley and power lines, at intervals of not more than 100 feet. The shelter holes shall be at least 4 feet wide, 4 feet deep, and 6 feet high unless the entry, tunnel, or slope is of less height, and then they shall be on the same level and as high as the roadway, and they shall be kept whitewashed and free from debris. Crosscuts and room necks may be used as shelter holes if on the side used for traveling.

(b) On haulage roads other than slopes, not used as traveling ways, shelter holes will not be required if the clearance between the mine and the rib of the entry is at least 3 feet.

SEC. 81. (a) Where men are hauled on slopes and inclines, safety catches or a special man car providing equivalent safety shall be installed if practicable; otherwise a safety hitching rope or chain of ample strength shall be employed, extending from the rear car to the main hoisting rope. All safety attachments shall be inspected before the trip is permitted to be operated.

(b) Derails or stopping blocks shall be placed in dip entries and rooms as a protection against runaway cars injuring men working at the face, and all cars must be safely blocked while being loaded or standing on a grade.

(c) Frogs, switch points, and guard rails shall be properly blocked and switch levers so installed as to prevent men from tripping over them.

STORAGE, TRANSPORTATION, DISTRIBUTION, AND USE OF EXPLOSIVES

SEC. 82. (a) All storage magazines for explosives shall be constructed and maintained in accordance with the published specifications of the United States Bureau of Mines in effect at the time of issuance of the lease and shall be in charge of a competent person or persons designated by the lessee or his agent and kept securely locked except when an authorized person is on duty there.

(b) Magazines shall be situated at a distance from active or used mine openings, buildings, dwellings, and places where persons congregate, proportionate to the maximum quantity of explosives to be stored therein, as specified in the American table of distances, unless natural barriers justify modification of such distances and approval of such modification is given by the district mining supervisor.

(c) A suitable underground chamber with wood lining and flooring, so constructed and maintained that no nails are exposed, may, with the written approval of the mining supervisor, be used in place of a surface magazine if such underground chamber is adequately ventilated and has sufficient cover, surrounding pillars, and strong bulkheads to prevent a dislodgement should an explosion occur that would endanger life, the mine, or any building or dwelling. The surface

entrance to such a magazine and the ventilating ducts shall be guarded by a fence, gates, and appropriate warning signs. Under no circumstances shall the magazine have any connection with any part of the mine in which men work. Where the entrance to the magazine is a drift or slope that points toward any active or used mine opening or toward any building or highway within the distance specified in the table of distances for the quantity of explosives stored, an earth barricade shall be erected opposite and as high as the entrance.

(*d*) All explosives except those for immediate use shall be kept in a magazine. Detonators and blasting caps shall not be stored with other explosives but kept in separate magazines.

(*e*) Thawing of explosives, when necessary, shall be done in a magazine at least 300 feet from the storage magazine, mine openings, or structures. No explosive of any kind shall be thawed, kept, or stored in dwellings or buildings other than magazines.

SEC. 83. If temporary storage of explosives in a mine is necessary, they shall be stored in a suitable magazine made in the solid coal or rock, at least 100 feet from any shaft or main slope. The magazine shall be provided with a strong door kept securely locked except when entered by authorized persons. Not more than 200 pounds of explosives shall be placed in any such magazine, and before each supply of explosives is placed in the magazine, the magazine shall be cleaned. No more than a 24 hours' supply of explosives, including any surplus remaining from the previous day, shall be stored underground.

SEC. 84. In mines where the miners charge their own blasting holes, not more than one day's supply of explosives may be in possession of any miner, or of two or more miners working in the same place.

SEC. 85. (*a*) The lessee shall require the miner, or miners working in the same working place, to keep explosives in portable, tight wooden boxes, each box having a lid that laps over the sides and is strongly hinged or has battens that engage under a strip securely fastened at the back edge of the box. Battens shall be placed over all cracks in the boxes to protect the explosives from sparks, flame, and water. Fuse and cartridge paper may be stored with the explosives, but not detonators or blasting caps, tools, pieces of metal, matches, or oily material.

(*b*) The powder box shall be placed in a crosscut or recess at a sufficient distance from the working face to prevent its being struck by flying pieces of coal or rock or being ignited by blown-out shots or electric cables.

SEC. 86. (*a*) A proper hard-leather or fiber container shall be furnished to shot firers and cap distributors, or to miners who carry blasting caps or detonators. The caps and detonators shall be taken into the mine in a separate container not used for other explosives.

(b) Where miners are permitted to charge their drill holes, the caps or detonators shall be kept in moisture-proof receptacles and placed in a hole in the rib or in a box at least 10 feet from any point at which other explosives are kept and where no danger exists of their being struck by flying missiles from blasting or from a fall of roof.

SEC. 87. Explosives shall be issued to miners only by authorized persons, and, if they are distributed underground, distribution shall be made as soon as they are taken into the mine. No smoking shall be permitted in the vicinity of explosives either in storage or in transportation.

SEC. 88. Where electricity is used as a source of power and the power circuit is not completely cut off, explosives shall be transported into a mine only in a closed powder car or box constructed of electrically nonconducting material, with no bolts or nails exposed on the inside; and no person other than explosives distributors and men necessary to operate the trip shall ride on a trip carrying explosives in bulk.

SEC. 89. (a) Only permissible explosives shall be used in a mine that is termed gassy under these regulations and due regard shall be given to the requirements for permissibility.

(b) In gassy mines a shot shall be fired only after tests with a permissible safety lamp or an equivalent permissible detector have determined the absence of a gas cap or the presence of less than 1 percent of flammable gas at or near the working place and an inspection has shown that no dry flammable coal dust has accumulated at or near the place of blasting.

SEC. 90. Black powder or other nonpermissible explosives may be used for blasting in a nongassy mine, providing all shots are fired by a shot firer after all men except the shot firers are out of the mine or when this requirement is modified in writing by the district mining supervisor.

SEC. 91. The depth of holes drilled for blasting coal shall not exceed the thickness of the coal bed, or, if the coal is undercut or sheared, the depth of the hole shall be at least 6 inches less than the depth of the undercutting or shear.

SEC. 92. All shots that are charged with an explosive shall be stemmed with noncombustible material and tamped with a copper tip or wooden bar, and such tamped material to extend to the outer end of the hole.

SEC. 93. (a) If black powder or other bulk explosives are used, the necessary charge or charges shall be made up at or near the box where the explosives are kept.

(b) No open light shall be permitted within 5 feet of any powder box while explosives are being obtained therefrom or during the process of filling or preparing the charge or cartridges.

PREVENTION OF COAL-DUST EXPLOSIONS

SEC. 94. To lessen the danger of coal-dust explosions in a mine that has been determined by the district mining supervisor to produce dust of an explosive character, unless the floor, roof, and sides of the roads are naturally wet, the mine shall be rock-dusted or the dust kept wet, as follows:

(a) If the screening and loading of coal on the surface produces much dust and there is a downcast shaft within 100 feet of the screens and loading chutes, the top of the downcast shaft shall be surrounded by iron sheeting or other noncombustible material for a height up to the level of the upper landing.

(b) Mine cars shall be constructed and maintained as compactly as possible and loaded in a way to prevent coal or coal dust from escaping from them while in transit. Tight-end cars and rotary dumps shall be used where practicable; otherwise, tight-fitting doors or gates shall be employed.

(c) Water shall be used on the cutter bar of mining machines and the cuttings wet down before shooting and the coal before loading when required by the district mining supervisor.

(d) Systematic and regular application of water, rock, or shale dust shall be made in all parts of the mine to render and maintain the coal dust in a nonflammable condition. If water is used, the dust must be made wet or washed from the timbers and ribs, and the floor dust made sufficiently wet to be molded in the hand. If the rock-dusting method is used, wet or dry, the dust and loose coal shall be systematically cleaned from the ribs, timber, and floor, and sufficient rock, shale, or other dust shall be distributed systematically along the entries, slopes, tunnels, and escapeways so that the mixture will not be explosive when brought up in suspension in the air; to this end the ash content of the mixture shall be determined by the lessee from time to time by sampling and analysis; the ash content plus the moisture shall not be less than 75 percent, and the rock dusting must be renewed in any portion of the mine where a deficiency is indicated.

(e) All rock or shale dust for general application and for rock-dust barriers shall pass through a 20-mesh screen, and not less than 50 percent of it through a 200-mesh screen. It shall contain a minimum of free silica and combustible matter.

(f) Before the track is removed from the air courses, abandoned rooms, and other places, all slack and coal dust must be cleaned

up and loaded out. This does not apply to rock and bone gobbled in rooms and other places that have been adequately rock-dusted.

FIRE PROTECTION

SEC. 95. (a) The lessee shall not light, keep, maintain, or permit any open fire or unattended open light or stove fire in any strip pit or along the outcrop of any coal bed or in any mine or near mine openings.

(b) Failure to take prompt and vigorous steps for the removal of a fire hazard or the extinguishment of any fire in the coal bed or outcrop shall be sufficient ground for the entry of the lessor to remedy said condition at the lessee's expense.

SEC. 96. (a) Hay, straw, or similar highly flammable material shall be taken into a mine only in compressed bales and in a closed car or covered with tarpaulin and shall not be handled in the presence of open lights.

(b) Hay sent into a mine shall be promptly delivered to the stable and stored in a locked compartment with fireproof lining and door. The amount of hay stored underground at any time shall not exceed the amount normally consumed in 48 hours, except that a sufficient supply may be stored to last over public holidays that occur successively.

(c) All underground stables shall be independently ventilated, and the air from such stables shall be conducted to the return airway and not carried into other parts of the mine. No open light shall be permitted in any stable in any mine.

SEC. 97. (a) Oil stored underground shall be kept in a recess or chamber which contains no exposed flammable material, such as timber or coal, and which has a cement floor; such chamber shall be provided with a self-closing iron or steel door set in an iron, concrete, or masonry wall, and shall not be situated within 100 feet of any shaft.

(b) Buckets or drip pans shall be used for catching the drip or leakage from oil barrels or tanks. A supply of sand for use if a fire should occur shall be kept in a suitable container placed outside of but near the chamber in which the oil is stored.

SEC. 98. Where more than 5 men are employed underground on any shift, a supply of water shall be available on the surface for fighting fires in and about the mine. If this supply of water is not furnished through pipes, hydrants, and hose, it shall be kept in barrels of about 50-gallon capacity, painted red, with covers, and a 2-gallon bucket or can, painted red and marked "Do not use except for fighting fire," shall be hung or placed immediately adjacent to each barrel. These barrels shall be maintained full of water. If

pipe lines and hose have not been installed in a mine, barrels shall be placed near the bottom of each shaft or slope and at principal junction points not exceeding 1,000 feet apart on a main haulage road. Provision shall be made to keep the water in barrels or pipe lines from freezing. Chemical fire extinguishers having a capacity of not less than 2 gallons may be substituted for water in barrels.

SEC. 99. (a) Where more than 50 men are employed underground on any shift and a sufficient water supply is obtainable within 1 mile of a mine shaft or slope, the district mining supervisor may require, if the conditions at the mine in his judgment make it advisable, the installation of a pumping system, tank or reservoir, pipe lines, fire hydrants and hose, and a pipe line into the mine, not less than 2 inches in diameter and extending at least 500 feet on each side of the main hoisting shaft or slope to the first working levels, with suitable attachments for hose not more than 100 feet apart and with at least three 50-foot lengths of 1½-inch hose with standard pipe-thread connections and nozzles at appropriate points for immediate use. Such pipe lines shall be so located and installed that the water will not freeze. Pressure-reducing valves or their equivalent shall be so placed that the pressure will not exceed 50 pounds to the square inch at the hydrant or point of attachment of the hose.

(b) In any mine where such water lines and hose are installed and maintained, barrels filled with water as specified under section 98 will not be required within the areas reached by such pipe lines, provided an adequate supply of water to which the water pipes are connected exists for emergency fire fighting. Pipe lines of a water-sprinkling or drainage system connected with a sump containing more than 5,000 gallons of water will fulfill the requirements of water supply and pipe lines underground if provided with taps, valves, and hose. A flow of 250 gallons a minute should be provided.

CHECK NUMBERS FOR EMPLOYEES

SEC. 100. (a) The lessee shall install a system of checking employees in and out of a mine whereby each employee may be identified, and shall keep a record of the local residence and working place in the mine of each underground employee.

(b) Where coal is being mined from Government-leased land and from other land and hauled through the same mine opening or dumped on the same tippie, a separate list of serial numbers shall be assigned to men or machines loading Government coal.

SAFETY GUARDS, TIMBER, AND SUPPLIES

SEC. 101. All dangerous parts of machinery used in and about a mine, such as flywheels, gears, belts, and exposed moving parts that

are likely to cause injury, shall be appropriately guarded to prevent injury to attendants or other persons. Stairs, platforms, and dangerous walks in or about a mine or stripping operation shall be provided with rails, fences, and gates, as may be appropriate, and safe traveling ways shall be maintained from the mine to the camp, town, or highway.

SEC. 102. The lessee shall substantially fill in, protect, or close all surface openings, subsidence holes, or workings situated where persons or animals are likely to be injured or be endangered by accumulation of gas, shall maintain all such protective means or coverings in a secure condition during the term of the lease, and before termination of a lease shall close all such openings in a permanent manner.

SEC. 103. The lessee shall at all times provide timber at or near the places where needed, and shall provide other material and supplies for the proper and safe conduct of the operation of the mine.

FIRST-AID EQUIPMENT AND SAFETY TRAINING

SEC. 104. At every working mine or strip pit a standard first-aid box and its equipment, or the equivalent, shall be provided and maintained in good condition for emergency use, within 1,000 feet of any group of 5 or more employees, and where more than 25 men are employed the lessee shall provide for emergency first-aid treatment of injured persons, near the main exit of the mine or stripping operation, a first-aid room or receiving station heated during cold weather and equipped with a standard first-aid box or cabinet or the equivalent, at least two stretchers or hospital cots, four pairs of clean blankets in waterproof bags, a fresh supply of pure drinking water, a basin, and suitable toilet facilities, all kept in a sanitary condition.

SEC. 105. The lessee shall also provide for every separate mine in which more than 50 men are employed underground on any shift a refuge and first-aid chamber underground, either near the foot of one of the shafts, if any, or at whatever point injured persons would most likely be taken prior to being hoisted or transported to the surface. In a mine on a dipping bed with one or more landings, the chamber shall be on the landing that serves the largest group of men. In a drift mine it shall be at a suitable point, such as the junction of the principal branch haulageways.

SEC. 106. (a) At every mine or strip pit the lessee shall require his mine officials to be trained in first-aid methods and shall provide facilities and encourage the training of any or all employees in first-aid methods.

(b) Where more than 25 men are employed in a mine or strip pit, a safety committee composed of representatives of the lessee and of

the employees shall be organized for the purpose of holding periodical meetings to discuss and make recommendations relating to safety in the operation of the mine or strip pit.

MINE RESCUE APPARATUS

SEC. 107. (a) Where more than 50 persons are employed underground on any shift, the lessee shall keep and maintain at the mine, in order and ready for use, in an adequate room provided for the purpose, five sets of oxygen or self-contained breathing apparatus of a kind approved by the United States Bureau of Mines, with an ample supply of appropriate absorption material and oxygen for at least 10 hours' service of the apparatus, together with a charging pump and repair supplies.

(b) Where the number of persons employed underground on any shift exceeds 100, five additional sets of breathing apparatus with the corresponding additional supplies and ten sets of universal gas masks of a kind approved by the United States Bureau of Mines for use in mines shall be kept, maintained, and periodically tested for serviceability.

SEC. 108. (a) The breathing apparatus specified above will not be required if the lessee cooperates with a neighboring mine or industrial works in the establishment of a joint rescue station which shall be within 1 hour's journey by rail or vehicle from the mine on the leased land: *Provided*, That said joint station is connected with the mine by telephone line and has an equipment of ten sets of approved breathing apparatus and adequate supplies for use in emergency, and that said joint station shall have constantly available means of transportation to reach the mine within 1 hour's time of the call.

(b) The district mining supervisor may authorize the substitution of an adequate supply of universal gas masks for the approved breathing apparatus when, in his judgment, such substitution is warranted.

SEC. 109. The lessee shall arrange for the training of employees in the use of mine rescue breathing apparatus and universal gas masks to the end that there shall be at least two teams of 5 men each, who may be mine officials, for the first 50 men employed underground on any shift and an additional team of 5 men for each additional 100 men or less employed. Each team shall be selected from men who have been certified by the Bureau of Mines as competent in first-aid and rescue work, and shall be trained in wearing apparatus in a smoke or gas chamber for a total of at least 2 hours in every two months.

HEALTH, SANITATION, AND WELFARE

SEC. 110. The lessee shall provide a substantial change house or room convenient to the mine exit or strip pit which shall be heated in winter and provided with lavatory and sanitary bathing arrangements such as showers or tubs, an ample supply of hot and cold water of proper quality, proper drains and means for sewage disposal, and sanitary lockers or hangers: *Provided*, That at mines where an ample supply of water cannot be obtained at reasonable expense, tubs for bathing will suffice if each employee is furnished at least 5 gallons of water per shift worked, until such time as sufficient water can be obtained at a reasonable expenditure.

SEC. 111. (a) Dwellings built on leased land shall be properly situated with reference to sanitary conditions, and an adequate supply of pure water shall be provided in proximity to each dwelling.

(b) Facilities shall be provided for the regular collection and sanitary disposal of garbage and trash. A separate toilet or privy shall be installed for each dwelling, and at least two shall be installed in the vicinity of the mine entrance.

(c) Unlined pits for privies may be constructed or used only where and when no danger of contaminating the water supply in the vicinity exists. Where privies unconnected with a sewerage system are used, openings must be screened from flies.

SEC. 112. The lessee shall provide ambulance service which shall be promptly available on notice in the event of serious injury to any employee.

SEC. 113. All contagious diseases in or about the leased land and all cases of occupational diseases known to the lessee which result from or are aggravated by the particular work shall be reported to the district mining supervisor. When any occupational, contagious, or infectious disease has been determined to be present among the employees in such a degree as is decided by the surgeons of the State or Public Health Service to be an occupational hazard, the lessee shall furnish necessary medical service and equipment for regular physical examination and treatment when needed of all employees: *Provided, however*, That the surgeons of the State or Public Health Service may require such additional examinations as they deem necessary to control or stamp out the disease or diseases.

SEC. 114. The administration of these regulations shall be under the direction of the Geological Survey, Department of the Interior.

Approved:

HAROLD L. ICKES,

Secretary of the Interior.

TAYLOR GRAZING ACT—LEASE FORM AMENDED

[Circular No. 1442]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

January 19, 1938.

REGISTERS, UNITED STATES LAND OFFICES:

The form of lease attached to and made a part of Circular No. 1401 Revised, approved April 30, 1937, is hereby amended by eliminating therefrom the sentence found in paragraph (a), page 2 thereof, which deals with the annual rental and reads as follows:

Annual rental shall reasonably conform to but in no case be in excess of the rental charged by the State or individuals for grazing privileges on lands of similar character in the immediate vicinity of the lease-hold.

You will give publicity to this amendment without expense to the Government and take particular care that a copy of this amendment accompanies Circular No. 1401, when used.

FRED W. JOHNSON,
Commissioner.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

CLASSIFICATION NOTIFICATIONS

[Circular No. 1443]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

January 20, 1938.

REGISTERS, UNITED STATES LAND OFFICES:

When public lands withdrawn by Executive orders of November 26, 1934, or February 5, 1935, are classified as subject to disposition under some form of the public land laws and opened to such disposition in accordance with section 7 of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269), as amended by the act of June 26, 1936 (49 Stat. 1976), you will note said classification and the character thereof on your records.

Such classifications will remain effective unless revoked, but will not preclude the filing and consideration of petitions for classification of the land as subject to disposition under some other public land law.

FRED W. JOHNSON,
Commissioner.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

**TEMPORARY REGULATIONS GOVERNING THE SALE OF TIMBER ON
LAND IN OREGON PURSUANT TO THE PROVISIONS OF THE ACT
OF AUGUST 28, 1937 (50 STAT. 874)**

[Circular No. 1444]

UNITED STATES DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

February 9, 1938.

1. *Policy.*—The comprehensive land-use conservation program contemplated by the act of August 28, 1937 (50 Stat. 874), will require extensive field examination and classification of all the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands, the title to which is still in the United States. Pending completion of such classification and determination of the annual sustained yield capacity of the timber growing area and in order to prevent the shutting down of operating lumbering concerns with resultant unemployment and hardship to a large number of persons, the following temporary regulations, embodying certain definite and desirable conservation features as to sound forestation practices, reforestation guarantees, and fire preventions in furtherance of the objectives of the said act of 1937, will be given immediate effect with respect to the sale of the timber on these lands as may be found advisable.

2. *Applications.*—Applications for the purchase of timber on re-vested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands in Oregon should be filed with the District Cadastral Engineer, 619 Post Office Building, Portland, Oregon. Such applications should describe the location of the timber desired by subdivision, section, township, and range, the amount of each variety of timber, and should contain a statement that the applicant will submit a bid of not less than the appraised price for the timber offered. No application previously filed and still pending before the District Cadastral Engineer or the General Land Office need be refiled.

3. *Application—Recommendation by engineer.*—Upon receipt of a proper application, the District Cadastral Engineer will carefully check the application with his records, as to description, and amount of each variety of timber, and will forward the application, if acceptable, to the Commissioner, General Land Office, Washington, D. C., with a complete statement as to all facts, appraised price, and suitable recommendation. Applications, which for any sufficient reason are unacceptable, should be rejected by the District Cadastral Engineer, subject to the right of appeal, with a letter to the applicant giving the reasons for such rejection. In any case where a

cruiser's report is known or believed to be erroneous, a recon-
cruise should be made, if possible, before action is taken on the application.

4. *Procedure—Publication, contract, deposit.*—The Commissioner of the General Land Office will authorize, from time to time, the sale of timber as may be found advisable. The procedure shall consist of a letter addressed to the Register of the local land office for the district in which the timber is situated, giving necessary information pertaining to the applicant and the timber applied for, together with a notice for publication and authorization to be transmitted by the Register to the publisher or publishers. Publication shall be made in each county containing timber applied for, in two consecutive issues if a weekly paper, or once each week for two consecutive weeks if a daily paper is used. The notice will invite the submission of sealed bids, in duplicate, on or before a certain date fixed by the Register, which date must be after the completion of the publication, and will require the execution of a contract by the successful bidder obligating himself to cut the timber and to dispose of the slash in conformity with governing forest practice rules. At least ten per centum of the price offered must accompany the bid in form of cash or certified check on a solvent national bank, and the remainder must be paid before approval of the contract. The deposit will be returned if the bid is rejected, applied as part of the purchase price of the successful bidder, or retained as liquidated damages if the bid is accepted and the required contract is not executed and presented for approval within ten days from the acceptance of the bid.

5. *Bond requirements.*—The successful bidder will also be required to file a cash bond or corporate surety bond in the amount of five dollars per acre as a guaranty for faithful performance of his contractual obligations, observance of proper forest practice in the cutting of the timber, and in the removal of the slash so as to bring about reforestation. The Secretary of the Interior or some one acting under his authority is to be the sole judge as to whether the cut-over area is left in satisfactory condition for natural reforestation and disposal of slash.

6. *Forest practice.*—The forest practice set forth in the Forest Practice Handbook of the Pacific Northwest Loggers Association will be used by the Secretary of the Interior as the basis for approval or disapproval of the condition of the cut-over area. The purchaser must likewise comply with the requirements of the Oregon State Fire Code in the disposition of the slash and the protection of the area from fire.

7. *Opening of bids.*—Upon receipt of evidence of publication and at the expiration of the period specified in the notice, the Register will open the bids and require the successful bidder to pay the pur-

chase price and execute the hereinbefore-mentioned contract and cash or surety bond within the period of ten days from receipt of notice.

8. *Payment of commission.*—The successful bidder will be required to pay a commission of one-fifth of one per centum of the purchase price paid as provided by section 6 of the act of June 9, 1916 (39 Stat. 218).

9. *Forms—Where obtainable.*—Forms for application, bid, contract, and bonds, approved by the Secretary of the Interior, will be available at the office of the Register or may be obtained from the District Cadastral Engineer, or upon application to the General Land Office.

10. *Approval of contract; rejection; appeal.*—Upon compliance by the successful bidder with these regulations, the Register will forward the entire record to the General Land Office for review, approval, or rejection as the case may be. Rejection of the bid for any good and sufficient reason will be communicated to the bidder through the Register and will afford the bidder an opportunity to appeal to the Department as provided by the Rules of Practice in similar cases. The approval of a contract will give the successful bidder the right, within two years from such approval, to cut and remove the timber purchased in the manner provided by the contract. A copy of the approved contract will be forwarded to the successful bidder through the Register. In meritorious cases, application for an extension of time may be granted.

11. *Limitations on sales—Qualifications of purchasers.*—No sale will be made for less than the appraised price and the right to purchase at any sale will be limited, in accordance with law, to citizens of the United States, associations of such citizens, and corporations organized under the laws of the United States, or any State, Territory, or district thereof. Native-born citizens will be required to file an affidavit to that effect in connection with the first purchase, and naturalized citizens will be required to furnish either the original certificate of naturalization or duly certified or attested copy thereof, which copy, if of a certificate of naturalization issued after September 26, 1906, must be on the form prescribed by the Bureau of Naturalization. Corporations will be required to furnish either the original certificate of incorporation, or a duly certified or attested copy thereof. A corporation organized outside of the State of Oregon must also show by a certificate by a proper State official that it has been authorized to do business within the State of Oregon.

12. *Funds.*—The Register of Public Moneys, in addition to his regular abstracts, will render monthly, for each county, in case of timber sales therein, a separate abstract, in duplicate, Form 4-103, reporting

thereon the date of the application of the money, the receipt and serial numbers, the name of the purchaser, together with a description of the land involved and the amount of purchase money, using more than one line, when necessary, for each item. Commissions should be shown on this abstract on separate lines. Notations showing the county in which the land is situated should also be made upon the receipt and papers pertaining to the sale.

13. *Repeal Circular No. 1200.*—Circular No. 1200, of July 29, 1929 (52 L. D. 683) is hereby revoked.

FRED W. JOHNSON,
Commissioner.

Approved:

HAROLD L. ICKES,
Secretary of the Interior.

ACCOUNTS—DEPOSIT OF PUBLIC MONEYS BY REGISTERS AND RECEIVERS

[Circular No. 1445]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
March 14, 1938.

REGISTERS AND RECEIVERS, UNITED STATES LAND OFFICES:

Treasury Circular No. 176 on which paragraph 84, Circular No. 616, is based having been amended to fit changed conditions, the said paragraph 84 is hereby amended to read as follows:

Treasury regulations require depositors of public moneys to forward checks and drafts for deposit each day to the Federal Reserve Bank of the district in which the depositor's head office is located, with the provision that officers in the same town with a Branch Bank may make such deposits with the Branch Bank, and requires deposits of cash with the local depository (Federal Reserve Bank, Branch Bank or general National bank depository) whenever there is one in the same town. All moneys received will be deposited in accordance therewith not later than the business day next following the day on which the collections were received.

FRED W. JOHNSON,
Commissioner.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

**REGULATIONS GOVERNING OIL AND GAS LEASE APPLICATIONS
FOR LANDS WITHIN ONE MILE OF CERTAIN RESERVES**

[Circular No. 1446]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.

REGISTERS, DISTRICT LAND OFFICES:

May 1, 1924, the Department directed that no filings under section 13 of the act of February 25, 1920 (41 Stat. 437), should be allowed for lands within one mile of the exterior boundaries of Naval Petroleum Reserves Nos. 1 and 3. By decisions of the Department rendered subsequent to that date, these instructions have been extended to all naval petroleum reserves and to the military and naval helium reserve.

Inasmuch as the Department's instructions of May 1, 1924, do not adequately express the present policy of the Department, the following regulation is hereby adopted:

No application for an oil and gas lease under the act of February 25, 1920 (41 Stat. 437), as amended, will be allowed for lands within one mile of the exterior boundaries of a naval petroleum reserve or military and naval helium reserve.

In accordance with the foregoing, you are directed to reject, subject to the right of appeal, all oil and gas lease applications for lands within one mile of the exterior boundaries of a naval petroleum reserve or military and naval helium reserve.

FRED W. JOHNSON,
Commissioner.

Approved: March 21, 1938.

HAROLD L. ICKES,
Secretary of the Interior.

**CULTIVATION REQUIREMENTS ELIMINATED AS TO CERTAIN
HOMESTEADS**

[Circular No. 1368a]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.

1. *Statutory authority.*—The act of March 31, 1938 (52 Stat. 149), amended the act of August 19, 1935 (49 Stat. 659), so as to extend its provisions to applications made prior to February 5, 1935. As amended the act provides that, with certain specified exceptions, described in paragraph 3 hereof, 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 or application made prior to said date, and no patent shall be withheld for failure to cultivate such lands.

2. *Proofs not to be rejected for failure to show cultivation.*—In all cases where said acts apply, no proof shall be rejected solely for failure to show that the cultivation requirements of the homestead laws have been complied with.

3. *Entries to which law does not apply.*—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 in the Territory of Alaska.

FRED W. JOHNSON,
Commissioner.

Approved: MAY 4, 1938

OSCAR L. CHAPMAN,
Assistant Secretary.

REGULATIONS GOVERNING RIGHTS-OF-WAY FOR CANALS, DITCHES, RESERVOIRS, WATER PIPE LINES, TELEPHONE AND TELEGRAPH LINES, TRAMROADS, ROADS AND HIGHWAYS, OIL AND GAS PIPE LINES, ETC.

[Circular 1237a]

UNITED STATES DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

May 23, 1938.

GENERAL REGULATIONS APPLICABLE TO ALL RIGHT-OF-WAY APPLICATIONS MADE UNDER THE REGULATIONS CONTAINED IN THIS CIRCULAR

1. *Application.*—No special form is required, but it should be filed at the land office for the district in which the land is located, should state the act invoked and the primary purpose for which the project is to be used. If there is no local land office, the application should be filed with the Commissioner of the General Land Office, Washington, D. C.

2. *Showing required of corporations.*—Application by a private corporation must be accompanied by a copy of its charter or articles of incorporation, duly certified to by the proper State official of the State where the corporation was organized; also an uncertified copy.

A corporation other than a private corporation should file a copy of the law under which it was formed and due proof of organization under the same.

When the project is in a State other than that in which the corporation was incorporated, it must submit a certificate of the Secretary of State or other proper official of the State in which the project is located, showing compliance with the laws relating to foreign corporations.

3. *Showing required of individuals or association of individuals.*—Application by an individual under any of the acts, except the act of March 3, 1891, and the acts amendatory or supplemental thereto, must be accompanied by affidavit of citizenship if the applicant is native born, or if a naturalized citizen, by proof of naturalization. Application by an association must be accompanied by a certified copy of the articles of association, if any; if there be none, the fact must be stated over the signature of each member of the association. Each member must furnish evidence of citizenship where it would be required if he were applying individually.

4. *Evidence which must accompany application.*—Each application must be accompanied by the following data:

(a) A map prepared on tracing linen, in duplicate, showing the survey of the right-of-way or site, properly located with respect to the public-land surveys so that said right-of-way or site may be accurately located on the ground by any competent engineer or land surveyor. The map should comply with the following requirements:

The scale should be 2,000 feet to the inch for canals, ditches, pipe lines, transmission lines, etc., and 1,000 feet to the inch for reservoirs, except where a larger scale is required to properly represent the details of the proposed developments, in which case the scales should be 1,000 feet to the inch and 500 feet to the inch, respectively.

Courses and distances of the center line of the right-of-way or traverse line of the reservoir should be given; the courses referred to the true meridian either by deflection from a line of known bearing or by independent observation, and the distances in feet and decimals thereof. Station numbers with plus distances at deflection points on the traverse line should be shown.

The initial and terminal points of the survey should be accurately connected by course and distance to the nearest corner of the public-land surveys, unless that corner is more than 6 miles distant, in which case the connection will be made to some prominent natural object or permanent monument, which can be readily recognized and recovered. The station number and plus distance to the point of intersection with a line of the public-land surveys should be ascertained and noted, together with the course and distance along the section line to the nearest existing corner, at a sufficient number of

points throughout the township to permit accurate platting of the relative position of the right-of-way to the public-land survey.

All subdivisions of the public-land surveys within the limits of the survey should be shown in their entirety, based upon the official subsisting plats with the subdivisions, section, township, and range clearly marked.

The width of the canal, ditch, or lateral at high-water line should be given and if not of uniform width, the location and amount of the change must be definitely shown. In the case of a pipe line, the diameter should be given. For reservoirs, the capacity in acre-feet, the area within the high-water line, the source of the water supply, and the location and height of the dam must be shown.

Each copy of the map should bear upon its face an affidavit of the engineer who makes the survey and the certificate of the applicant. See forms 1 and 2 on pages 552 and 553, which should be modified so as to be appropriate to the act invoked and the nature of the project.

(b) Evidence of water right, if the project involves the storage, diversion, or conveyance of water. Control and jurisdiction over the appropriation of water is vested in the State authorities. The applicant, therefore, must file evidence, obtained from the proper State official, that he has the right to appropriate the water to be stored, diverted, or conveyed.

5. *Oregon and California Railroad and Coos Bay Wagon Road lands (Oregon).*—All applications for rights-of-way for the construction and operation of any project over Oregon and California Railroad lands, title to which was revested in the United States by the act of June 9, 1916 (39 Stat. 218), and reconveyed Coos Bay Wagon Road lands, act of February 26, 1919 (40 Stat. 1179), must be accompanied by a stipulation executed by the applicant, agreeing to pay to the United States, by certified check drawn in favor of the Commissioner of the General Land Office, within 30 days from receipt of written notice to do so from the District Cadastral Engineer, such sum of money as may be determined by him to be fair compensation for the Government timber cut, removed, or destroyed in the construction and operation of the project. Such applications should also contain an affirmative showing that favorable action thereon will not adversely affect or impair watershed protection, stream-flow regulation, and other conservation features enumerated in the act of August 28, 1937 (50 Stat. 874), amending the acts of June 9, 1916, and February 26, 1919, *supra*.

6. *Proposed or existing national forest.*—Whenever a right-of-way is through or in a national forest, or any area which the Secretary of Agriculture has recommended for inclusion within a national forest, the applicant must enter into such stipulations and execute such bond as the Forest Service may require for the protection of

such existing or proposed national forest. No construction will be allowed in an existing or proposed national forest until an application for right-of-way has been regularly filed and approved by the Secretary of the Interior, or unless permission for such construction work has been specifically given.

7. *National parks.*—The act of March 3, 1921 (41 Stat. 1353), provides, *inter alia*:

That hereafter no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits as now constituted of any national park or national monument, shall be granted or made without specific authority of Congress, etc.

8. *Action on application.*—When an application is filed, the register will place on the papers and accompanying maps, the serial number, the name of the office, and the date of filing. Notations will be made on the local office records opposite each unpatented tract affected by the right-of-way or site, giving serial number, date of filing, and the name of the applicant. The register will certify on each map, over his written signature, that unpatented land is affected. If no unpatented land is affected, the register will return the map and duplicate to the applicant with notice of that fact.

(a) The General Land Office shall request the Geological Survey and the Bureau of Reclamation to make reports in connection with all right-of-way applications involving the diversion, storage, or conveyance of water and shall request the Geological Survey for reports in connection with all right-of-way applications under the oil and gas leasing act. Requests by the General Land Office for reports from all bureaus or departments shall be made in connection with all right-of-way applications affecting lands in withdrawals or reservations in which the bureau or department might be interested. Upon the approval of a map by the Secretary of the Interior, the duplicate copy will be sent to the register who will mark upon the township plats the line of the right-of-way or site as shown on the approved map. The register will also note the approval in ink on the tract books, opposite each legal subdivision affected, with a reference to the act mentioned on the map.

9. *Proof of construction.*—A period of 5 years from the date of the approval of a map is usually allowed for construction. Upon completion of construction, proof thereof should be filed in the local office, consisting of an affidavit of the person in charge of the construction or who has checked over the construction, and the certificate of the grantee. Forms 3 and 4 for the affidavit and certificate are shown on pages 553 and 554. The forms should be modified so as to be appropriate to the act and to the nature of the project. If, in constructing, there has been a substantial deviation from the location

shown on the approved map, the party in interest must file a duly executed relinquishment of the unused portion of the right-of-way or site, accompanied by a map of amended location of the right-of-way or site of the project as actually constructed. The map of amended location must be prepared in accordance with regulation 4. The relinquishment may be prepared so as to become effective upon departmental approval of the map of amended location.

Upon expiration of the 5-year period allowed for construction, if there has been no construction, grants of rights-of-way or sites are subject to cancellation through court proceedings. A permit may be revoked by the Secretary for nonconstruction or abandonment.

RIGHTS-OF-WAY THROUGH PUBLIC LANDS AND RESERVATIONS FOR CANALS, DITCHES, AND RESERVOIRS

10. *Statutory authority.*—Section 18 of the act of March 3, 1891 (26 Stat. 1095), as amended by the acts of March 4, 1917 (39 Stat. 1197), and May 28, 1926 (44 Stat. 668), 43 U. S. C. 946, authorizes the Secretary of the Interior to grant rights-of-way for irrigation and drainage purposes to the extent of the ground occupied by the water of any reservoirs and any canals and laterals and 50 feet on each side of the marginal limits thereof and such additional right-of-way as may be deemed necessary for the proper operation and maintenance of said reservoirs, canals, and laterals.

Section 19 of the act of March 3, 1891 (43 U. S. C. 947), provides for the filing of maps by applicants desiring to secure the benefits of said act; that upon the approval thereof by the Secretary of the Interior, the same shall be noted upon the records and thereafter all lands affected by such right-of-way shall be disposed of, subject to such right-of-way.

Section 20 of the act of March 3, 1891 (43 U. S. C. 948), provides that this act shall apply to all canals, ditches, or reservoirs heretofore or hereafter constructed, whether by corporations, individuals, or association of individuals, on the filing of the certificates and maps as therein provided; that if any section of the project is not completed within 5 years after location, the right-of-way granted shall be forfeited as to the uncompleted canal, ditch, or reservoir, to the extent that the same is not completed at the date of forfeiture.

Section 21 of the act of March 3, 1891 (43 U. S. C. 949), provides that nothing in this act shall authorize the occupancy of such right-of-way except for the purpose for which the grant is made, and then only so far as may be necessary for the construction, maintenance, and care of the project.

11. *Statute construed.*—The act of March 3, 1891, as amended, is applicable to rights-of-way for pipe lines, flues, or other conduits,

although they are not specifically mentioned in the act, if water is conveyed primarily for irrigation or drainage purposes.

Material on adjacent lands: The word "adjacent," as used in section 18 of the act, in connection with the right to take material for construction from the public lands, must be construed according to the conditions of each case (28 L. D. 439). The right extends only to construction, and no public timber or material may be taken or used for repair or improvements (14 L. D. 566). These decisions were rendered under the railroad right-of-way act and are applied to this act since the words are the same in both.

12. *Use subsidiary to main purpose of irrigation.*—Section 2 of the act of May 11, 1898 (30 Stat. 404), authorizes the use of rights-of-way granted under the act of March 3, 1891, for purposes subsidiary to the main purpose of irrigation.

13. *Caretaker's building sites.*—The act of March 1, 1921 (41 Stat. 1194), authorizes the Secretary of the Interior, except as to lands within national forests, to grant permits or easements for not to exceed 5 acres of ground adjoining the right-of-way at each of the locations, to be determined by the Secretary of the Interior, to be used for the erection thereon of dwellings or other buildings or corrals for the convenience of those engaged in the care and management of the works provided for by the act of March 3, 1891, as amended.

14. *Showing required for additional right-of-way.*—The act of May 28, 1926 (44 Stat. 668), amended section 18 of the act of March 3, 1891, so as to authorize, if needed, right-of-way additional to the 50 feet allowed by the section for operation and maintenance of reservoirs, etc. To obtain such additional right-of-way, explanatory showing must accompany the application. This should consist of an affidavit by the applicant's engineer or surveyor setting forth succinctly the extent of the additional right-of-way required and the necessity therefor. The additional right-of-way should also be shown graphically by lateral limit lines on the map filed in connection with the application. If additional right-of-way is wanted only for portions or sections of the reservoirs, canals, ditches, or laterals, the termini thereof should be fixed by engineer's survey stations in addition to the lateral limit lines.

15. *Nature of grant.*—Grants made under the act of March 3, 1891, are base fees with possibility of reverter to the Government in the event the grantee or successor ceases to use or retain the lands for the purposes for which they were granted. All persons settling on a tract of public land, to part of which right-of-way has attached for a canal, ditch, or reservoir, etc., take the land subject to such right-of-way, and at the total area of the subdivision entered, there

being no authority to make deductions in such cases. If a settler has a valid claim to land, existing at the date of filing of the map of definite location, his right is superior, and he is entitled to such reasonable measure of damages for right-of-way as may be determined by agreement or by the courts, the question being one that does not fall within the jurisdiction of this Department.

16. *Unsurveyed land*.—Maps, filed under the said act, as amended, showing canals, ditches, reservoirs, etc., lying partly upon unsurveyed land can be approved if the application and accompanying maps conform to these regulations, but the approval will only relate to that portion of the right-of-way traversing the surveyed land.

(a) Maps showing canals, ditches, reservoirs, etc., lying wholly on unsurveyed lands may be received and placed on file in the General Land Office and the local land office of the district in which the land is located, for general information. The date of filing will be noted thereon; but the maps will not be submitted to nor approved by the Secretary of the Interior, as the act makes no provision for the approval of any but maps showing locations on surveyed lands. The filing of such maps will not dispense with the filing of maps after the survey of the lands and within the time specified in the act, and if the maps are regular in all respects they will receive the Secretary's approval.

17. *Segregated reservoir sites*.—The act of February 26, 1897 (29 Stat. 599), permits the approval of applications under the act of March 3, 1891, for rights-of-way upon reservoir sites reserved under authority of the act of October 2, 1888 (25 Stat. 505, 526), and August 30, 1890 (26 Stat. 371, 391).

RIGHTS-OF-WAY OVER PUBLIC LANDS FOR RESERVOIRS FOR WATERING LIVESTOCK

18. *Statutory authority*.—By the act of January 13, 1897 (29 Stat. 484; 43 U. S. C. 952-953), it is provided that any person, livestock company, or transportation corporation engaged in breeding, grazing, driving, or transporting livestock may construct reservoirs upon unoccupied public lands of the United States, not mineral or otherwise reserved, for the purpose of furnishing water to such livestock, and shall have control of such reservoir, under regulations prescribed by the Secretary of the Interior, and the lands upon which the same is constructed, not exceeding 160 acres, so long as such reservoir is maintained and water kept therein for such purposes.

19. *Declaratory statement*.—Any person, livestock company, or transportation corporation engaged in breeding, grazing, driving, or transporting livestock, desiring to construct a reservoir under the authority of this act upon unappropriated public lands of the United

States, not mineral or otherwise reserved except by Executive Order No. 6910 of November 26, 1934, and amendments thereto, and Executive Order No. 6964 of February 5, 1935, as amended, or within a grazing district established under the act of June 28, 1934 (48 Stat. 1269), may file a petition, in duplicate, for the classification of the land involved, together with a declaratory statement, in the district land office for the district in which the land is located in accordance with the instructions contained in Circular No. 1353, approved June 29, 1937.

20. *Application by corporation.*—When the applicant is a corporation there should be filed a copy of its articles of incorporation and proofs of its organization, as required in sections 2 and 4 (b) of these regulations. If these papers are filed with the first declaratory statement made by the company, a reference thereto by its number will be sufficient in any subsequent application by the company.

The declaratory statement must be made under oath and should be drawn in accordance with form 7 (p. 555), and must contain the following:

(a) The post office address of the applicant; the name of the county in which the reservoir is to be or has been constructed; the description by the smallest legal subdivisions (40-acre tracts or lots) of the land sought to be reserved, which under no circumstances must exceed 160 acres; certificate that the land is not occupied or otherwise claimed; certificate that to the best of the applicant's knowledge and belief the land is not mineral or otherwise reserved; statement of the business of the applicant, which statement shall include full and minute information concerning the extent to which he is engaged in breeding, grazing, driving, or transporting livestock, the number and kinds of such stock, the place where they are being bred or grazed, whether within an enclosure or upon unenclosed lands, and also the points from which and to which they are being driven or transported; description of the land owned or claimed by the applicant in the vicinity of the proposed reservoir and statement of its amount; certificate that no part of the land sought to be reserved is or will be fenced, that all the land will be kept open to the free use of any person desiring to water animals of any kind; and that the lands so sought to be reserved are not, by reason of their proximity to other lands reserved for reservoirs, excluded from reservation by the regulations and rulings of the Department.

(b) The location of the reservoir described by the smallest legal subdivision (40-acre tracts or lots), its area in acres, its capacity in gallons, the source from which water is to be obtained for such reservoir, whether there are any streams or springs within 2 miles of the land sought to be reserved; and if so, where.

(c) The numbers, locations, and areas of all other reservoir sites filed upon by the applicant, especially designating those in the county in which the proposed reservoir is located.

21. *Action by the Department on declaratory statements and size, location, and number of reservoir sites.*—When such declaratory statement is filed the date of filing will be noted thereon over the signature of the officer receiving it, and the statements will be numbered according to order of June 1, 1908. The register will make the usual notations on the records, in pencil, under the designation of "Reservoir Declaratory Statement No. —," adding the date of the act. For the filing of such reservoir declaratory statement the local officers will be authorized to charge the usual fee (sec. 2238, U. S. Rev. Stat.). The local officers will forward the declaratory statement with the regular monthly returns, with abstracts, in the usual manner. In acting upon these statements the following general rules will be applied:

(a) No reservation will be made for a reservoir of less than 250,000 gallon capacity, and for a reservoir of less than 500,000 gallon capacity not more than 40 acres can be reserved. For a reservoir of 1,000,000 gallon capacity not more than 80 acres can be reserved. For a reservoir of 1,000,000 gallon and less than 1,500,000 gallon capacity not more than 120 acres can be reserved. For a reservoir of 1,500,000 gallon capacity or more 160 acres may be reserved. In the case where the water is furnished the livestock by artificial means, such as by windmill, pump, tanks, troughs, etc., the regulations requiring a minimum capacity of 250,000 gallons may be waived upon the claimant's submitting a satisfactory showing that by such artificial means he will be able to furnish sufficient water and provide proper troughs, etc., to accommodate properly all cattle likely to water at the place in question.

(b) Not more than 160 acres shall be reserved for this purpose in any section.

(c) Not more than 160 acres shall be reserved for this purpose in one group of tracts adjoining or cornering upon each other.

(d) A distance of one-half mile must be left between any two groups of tracts which aggregate more than 160 acres.

(e) The local officers will reject any reservoir declaratory statement not in conformity with these rules.

(f) Lands so reserved shall not be fenced, but shall be kept open to the free use of any person desiring to water animals of any kind. If lands so reserved are at any time fenced or otherwise enclosed, or if they are not kept open to the free use of any person desiring to water animals of any kind, or if the reservoir applicant attempts to use them for any other purpose, or if the reservation is not obtained for

the bona fide and exclusive purpose of constructing and maintaining a reservoir thereon according to law, the declaratory statement, upon any such matter being made to appear, will be canceled and all rights thereunder be declared at an end.

(g) Notwithstanding the action of the local officers in accepting any such declaratory statement, the Commissioner of the General Land Office will reject the same if upon considering the matters set forth therein it appears that the declaratory statement is not filed in good faith for the sole purpose of accomplishing what the law authorizes to be done.

22. *Construction.*—The reservoir must be completed and constructed within 2 years after the filing of the declaratory statement; otherwise the declaratory statement will be subject to cancellation.

23. *Map of constructed reservoir.*—After the construction and completion of the reservoir the applicant shall have the same accurately surveyed and mapped in accordance with regulations 4 and 9, so far as they are applicable. The map, which is not to be prepared in duplicate, must be filed in the proper local office and must bear Forms 8 and 9 (pages 556 and 557).

24. *Action by register.*—When the map and other papers have been filed in the local office, the date of filing will be noted thereon and the proper notations will be made on the local office records, as in the case of the declaratory statement. The register will then promptly forward the map and papers to the General Land Office.

25. *Approval of constructed project.*—The map and papers will be examined in the General Land Office to determine whether they comply with the law and the regulations, and whether the amount of land desired is warranted by the showing made in the application. If found satisfactory, they will be submitted to the Secretary of the Interior, and upon approval, the lands shown to be necessary for the proper use and enjoyment of the reservoir will be reserved from other disposition so long as the reservoir is maintained and water kept therein for the purposes named in the act. Upon the receipt of notice of such reservation from the General Land Office, the register will make the proper notations on his records and report the making thereof promptly to the General Land Office.

26. *Annual proof of maintenance.*—In order that this reservation shall be continued it is necessary that the reservoir "shall be kept in repair and water kept therein." For this reason the owner of the reservoir will be required, during the month of January of each year, to file in the local office an affidavit to the effect that the reservoir has been kept in repair and water kept therein during the preceding year, and that all the provisions of the act have been complied with. Form 10 (p. 557) will be used for this affidavit. Upon failure to file

such affidavit, steps will be taken looking to the revocation of the reservation of the lands.

27. *Reservoir on unsurveyed land.*—In any case where the proposed reservoir is to be located upon unsurveyed public land, the declaratory statement may be filed, the land being therein described by metes and bounds and, as well, by the description which it is believed it will bear when officially surveyed. Proof of construction must be submitted at the end of the same period of time and in the same manner as is prescribed and required in cases where the lands have been previously surveyed. Such proof should embrace the field notes and a plat of survey such as is required in cases of reservoirs on surveyed lands, with such modifications as are necessary (regulation 23).

(a) Any reservation made pursuant to this statute secures only a license to use and occupy the reserved land with and for a reservoir, and this license may endure permanently or may be of transient duration. No estate in the land is granted. For this reason it is administratively undesirable that private surveys made pursuant to the statute and these regulations shall be preserved and established by subsequent public-land surveys and approved plats thereof. When, therefore, the public-land surveys have been extended over land covered by a reservoir declaratory statement affecting unsurveyed lands, the declarant shall adjust his survey to the lines of the official survey, showing the location of the reservoir with respect to said lines by means of properly established tie lines. Any subsequent reservation which may be ordered will be of those subdivisions thus shown to be occupied by or necessary for the proper use of the reservoir.

(b) An annual affidavit of maintenance must be submitted the same as though the reservoir had been constructed on surveyed lands. Nothing contained in these regulations shall preclude the General Land Office or the Department from requiring additional information in any case where that information is deemed proper or necessary.

FENCING OF STOCK-WATERING RESERVOIRS

28. *Statutory authority.*—The act of Congress approved March 3, 1923 (42 Stat. 1437), amends section 1 of the act of January 13, 1897 (29 Stat. 484), so as to authorize the Secretary of the Interior, in his discretion, under such rules, regulations, and conditions as he may prescribe, upon application by such person, company, or corporation, to grant permission to fence such reservoirs constructed under the act of January 13, 1897, in order to protect livestock, to conserve water, and to preserve its quality and conditions.

This act applies only to stock-watering reservoirs which have been or may hereafter be constructed and due proof of construction filed in the General Land Office.

29. *Application for permission to fence reservoir.*—Any person, company, or corporation desiring to secure the benefits of this act should file in the local land office an application, under oath, duly corroborated by at least two disinterested witnesses, setting forth such facts as would show that it is necessary to fence such reservoir in order to protect the livestock, to conserve water, and to preserve its quality and conditions. There should be filed with such application, and as a part thereof, a plat showing the land embraced in the reservoir as near as may be, the location of the proposed fence with respect to such reservoir, together with all gates or other openings and roadways leading to the same. In no instance will an application be considered unless said plat shows the location of at least two gates. Said gates shall be so constructed and maintained that they may be, at all times, readily opened and closed by any person desiring to water animals of any kind, and such gates shall be so placed as to be readily accessible from the road or roads nearest the reservoir, which roads shall be the ones usually traveled and, where there are no such roads whereby to govern the location of such gates, they shall be so situated as to make the reservoir readily available from the adjacent public or other range; and that there shall be posted on the gates, and elsewhere if necessary, a notice stating that the reservoir is for stock-watering purposes, located on public lands, and that the same is opened to the free use of any person desiring to water animals of any kind.

30. *Action on application.*—Upon the filing of such an application, it should be considered by the local office as an additional paper in the case and transmitted to the General Land Office by special letter under the serial number of the reservoir declaratory statement for such action as may be deemed proper.

RIGHTS-OF-WAY THROUGH PUBLIC LANDS AND RESERVATIONS FOR TELEPHONE AND TELEGRAPH LINES, PIPE LINES, CANALS, DITCHES, WATER PLANTS, ETC.

31. *Statutory authority.*—The act of February 15, 1901 (31 Stat. 790; 43 U. S. C. 959), authorizes the Secretary of the Interior, under such regulations as he may fix, to permit the use of rights-of-way through public lands and certain reservations of the United States, for telephone and telegraph lines, pipe lines, canals, ditches, water plants, etc., to the extent of the ground occupied by such canals, ditches, or water plants, or other works permitted thereunder, and not to exceed 50 feet on each side of the marginal limits thereof, or

not to exceed 50 feet on each side of the center line of such pipe lines, telephone and telegraph lines, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted under said act.

32. *Applications which may be submitted.*—Although the act of February 15, 1901, does not expressly repeal any provision of law relating to the granting of permission to use rights-of-way contained in the act of January 21, 1895, and section 1 of the act of May 11, 1898, yet in view of the general scope and purpose of the act, and of the fact that Congress has, with the exception above noted, embodied therein the main features of the former acts relative to the granting of a mere permission or license for such use, it is evident that, for the purposes of administration, the act of February 15, 1901, should control insofar as it pertains to the granting of permission to use rights-of-way for purposes therein specified. Accordingly, all applications for permission to use rights-of-way for the purposes specified in the act of February 15, 1901, must be submitted thereunder. Where, however, it is sought to acquire a right-of-way for the main purpose of irrigation as contemplated by sections 18 to 21 of the act of March 3, 1891 (26 Stat. 1095), and section 2 of the act of May 11, 1898, *supra*, the application must be submitted in accordance with the regulations issued under said acts.

(a) An application may be filed under the act of February 15, 1901, for a stock-watering reservoir site. An application under the act for a "water plant" site or for a pipe line right-of-way may include an area for a well to supply the water; but if, because the lands affected are within a grazing district established under the grazing act of June 28, 1934 (48 Stat. 1269), or for any other reason, the granting of a permit for a stock-watering reservoir site, or for a water plant site or for a pipe line right-of-way would adversely affect the interests of the Government, the applications therefor will not be allowed. If the lands affected are within a grazing district, an application for a stock-watering reservoir or water well site should be filed under section 4 of said act of June 28, 1934, with the regional grazier, if the applicant is qualified under the section; and if the reservoir or well is necessary to the care and management of the permitted livestock and primarily for that purpose. Regulations under the said section 4 are contained in a separate circular which will be sent by the regional grazier upon request.

33. *No rights acquired prior to filing and approval of application.*—Application under the act of February 15, 1901, for permission to use the desired right-of-way through the public lands and parks designated in the act must be filed and approved before any rights can be claimed thereunder.

34. *Nature of permit.*—It is to be specially noted that the act of February 15, 1901, does not make a grant in the nature of an easement but authorizes a mere permit in the nature of a license, which permit may be revoked by the Secretary, or his successor, at any time in his discretion. Further, it gives no right whatever, to take from public lands, reservations, or parks adjacent to the right-of-way, any materials, earth, or stone for construction or other purposes. The final disposal by the United States of any tract traversed by a right-of-way permitted under this act shall not be considered to be a revocation of such permission in whole or in part but such final disposal shall be deemed and taken to be subject to such right-of-way until such permission shall have been specifically revoked in accordance with the provisions of said act.

35. *When application should be made to Department of Agriculture.*—Section 1 of the act of February 1, 1905 (33 Stat. 628), vested jurisdiction in the Department of Agriculture to pass upon all applications under any law of the United States providing for the granting of a permission to occupy and use lands in a national forest, provided this occupation or use is temporary, and will in no wise affect the fee or cloud the title of the United States should the reserve be discontinued.

Therefore, when it is desired to obtain permission under the act of February 15, 1901, to use a right-of-way over public lands wholly within a national forest, an application should be prepared in accordance with the instructions issued by the Department of Agriculture, and should be filed with the officer in charge of such national forest.

In case the applicant desires rights and privileges upon public lands partly within and partly without a national forest, separate applications must be prepared, and the one affecting lands within the national forest filed with the forest officer and the other filed in the local land office.

36. *Buildings to be platted on map in main drawing and in separate drawing.*—When application is made for right-of-way for water plants, the location and extent of ground proposed to be occupied by buildings or other structures necessary to be used in connection therewith must be clearly designated on the map and described (forms 5 and 6, pages 554 and 555) by reference to course and distance from a corner of the public survey. In addition to being shown in connection with the main drawing, the buildings or other structures must be platted on the map in a separate drawing on a scale sufficiently large to show clearly their dimensions and relative positions. When two or more such proposed structures are to be located near each other, it will be sufficient to give the reference to a corner of the public survey for one of them, provided all the others are connected

therewith by course and distance shown on the map. The applicant must also file an affidavit setting forth the dimensions and proposed use of each of the structures, and must show definitely that each one is necessary for a proper use of the right-of-way for the purposes contemplated in the act.

37. *Unsurveyed lands*.—Permission may be given under this act (February 15, 1901), for rights-of-way upon unsurveyed lands, maps to be prepared in accordance with the requirements of this circular.

38. *National parks*.—Whenever a right-of-way is through any of the national parks designated in the act, for purposes other than those excepted by the act of March 3, 1921 (regulation 7) the applicant must show to the satisfaction of the Department that the location and use of the right-of-way for the purposes contemplated will not interfere with the uses and purposes for which the park was originally dedicated, and will not result in damage or injury to the natural conditions of property or scenery existing therein. The applicant must also file such stipulations and bond as may be required by the Director of the National Park Service.

Whenever right-of-way within a park is desired for operations in connection with mining, quarrying, cutting timber, or manufacturing lumber, a satisfactory showing must be made of the applicant's right to engage in such operations within the park.

39. *Indian reservations*.—Applications for right-of-way, under the act of February 15, 1901, all of which are located upon land within an Indian reservation, and applications for right-of-way affecting lands within and without Indian reservations must be filed in the local land office for forwarding to the Commissioner of the General Land Office. Before such applications are transmitted to the Department, they will be submitted by the Commissioner of the General Land Office to the Commissioner of Indian Affairs for such action and recommendation as that officer may deem proper insofar as the same pertains to such Indian reservation. Attention is directed to the provisions of section 3 of the act of March 3, 1901 (31 Stat. 1083), which authorizes the granting of permanent rights-of-way, in the nature of easements, for telegraph and telephone purposes only, through Indian reservations and other Indian lands, upon payment of proper compensation for the benefit of the Indians interested therein. The provisions of the act of March 3, 1901, and the nature and character of the rights authorized to be secured thereunder differ materially from the provisions of the act on which these regulations are based and the rights authorized to be conferred thereunder. Applicants desiring to secure permanent rights-of-way through Indian reservations or other Indian lands for telegraph and telephone purposes will, therefore, be required to submit their appli-

cations under the act of March 3, 1901, *supra*, in accordance with the then current regulations issued thereunder. (For existing regulations under said act, see Indian Office regulations approved May 22, 1928.)

RIGHTS-OF-WAY OVER PUBLIC LANDS AND RESERVATIONS FOR TELEPHONE
AND TELEGRAPH LINES

40. *Statutory authority.*—The act of March 4, 1911 (36 Stat. 1253; 43 U. S. C. 961), authorizes the head of the department having jurisdiction over the lands, under such regulations as may be fixed by him to permit the use of rights-of-way for a period not exceeding 50 years, over and across public lands and reservations of the United States, for telephone and telegraph lines to the extent of 20 feet on each side of the center line of such telephone and telegraph lines, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted under said act.

41. *Jurisdiction over land.*—For the purposes of this statute, national parks, Indian reservations, and reservations for water power sites, irrigation, classification of lands, or other purposes, created under the withdrawal act of June 25, 1910 (36 Stat. 847), are considered to be under the jurisdiction of the Department of the Interior; military reservations under the jurisdiction of the War Department; and reservations created for the special occupancy, use, or control of other departments under the jurisdiction of such departments, respectively. The Attorney General on February 3, 1912, advised the Secretaries of the Interior and Agriculture that, for this purpose, national forests are under the jurisdiction of the Department of Agriculture (29 Op. Atty. Gen. 303).

42. *Nature of permit.*—This act, which authorizes the granting of easements for telephone and telegraph lines for stated periods not to exceed 50 years, follows, as closely as is possible in the accomplishment of its purposes, the language of the act of February 15, 1901 (31 Stat. 790), which authorizes mere revocable permits or licenses not only for such lines but for other purposes.

RIGHTS-OF-WAY THROUGH NATIONAL FORESTS FOR DAMS, RESERVOIRS,
WATER PLANTS, DITCHES, FLUMES, PIPES, TUNNELS, AND CANALS FOR
MUNICIPAL OR MINING PURPOSES

43. *Statutory authority.*—Section 4 of the act of February 1, 1905 (33 Stat. 628; 16 U. S. C. 524), grants rights-of-way through national forests to citizens and corporations of the United States, for the construction and maintenance of dams, reservoirs, water plants, pipes, tunnels, and canals, for municipal or mining purposes, during

the period of the beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said forests are respectively situated.

44. *Commencement of construction.*—No construction will be allowed in national forests until an application for right-of-way has been regularly filed in accordance with these regulations and has been approved by the Secretary of the Interior, or unless permission has been specifically given.

45. *Nature of grant.*—Grants made under the act are base fees with possibility of reverter to the Government in the event the grantee or successor ceases to use or retain the lands for the purposes for which they were granted. No right whatever is given to take any material, earth, or stone for construction or other purposes, nor is any right given to use any land outside of what is actually necessary for the construction and maintenance of the works.

46. *Water plant structures.*—When application is made for right-of-way for water plants, regulation 36 should be followed, with appropriate changes in the prescribed forms.

47. *Unsurveyed lands.*—Maps showing reservoirs, canals, water plants, etc., wholly upon unsurveyed lands, will be received and acted upon in the manner prescribed for surveyed lands.

RIGHTS-OF-WAY OVER PUBLIC LANDS FOR TRAMROADS, TRAMWAYS, LOGGING,
AND OTHER ROADS

48. *Statutory authority.*—The act of January 21, 1895 (28 Stat. 635; 43 U. S. C. 956), authorizes the Secretary of the Interior under such regulations as may be fixed by him to permit the use of rights-of-way over the public lands of the United States, for tramroads to the extent of 50 feet on each side of the center line of the tramroad, by any citizen or association of citizens of the United States, engaged in the business of mining, or quarrying or of cutting timber and manufacturing lumber. The act does not authorize the use of rights-of-way within the limits of any park, national forest, military reservation or Indian reservation.

49. *Tramroads defined.*—This act has been superseded by other acts given in this circular, except as to tramroads. Tramroads are considered as including tramways, narrow-gage railroads, and wagon or motor-truck roads to be used in connection with mining, quarrying, logging, and the manufacturing of lumber.

50. *Nature of permit.*—Permission to use rights-of-way for tramroads over public lands, when granted, only confers a right in the nature of a license and is subject to all the conditions and limitations hereinbefore stated in regulation 34.

RIGHTS-OF-WAY OVER PUBLIC LANDS AND RESERVATIONS FOR HIGHWAYS
AND ROAD-BUILDING MATERIAL SITES

51. *Statutory authority.*—Section 17 of the Federal Aid Highway Act of November 9, 1921 (42 Stat. 212; 23 U. S. C. 18), authorizes the transfer of public lands and reservations of the United States to the State highway departments on determination by the Secretary of Agriculture that such lands are necessary for the right-of-way for any highway or forest road or as a source of materials for the construction and maintenance of such roads and highways, and after his request for such transfer with a map showing the portions of such lands which it is desired to appropriate.

This statute provides that if within a period of 4 months after such filing the Secretary of the Interior shall not have certified to the Secretary of Agriculture that the proposed transfer of such lands is contrary to public interest or inconsistent with the object of the Government, or shall have agreed to the appropriation and transfer under conditions which he deems necessary for the protection of the Government's interest, then such land or materials may be appropriated and transferred to the State highway departments for such purposes. If and when the need for any such land or materials shall no longer exist, notice of that fact must be given by the State highway department to the Secretary of Agriculture, and such lands or materials will immediately revert to the control of the Department of the Interior.

52. *Filing of application.*—Where a highway is to be constructed or improved under the provisions of the act of November 9, 1921, and the amendment or supplements thereto, the State highway departments may take advantage of the provisions of section 17 of said act by filing application and maps with the register of the land office for the district in which the lands affected are situated, in the manner prescribed by regulations 1 and 4. Application for rights-of-way under section 17 of said act should be filed by the State highway department of the particular State and not by any political subdivision of the State. No application will be received by the register under said section 17 for rights-of-way for highways or material sites affecting lands entirely within a national forest or an Indian reservation.

53. *Action on application.*—Upon receipt of an application in the local land office, filed under section 17, action thereon will be taken in accordance with regulation 8. If unpatented lands are affected, the register will forward the application and map, or set of maps, to the General Land Office and will return the duplicate map, or maps, to the State highway department which will forward them to the Bureau of Public Roads for submission to the Secretary of

Agriculture for his determination that the lands are necessary for right-of-way for the highway or road-building material site purpose, as required by the act.

RIGHTS-OF-WAY FOR ROADS AND HIGHWAYS OVER PUBLIC LANDS

54. *Statutory authority.*—By section 2477, U. S. R. S., 43 U. S. C. 932, it is provided:

The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

55. *When grant becomes effective.*—This grant becomes effective upon the construction or establishing of highways, in accordance with the State laws, over public lands not reserved for public uses. No application should be filed under the act, as no action on the part of the Federal Government is necessary.

RIGHTS-OF-WAY THROUGH PUBLIC LANDS AND RESERVATIONS FOR OIL AND NATURAL GAS PIPE LINES AND PUMPING PLANT SITES

56. *Statutory authority.*—Section 28 of the act of February 25, 1920 (41 Stat. 437), as amended by the act of August 21, 1935 (49 Stat. 674; 30 U. S. C. 185), authorizes the Secretary of the Interior to grant rights-of-way through the public lands, including the forest reserves of the United States, for pipe line purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in section 1 of the act, to the extent of the ground occupied by the said pipe line and 25 feet on each side of the same under such regulations and conditions as to survey, location, application, and use as may be prescribed by him, and upon the express conditions, provisions, and limitations enumerated in said section 28.

Section 29 of said act provides, in part:

That any permit, lease, occupation, or use permitted under this act shall reserve to the Secretary of the Interior the right to permit upon such terms as he may determine to be just, for joint or several use, such easements or rights-of-way, including easements in tunnels upon, through, or in the lands leased, occupied, or used as may be necessary or appropriate to the working of the same, or of other lands containing the deposits described in this act, and the treatment and shipment of the products thereof by or under authority of the Government, its lessees, or permittees, and for other public purposes.

57. *Qualification of applicants.*—Application may be filed by citizens of the United States, or association of such persons, any corporation organized under the laws of the United States, or of any State or Territory, and municipalities.

58. *Use of pipe line.*—The applicant shall state in the application (preferably in the certificate written on the face of the map), the specific use, within the purview of the act, to which the pipe line is

to be put, and any approval of the grant for the right-of-way shall be limited to such specific use, unless otherwise stated in the approval. No change in the use of the pipe line, other than that authorized by the approval, shall be allowed except with approval in writing first obtained from the Secretary of the Interior, and upon such terms and conditions as the Secretary may prescribe as a prerequisite to the approval of the change of use.

59. *Approval of right-of-way.*—The approval of such rights-of-way grant shall be subject to the express conditions that the use of the pipe line for the transportation of oil, gas, or other similar natural products, shall be limited to such products produced in conformity with State and Federal laws, including laws prohibiting waste.

60. *Pumping plant site.*—By opinion of December 2, 1931 (36 Op. Atty. Gen. 480), the Attorney General held that under section 28 of the act there may be granted a site for a pumping station reasonably necessary to the operation of a pipe line on a right-of-way granted under the section.

61. *Trespass.*—Any occupancy or use of public lands, including reservations, parks, or national forests, without proper authority, constitutes a trespass.

FRED W. JOHNSON,
Commissioner.

I concur:

W. C. MENDENHALL,
Director of Geological Survey.

Approved: May 23, 1938.

OSCAR L. CHAPMAN,
Assistant Secretary.

FORMS ¹

FORMS TO BE PLACED ON MAPS

(Form 1)

State of _____,

County of _____, ss:

_____, being duly sworn, says he is the chief engineer of (or the person employed to make the survey by) the _____ company; that the survey of said company's (canals, ditches, and reservoirs), as described and shown on this map (being a total length of canals, ditches, and laterals of ____ miles, and a total area of reservoirs at _____ acres), was made by him (or under his direction) as chief engineer of the company (or as surveyor employed by the company) and under authority, commenced

¹ Where necessary, these forms should be modified so as to be appropriate to the applicant (corporation, association, or individual), to the act invoked, and to the nature of the project.

on the _____ day of _____, 19____, and ending on the _____ day of _____, 19____ (and that the survey of the said canals, ditches, laterals, and reservoirs) accurately represents (a proper grade line for the flow of water, and accurately represents a level line, which is the proposed water line of the said reservoir), and that such survey is accurately represented upon this map. (And no lake or lake bed, stream or stream bed, is used for the said (canals, ditches, laterals, and reservoirs) except as shown on this map).

Subscribed and sworn to before me this _____ day of _____, 19____.

[SEAL]

Notary Public.

(Form 2)

I, _____, do hereby certify that I am president of the _____ company; that _____, who subscribed the accompanying affidavit, is the chief engineer of (or was employed to make the survey by) the said company; that the survey of the said (canals, ditches, laterals, and reservoirs), as accurately represented on this map, was made under authority of the company; that the company is duly authorized by its articles of incorporation to construct the said (canals, ditches, laterals, and reservoirs) upon the location shown upon this map; that the said (canals, ditches, laterals, and reservoirs), as represented on this map, was adopted by the company, by resolution of its board of directors, on the ____ day of _____, 19____, as the definite location of the said (canals, ditches, laterals, and reservoirs) and that no lake or lake bed, stream or stream bed is used for the said (canals, ditches, laterals, and reservoirs) except as shown on this map; and that the map has been prepared to be filed for the approval of the Secretary of the Interior, in order that the company may obtain the benefits of (sections 18 to 21, inclusive, of the acts of Congress approved March 3, 1891, entitled "An Act to repeal timber-culture laws, and for other purposes," and section 2 of the act approved May 11, 1898); and I further certify that the right-of-way herein described is desired for the main purpose of irrigation.

Attest:

President of the _____ Company.

[SEAL OF THE COMPANY]

 Secretary.

FORMS FOR PROOF OF CONSTRUCTION

(Form 3)

State of _____,

County of _____, ss:

_____, being duly sworn, says that he is the chief engineer of (or was employed to supervise or check the construction of the canals, ditches, laterals, and reservoirs of) the _____ company; that said (canals, ditches, laterals, and reservoirs) have been constructed under his supervision; that construction was commenced on the _____

day of _____, 19___, and completed on the _____ day of _____, 19___; that the constructed (canals, ditches, laterals, and reservoirs) as aforesaid, conform to the map which received the approval of the Secretary of the Interior on the _____ day of _____, 19___.

Subscribed and sworn to before me this _____ day of _____, 19___

(Form 4)

I, _____, do certify that I am the president of the _____ company; that the (canals, ditches, laterals, and reservoirs) were actually constructed as set forth in the accompanying affidavit of _____, chief engineer (or the person employed by the company in the premises), and on the exact location represented on the map approved by the Secretary of the Interior on the _____ day of _____ 19___; and that the company has in all things complied with the requirements of the act of Congress. (March 3, 1891, granting rights-of-way for canals, ditches, and reservoirs through the public lands of the United States.)

[SEAL OF COMPANY]

President of the _____ Company.

Attest:

Secretary.

FORM FOR WATER PLANTS ONLY

(Act of February 15, 1901, or February 1, 1905)

(Form 5)

State of _____,

County of _____, ss:

_____, being duly sworn, says he is the chief engineer of (or the person employed by) the _____ company, under whose supervision the survey was made of the grounds selected by the company for structures for a water plant under the act of Congress approved February 15, 1901 (or act of February 1, 1905), said grounds (here describe as required by regulation 36); that the accompanying drawing correctly represents the locations of the said structures; and that in his belief the structures represented are actually and to their entire extent required for the necessary uses contemplated by the said act of February 15, 1901 (31 Stat. 790), (or February 1, 1905).

Chief Engineer.

Subscribed and sworn to before me this _____ day of _____ 19___

[SEAL]

Notary Public.

(Form 6)

I, _____, do hereby certify that I am the president of the _____ company; that the survey of the structures represented on the accompanying drawing was made under authority and by direction of the company, and under the supervision of _____, its chief engineer (or the person employed in the premises), whose affidavit precedes this certificate; that the survey as represented on the accompanying drawing actually represents the structures required (here describe as required by regulation 36) for water plant, under the act of Congress approved February 15, 1901 (or act of February 1, 1905); and that the company, by resolution of its board of directors, passed on the _____ day of _____, 19____, directed the proper officers to present the said drawing for the approval of the Secretary of the Interior in order that the company may obtain the use of the grounds required for said structures, under the provisions of said act approved February 15, 1901 (31 Stat. 790), or (February 1, 1905).

[SEAL OF THE COMPANY] _____,

President of the _____ Company.

Attest:

Secretary.

(Form 7)

RESERVOIR DECLARATORY STATEMENT

(Under act of January 13, 1897 (29 Stat. 484))

Res. D. S.

No. _____

Land Office at _____, 19____

I, _____, of _____, do hereby certify that I am president of the _____ company, and on behalf of said company, and under its authority, do hereby apply for the reservation of land in _____ County, State of _____, for the construction and use of a reservoir for furnishing water for livestock under the provisions of the act of January 13, 1897 (29 Stat. 484). The location of said reservoir and of the land necessary for its use, is as follows: _____ of section _____ in township _____, of range _____, _____ M., containing _____ acres.

I hereby certify that to the best of my knowledge and belief the said land is not occupied or otherwise claimed, is not mineral or otherwise reserved, and that the said reservoir is to be used in connection with the business of the applicant of _____

The land owned or claimed by the applicant within the vicinity of the said reservoir (within 3 miles) is as follows:

I further certify that no part of the land to be reserved under this application is or will be fenced; that the same shall be kept open to the free use of any person desiring to water animals of any kind; that the land will not be used for any purpose except the watering of stock; and that the land is not, by reason

of its proximity to other lands reserved for reservoirs, excluded from reservation by the regulations and rulings of the Department.

The water of said reservoir will cover an area of _____ acres in _____ of section _____ in township _____, of range _____ of said lands; the capacity of the reservoir will be _____ gallons, and the dam will be _____ feet high. The source of the water for said reservoir is _____

and there are no streams or springs within 2 miles of the land to be reserved except as follows: _____

The applicant has filed no other declaratory statements under this act except as follows:

- No. _____, _____ land office area to be reserved _____ acres.
 - No. _____, _____ land office area to be reserved _____ acres.
 - No. _____, _____ land office area to be reserved _____ acres.
 - No. _____, _____ land office area to be reserved _____ acres.
- Total, _____ acres, of which Nos. _____ are located in said county.

And I further certify that it is the bona fide purpose and intention of this applicant to construct and complete said reservoir and maintain the same in accordance with the provisions of said act of Congress and such regulations as are or may be prescribed thereunder.

[SEAL OF COMPANY]

Attest:

Secretary.

State of _____,

County of _____, ss:

_____, being duly sworn, deposes and says that the statements herein made are true to the best of his knowledge and belief.

Subscribed and sworn to before me this _____ day of _____, in the year 19____

Notary Public.

Land Office at _____,

_____, 19__

I, _____, register of the land office, do hereby certify that the foregoing application is for the reservation of lands subject thereto under the provisions of the act of January 13, 1897; that there is no prior valid adverse right to the same; and that the land is not, by reason of its proximity to other lands reserved for reservoirs, excluded from reservation by the regulations and ruling of the Department.

Fees, \$_____ paid.

Register.

(Form 8)

State of _____,

County of _____, ss:

_____, being duly sworn, says that he is the person who was employed to make the survey of a reservoir covering an area of _____ acres, the initial point of the survey being _____ (here describe as required by regulation 4a), said reservoir having been constructed upon the _____ quarter of the _____ quarter of section

_____, township _____, range _____, _____ principal meridian, as proposed by reservoir declaratory statement No. _____, which was filed in the local land office at _____, under the provisions of the act of January 13, 1897 (29 Stat. 484); that the said survey was made on the _____ day of _____, 19___; that the dam and all necessary works have been constructed in a substantial manner; that the reservoir has a capacity of _____ gallons, and at the time of said survey contained _____ gallons of water.

Subscribed and sworn to before me this _____ day of _____, 19___.

Notary Public.

(Form 9)

I, _____, do hereby certify that I am the president of the _____ company which filed (or that I am the person who filed) reservoir declaratory statement No. _____ in the local land office at _____; that the reservoir proposed to have been constructed upon the _____ quarter of the _____ quarter of section _____ township _____, range _____, _____ principal meridian, covering an area of _____ acres, the initial point of the survey being _____ (describe as in form 8); that the dam and all necessary works have been constructed in a substantial manner in good faith in order that the reservoir may be used and maintained for the purpose, and in the manner prescribed by the said act of January 13, 1897 (29 Stat. 484), the provisions of which have been and will be complied with in all respects.

[SEAL OF COMPANY] _____
President of Company.

Attest: _____
Secretary.

(Form 10)

State of _____,
 County of _____, ss:

_____, being duly sworn, deposes and says that he is the president of the _____ company which filed (or that he is the person who filed) reservoir declaratory statement No. _____, in the local land office at _____; that the reservoir constructed in pursuance thereof, as heretofore certified, has been kept in repair; that the water has been kept therein to the extent of not less than _____ gallons during the entire calendar year of 19___; that neither the reservoir nor any part of the land reserved for use in connection therewith is or has been fenced during said years; and that the said company has in all things complied with the provisions of the act of January 13, 1897 (29 Stat. 484).

President of _____ Company.

Subscribed and sworn to before me this _____ day of _____, 19___.

[SEAL] _____
Notary Public.

Statutes

TRANSFER BY HOMESTEADER OF LAND FOR RIGHTS-OF-WAY

Section 2288, United States Revised Statutes:

Any bona fide settler under the homestead, or other settlement law, shall have the right to transfer by warranty against his own acts any portion of his claim for church, cemetery, or school purposes, or for the right-of-way of railroads, telegraph, telephones, canals, reservoirs, or ditches for irrigation or drainage across it; and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to his claim. (As amended by act of March 3, 1905.)

VESTED AND ACCRUED WATER RIGHTS

Section 2339, United States Revised Statutes:

Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right-of-way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

RESERVATION IN PATENTS OF RIGHTS-OF-WAY

Section 2340, United States Revised Statutes:

All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section.

The act of August 30, 1890 (26 Stat. 371-391), among other things, provides:

That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one-hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right-of-way thereon for ditches or canals constructed by the authority of the United States.

CANALS, DITCHES, AND RESERVOIRS FOR IRRIGATION

Section 18 of the act of March 3, 1891 (26 Stat. 1095), as amended by the acts of March 4, 1917 (39 Stat. 1197), and May 28, 1926 (44 Stat. 668), reads as follows :

That the right-of-way through the public lands and reservations of the United States is hereby granted to any canal ditch company, irrigation or drainage district formed for the purpose of irrigation or drainage, and duly organized under the laws of any State or Territory, and which shall have filed, or may hereafter

file, with the Secretary of the Interior a copy of its articles of incorporation or, if not a private corporation, a copy of the law under which the same is formed and due proof of its organization under the same, to the extent of the ground occupied by the water of any reservoir and of any canals and laterals and fifty feet on each side of the marginal limits thereof, and, upon presentation of satisfactory showing by the applicant, such additional right-of-way as the Secretary of the Interior may deem necessary for the proper operation and maintenance of said reservoirs, canals, and laterals; also the right to take from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: *Provided*, That no such right-of-way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the department of the Government having jurisdiction of such reservation; and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.

Sections 19, 20, and 21 of the act of March 3, 1891, read as follows:

SEC. 19. That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal if the same be upon surveyed lands, and if upon unsurveyed lands within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights-of-way shall pass shall be disposed of subject to such right-of-way. Whenever any person or corporation in the construction of any canal, ditch, or reservoir injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

SEC. 20. That the provisions of this act shall apply to all canals, ditches, or reservoirs heretofore or hereafter constructed, whether constructed by corporation, individuals, or association of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal, or reservoir has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the Secretary of the Interior and with the register of the land office where said land is located, a map of the line of such canal, ditch, or reservoir, as in case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of this act from the date of their filing, as though filed under it: *Provided*, That if any section of said canal or ditch shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture.

SEC. 21. That nothing in this act shall authorize such canal or ditch company to occupy such right-of-way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch.

Section 2 of the act of May 11, 1898 (30 Stat. 404), provides:

That rights-of-way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the act entitled "An Act to repeal timber-culture laws, and for other

purposes," approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights-of-way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation.

CARETAKER'S BUILDING SITES

The act of March 1, 1921 (41 Stat. 1194), provides:

That in addition to the rights-of-way granted by sections 18, 19, 20, and 21 of the act of Congress entitled "An act to repeal timber-culture laws, and for other purposes," approved March 3, 1891 (Twenty-sixth Statutes, p. 1095), as amended by the act of Congress entitled "An act to amend the irrigation act of March 3, 1891 (Twenty-sixth Statutes, p. 1095, sec. 18), and to amend section 2 of the act of May 11, 1898 (Thirtieth Statutes, p. 404)," approved March 4, 1917 (Thirty-ninth Statutes, p. 1197), and, subject to the conditions and restrictions therein contained, the Secretary of the Interior is authorized to grant permits or easements for not to exceed five acres of ground adjoining the right-of-way at each of the locations, to be determined by the Secretary of the Interior, to be used for the erection thereon of dwellings or other buildings or corrals for the convenience of those engaged in the care and management of the works provided for by said acts: *Provided*, That this act shall not apply to lands within national forests.

STOCK-WATERING RESERVOIRS

The act approved January 13, 1897 (29 Stat. 484), entitled "An act providing for the location and purchase of public lands for reservoir sites," is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person, livestock company, or transportation corporation engaged in breeding, grazing, driving, or transporting livestock may construct reservoirs upon unoccupied public lands of the United States, not mineral or otherwise reserved, for the purpose of furnishing water to such livestock, and shall have control of such reservoir, under regulations prescribed by the Secretary of the Interior, and the lands upon which the same is constructed, not exceeding one hundred and sixty acres, so long as such reservoir is maintained and water kept therein for such purposes: *Provided*, That such reservoir shall not be fenced and shall be open to the free use of any person desiring to water animals of any kind.

SEC. 2. That any person, livestock company, or corporation desiring to avail themselves of the provisions of this act shall file a declaratory statement in the United States land office in the district where the land is situated, which statement shall describe the land where such reservoir is to be or has been constructed; shall state what business such corporation is engaged in; specify the capacity of the reservoir in gallons, and whether such company, person, or corporation has filed upon other reservoir sites within the same county; and if so, how many.

SEC. 3. That at any time after the completion of such reservoir or reservoirs which, if not completed at the date of the passage of this act, shall be constructed and completed within two years after filing such declaratory statement, such person, company, or corporation shall have the same accurately surveyed, as hereinafter provided, and shall file in the United States land office in

the district in which such reservoir is located a map or plat showing the location of such reservoir, which map or plat shall be transmitted by the register and receiver of said United States land office to the Secretary of the Interior and approved by him, and thereafter such land shall be reserved from sale by the Secretary of the Interior so long as such reservoir is kept in repair and water kept therein.

SEC. 4. That Congress may at any time amend, alter, or repeal this act.

FENCING STOCK-WATERING RESERVOIRS

Section 1 of the act of January 13, 1897, as amended by the act of March 3, 1923 (42 Stat. 1437), provides:

The Secretary of the Interior, in his discretion, under such rules, regulations, and conditions as he may prescribe, upon application by such person, company, or corporation, may grant permission to fence such reservoirs in order to protect livestock, to conserve water and to preserve its quality and conditions: *Provided*, That such reservoir shall be open to the free use of any person desiring to water animals of any kind; but any fence erected under the authority hereof shall be immediately removed on the order of the Secretary.

TELEPHONE AND TELEGRAPH LINES, PIPE LINES, WATER PLANTS, ETC.

The act of February 15, 1901 (31 Stat. 790), is as follows:²

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights-of-way through the public lands, forest, and other reservations of the United States, and the Yosemite, Sequoia, and General Grant National Parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes, and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works, permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided*, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further*, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights-of-way for telegraph companies over the

² These acts have been superseded in part by the Federal Power Act of June 10, 1920 (41 Stat. 1063), as amended.

public domain: *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

The act of March 4, 1911 (36 Stat. 1253), provides, among other things, as follows: ³

That the head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights-of-way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands, national forests, and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for telephone and telegraph purposes, to the extent of twenty feet on each side of the center line of such electrical, telephone, and telegraph lines and poles, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right-of-way herein granted for any one or more of the purposes herein named: *Provided*, That such right-of-way shall be allowed within or through any national park, national forest, military, Indian, or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided*, That all or any part of such right-of-way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for non-use for a period of two years or for abandonment.

That any citizen, association, or corporation of the United States to whom there has heretofore been issued a permit for any of the purposes specified herein under any existing law may obtain the benefit of this act upon the same terms and conditions as shall be required of citizens, associations, or corporations hereafter making application under the provisions of this statute.

DAMS, RESERVOIRS, WATER PLANTS, DITCHES, CANALS, ETC., IN NATIONAL FORESTS FOR MINING OR MUNICIPAL PURPOSES

Section 4 of the act of Congress approved February 1, 1905 (33 Stat. 628), reads as follows:

That rights-of-way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals, within and across the forest reserves of the United States, are hereby granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of the milling and reduction of ores, during the period of the beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said reserves are respectively situated.

TRAMROADS, LOGGING, AND OTHER ROADS

The act of January 21, 1895 (28 Stat. 635), provides as follows: ⁴

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

³ These acts have been superseded in part by the Federal Power Act of June 10, 1920 (41 Stat. 1063), as amended.

⁴ This act has been superseded in part by the act of February 15, 1901 (31 Stat. 790).

hereby is, authorized and empowered, under the general regulations to be fixed by him, to permit the use of the right-of-way through the public lands of the United States, not within the limits of any park, forest, military, or Indian reservation, for tramroads, canals, or reservoirs to the extent of the ground occupied by the water of the canals and reservoirs and fifty feet on each side of the marginal limits thereof, or fifty feet on each side of the center line of the tramroad, by any citizen or any association of citizens of the United States engaged in the business of mining or quarrying or of cutting timber and manufacturing lumber.

HIGHWAYS AND MATERIAL SITES

Section 17 of the act of November 9, 1921 (42 Stat. 212), provides:

That if the Secretary of Agriculture determines that any part of the public lands or reservations of the United States is reasonably necessary for the right-of-way of any highway or forest road or as a source of materials for the construction or maintenance of any such highway or forest road adjacent to such lands or reservation, the Secretary of Agriculture shall file with the Secretary of the department supervising the administration of such land or reservation a map showing the portion of such lands or reservations which it is desired to appropriate.

If within a period of four months after such filing the said Secretary shall not have certified to the Secretary of Agriculture that the proposed appropriation of such land or material is contrary to the public interest or inconsistent with the purposes for which such land or materials have been reserved, or shall have agreed to the appropriation and transfer under conditions which he deems necessary for the adequate protection and utilization of the reserve, then such land and materials may be appropriated and transferred to the State highway department for such purposes and subject to the conditions so specified.

If at any time the need for any such lands or materials for such purposes shall no longer exist, notice of the fact shall be given by the State highway department to the Secretary of Agriculture, and such lands or materials shall immediately revert to the control of the Secretary of the department from which they had been appropriated.

OIL AND GAS PIPE LINES

Section 28 of the act of February 25, 1920 (41 Stat. 437), as amended by the act of August 21, 1935 (49 Stat. 674), and section 29 of said act read as follows:

SEC. 28. That rights-of-way through the public lands, including the forest reserves of the United States, may be granted by the Secretary of the Interior for pipe-line purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in section 1 of this act to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations and conditions as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers and 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 the interested

parties, and a proper finding of facts, determine to be reasonable: *Provided*, That the Government shall in express terms reserve and shall provide in every lease of oil lands hereunder that the lessee, assignee, or beneficiary, if owner, or operator or owner of a controlling interest in any pipe line or of any company operating the same which may be operated accessible to the oil derived from lands under such lease, shall at reasonable rates and without discrimination accept and convey the oil of the Government or of any citizen or company not the owner of any pipe line operating a lease or purchasing gas or oil under the provisions of this act: *Provided further*, That no right-of-way shall hereafter be granted over said lands for the transportation of oil or natural gas except under and subject to the provisions, limitations, and conditions of this section. Failure to comply with the provisions of this section of the regulations and conditions prescribed by the Secretary of the Interior shall be ground for forfeiture of the grant by the United States district court for the district in which the property, or some part thereof, is located in an appropriate proceeding.

SEC. 29. That any permit, lease, occupation, or use permitted under this act shall reserve to the Secretary of the Interior the right to permit, upon such terms as he may determine to be just, for joint or several use, such easements or rights-of-way, including easements in tunnels upon, through, or in the lands leased, occupied, or used, as may be necessary or appropriate to the working of the same, or of other lands containing the deposits described in this act, and the treatment and shipment of the products thereof by or under authority of the Government, its lessees, or permittees, and for other public purposes: *Provided*, That said Secretary, in his discretion, in making any lease under this act, may reserve to the United States the right to lease, sell, or otherwise dispose of the surface of the lands embraced within such lease under existing law or laws hereafter enacted, in so far as said surface is not necessary for use of the lessee in extracting and removing the deposits therein: *Provided further*, That if such reservation is made it shall be so determined before the offering of such lease: *And provided further*, That the said Secretary, during the life of the lease, is authorized to issue such permits for easements herein provided to be reserved.

TRANSFER OF RIGHT-OF-WAY FOR HIGHWAY PURPOSES

Section 16 of the act of November 9, 1921 (42 Stat. 212), reads as follows:

That for the purpose of this act the consent of the United States is hereby given to any railroad or canal company to convey to the highway department of any State any part of its right-of-way or other property in that State acquired by grant from the United States.

The act of May 25, 1920 (41 Stat. 621), reads as follows:

That all railroad companies to which grants for rights-of-way through the public lands have been made by Congress, or their successors in interest or assigns, are hereby authorized to convey to any State, county, or municipality any portion of such right-of-way to be used as a public highway or street: *Provided*, That no such conveyance shall have the effect to diminish the right-of-way of such railroad company to a less width than fifty feet on each side of the center of the main track of the railroad as now established and maintained.

ABANDONED RAILROAD RIGHTS-OF-WAY

The act of March 8, 1922 (42 Stat. 414), to provide for the disposition of abandoned railroad rights-of-way, reads as follows:

That whenever public lands of the United States have been or may be granted to any railroad company for use as a right-of-way for its railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by act of Congress, then and thereupon all right, title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment, be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures of any kind as aforesaid, except lands within a municipality the title to which, upon forfeiture or abandonment, as herein provided, shall vest in such municipality, and this by virtue of the patent thereto and without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever: *Provided*, That this act shall not affect conveyances made by any railroad company of portions of its right-of-way if such conveyance be among those which have been or may hereafter and before such forfeiture or abandonment be validated and confirmed by any act of Congress; nor shall this act affect any public highway now on said right-of-way: *Provided further*, That the transfer of such lands shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals in the land so transferred and conveyed with the right to prospect for, mine, and remove same.

RESERVATION OF RIGHT-OF-WAY FOR FEDERAL IRRIGATION PURPOSES

Subsection "P" of the act of December 5, 1924 (43 Stat. 672-704), reads as follows:

That where, in the opinion of the Secretary, a right-of-way or easement of any kind over public land is required in connection with a project, the Secretary may reserve the same to the United States by filing in the General Land Office and in the appropriate local land office, copies of an instrument giving a description of the right-of-way or easement and notice that the same is reserved to the United States for Federal irrigation purposes under this section, in which event entry for such land and the patent issued therefor shall be subject to the right-of-way or easement so described in such instrument; and reference to each such instrument shall be made in the appropriate tract books and also in the patent.

RIGHTS-OF-WAY WITHIN GRAZING DISTRICTS

Section 6 of the act of June 28, 1934 (48 Stat. 1269), reads, in part, as follows:

Nothing herein contained shall restrict the acquisition, granting, or use of permits of rights-of-way within grazing districts under existing law; or ingress or egress over the public lands in such districts for all proper and lawful purposes; * * *

REINDEER GRAZING—ALASKA

[Circular No. 1138a]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

May 26, 1938.

1. *Statutory authority.*—The act of March 4, 1927 (44 Stat. 1452), authorizes the Secretary of the Interior to lease public lands in Alaska for grazing reindeer and other animals on the public lands of Alaska. Section 14 of the act of September 1, 1937 (50 Stat. 900), authorizes the Secretary of the Interior, in order to coordinate the use of public lands in Alaska for grazing reindeer, to regulate the grazing of reindeer upon said lands. It authorizes him, in his discretion, to define reindeer ranges and to regulate the use thereof for grazing reindeer, to issue reindeer grazing permits and to issue rules and regulations to carry into effect the provisions of said section of the act.

2. *No reindeer leases to issue under the act of March 4, 1927.*—In view of the provisions of section 14 of the act of September 1, 1937, no reindeer leases will issue under the act of March 4, 1927, after the date of this circular, and the grazing of reindeer in Alaska will be governed by the act of September 1, 1937, and the rules and regulations that may be promulgated thereunder.

3. *Circular No. 1138 as amended by Circular No. 1203, amended.*—In accordance with the foregoing, Circular No. 1138 as amended by Circular No. 1203 is hereby amended by substituting for sections 3 and 4 thereof the following:

3. After the establishment of a grazing district, applications for leases may be filed in the proper district land office. Applications should be filed in duplicate.

(a) After a serial number has been assigned by the Register of the district land office to an application for a lease, one copy will be forwarded to the Commissioner of the General Land Office and one to the Office of the Division of Investigations at Anchorage, Alaska, each copy to be accompanied by a status report.

(b) Applications for leases must conform substantially to the Form 4-469.

4. The Special Agent in Charge will cause an investigation to be made of all applications to lease for grazing purposes and report to the General Land Office as to the livestock to be grazed on the land; as to the carrying capacity of the areas sought; as to the improvements, if any, existing thereon; as to their use and occupancy and as to the feasibility of granting the lease applied for. Recommendation

should also be made as to what rental should be charged and whether such charge should be deferred for any particular period.

FRED W. JOHNSON,
Commissioner.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

**PUBLIC SALE APPLICATIONS FOR LANDS IN GRAZING DISTRICTS
ESTABLISHED UNDER AUTHORITY OF THE TAYLOR GRAZING
ACT—CIRCULAR NO. 684 AMENDED**

[Circular No. 1447]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.

Circular No. 684, dated November 23, 1934, which indicates that public sale applications must be restricted to tracts of unreserved public lands, is hereby amended by adding thereto the following:

*Public Sale Applications for Lands in Grazing Districts Established
Under Authority of the Taylor Grazing Act*

29. *Statutory authority.*—Section 7 of the Taylor Grazing Act of November 26, 1934 (48 Stat. 1269), as amended by section 2 of the act of June 26, 1936 (49 Stat. 1976), authorizes the Secretary of the Interior, in his discretion, to examine and classify any lands within a grazing district, established under authority of said act, which are more valuable or suitable for any other use than for the use provided for under said act, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public land laws. On April 4, 1938, the Department construed the said section as authorizing the Secretary of the Interior to classify lands within a grazing district for disposition at public sale.

30. *Action on applications.*—Applications for public sales of lands in grazing districts, made under authority of the appropriate public sale law and said section 7 of the Taylor Grazing Act, as amended, must be accompanied by petitions for classification, as required by Circular No. 1353. Such applications and petitions, when received by the register, will be acted upon by him in accordance with instructions contained in said circular. If the Division of Grazing shall report as to the land applied for that there is no objection to the classification and opening, the General Land Office, through the Division of Grazing, will recommend the classification of the land

to the Secretary of the Interior. If and when the land is classified for disposition at public sale, the usual public sale procedure will be followed.

31. *Applicant will not secure preference right of entry.*—An applicant for the classification and public sale of lands in grazing districts will not secure a preference right of entry by reason of the filing of the application and petition.

FRED W. JOHNSON,
Commissioner.

Approved: June 2, 1938.

F. R. CARPENTER,
Director of Grazing.

Approved: June 14, 1938.

OSCAR L. CHAPMAN,
Assistant Secretary.

**AMENDMENT OF LEASE FORMS PRESCRIBED UNDER OIL AND GAS
REGULATIONS FOR THE PROTECTION OF LANDS EMBRACED IN
A RESERVATION OR SEGREGATED FOR ANY PARTICULAR PUR-
POSE, AND AS TO HELIUM PROVISIONS**

[Circular No. 1451]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.

1. *Provision for protection of lands embraced in a reservation or segregated for any particular purpose.*—Hereafter all leases issued under the oil and gas leasing act of February 25, 1920 (41 Stat. 437), as amended, and regulations thereunder, for lands embraced in a reservation or segregated for any particular purpose, will contain the following subsection:

Reserved or segregated lands.—If any of the land included in this lease is embraced in a reservation or segregated for any particular purpose, the lessee shall conduct operations thereunder in conformity with such requirements as may be made by the Secretary of the Interior for the protection and use of the land for the purpose for which it was reserved or segregated, so far as may be consistent with the use of the land for the purposes of this lease, which latter shall be regarded as the dominant use unless otherwise provided herein or separately stipulated.

2. *Oil and gas lease forms amended as to helium provisions.*—Subsection 3 (e) of the form of lease prescribed by Circular No. 672 approved March 11, 1920 (47 L. D. 437), and subsection 3 (d) of the form of lease prescribed by Circular No. 1386 approved May 7, 1936 (55 I. D. 502), which contain provisions relative to the helium con-

tent of any gas produced on lands embraced in such leases, are amended to read as follows:

Helium.—Pursuant to section 1 of the Act, and section 1 of the act of Congress approved March 3, 1927 (44 Stat. 1387), as amended, 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.

FRED W. JOHNSON,
Commissioner.

I concur: June 15, 1938.

JOHN C. PAGE,
Commissioner, Bureau of Reclamation.

I concur: June 15, 1938.

W. C. MENDENHALL,
Director, Geological Survey.

Approved: September 24, 1938.

E. K. BURLEW,
Acting Secretary of the Interior.

SURVEY AND DISPOSAL OF INDIAN POSSESSIONS IN TRUSTEE TOWNS AND SURVEY AND DISPOSAL OF NATIVE TOWNS, IN ALASKA

[Circular No. 1082a]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.

1. *Statutory authority.*—The act of May 25, 1926 (44 Stat. 629), provides for the town-site survey and disposition of public lands set apart or reserved for the benefit of Indian or Eskimo occupants in trustee town sites in Alaska and for the survey and disposal of the lands occupied as native towns or villages.

2. *Administration of Indian possessions in trustee towns.*—As to Indian possessions in trustee town sites in Alaska established under

authority of section 11 of the act of March 3, 1891 (26 Stat. 1095), and for which the town-site trustee has closed his accounts and been discharged as trustee, and as to such possessions in other trustee town sites in Alaska, such person as may be designated by the Secretary of the Interior will perform all necessary acts and administer the necessary trusts in connection with the act of May 25, 1926.

3. *Survey and disposal of Indian or Eskimo possessions.*—Where the matter of surveying and disposing of Indian or Eskimo possessions in trustee town sites is taken up for consideration, the town-site trustee will submit a report to the Commissioner of the General Land Office, showing whether or not it would be of interest to the Indian or Eskimo occupants of the land to extend the established streets and alleys of the town site upon and across the tract, and whether or not subdivisional surveys should be made. The report will be examined and considered by the Commissioner of the General Land Office, and will be referred to the Commissioner of Indian Affairs for consideration before transmittal to the Secretary with appropriate recommendations.

Before directing the survey and disposal of such Indian or Eskimo possessions under authority of the act of May 25, 1926, the Secretary of the Interior will determine whether or not the patent which issued for the town-site tract includes the tract designated as "Indian possessions." If it does not, a supplemental patent will be issued, to accompany the departmental order for survey and disposal.

4. *Sale of land for which restricted deed has issued.*—If the parties to a proposed sale involving land for which a restricted deed has been issued under authority of the act of May 25, 1926, wish to have the sale approved by the Secretary of the Interior, the fact should first be submitted to the town-site trustee. Upon receiving information regarding any proposed sale, the trustee will make such investigation as he deems proper, and he will submit a report to the Commissioner of the General Land Office as to the advisability of approving the proposed sale. The report will be examined by the Commissioner of the General Land Office and will be referred to the Commissioner of Indian Affairs for consideration before transmittal to the Secretary of the Interior with appropriate recommendation.

5. *Administration of native towns.*—The trustee for any and all native towns in Alaska which may be established and surveyed under authority of section 3 of the said act of May 25, 1926, will take such action as may be necessary to accomplish the objects sought to be accomplished by that section. In any case in which he thinks it would be of advantage to the Indian or Eskimo occupants to have the lands occupied and claimed by them surveyed as town or village, he

should bring the matter to the attention of the Commissioner of the General Land Office with appropriate recommendation.

6. *No payment, publication or proof required on entry for native towns.*—In connection with the entry of lands as a native town or village under section 3 of the said act of May 25, 1926, no payment need be made as purchase money or as fees, and the publication and proof which are ordinarily required in connection with trustee town sites will not be required.

7. *Provisions to be inserted in restricted deeds.*—The town-site trustee will note a proper reference to the act of May 25, 1926, on each deed which is issued under authority of that act and each such deed should provide that the title conveyed is inalienable except upon approval of the Secretary of the Interior, and that the issuance of the restricted deed does not subject the tract to taxation, to levy and sale in satisfaction of the debts, contracts, or liabilities of the transferee, or to any claims of adverse occupancy or law of prescription; also, if the established streets and alleys of the town site have been extended upon and across the tract, that there is reserved to the town site the area covered by such streets and alleys as extended. The deed should further provide that the approval by the Secretary of the Interior of a sale by the Indian or Eskimo transferee shall vest in the purchaser a complete and unrestricted title from the date of such approval.

8. *Unrestricted deeds not to be issued.*—The trustee shall not issue other than restricted deeds to Indians or other Alaskan natives.

9. *Native towns occupied partly by white occupants.*—Native towns which are occupied partly by white lot-occupants will be surveyed and disposed of under the provisions of both the act of March 3, 1891 (26 Stat. 1095, 1099), and the act of May 25, 1926 (44 Stat. 629).

In each case of this kind the town-site trustee will report the facts to the Commissioner of the General Land Office, showing the name and location of the town, the number of Indian or Eskimo lot-occupants, and the number of white lot-occupants, the amount of land used or claimed by each and the approximate periods for which it has been used or claimed, the value of the improvements on the lands and by whom owned, and such other facts as he may deem appropriate.

Upon receipt of such report special instructions will be issued as to the procedure which should be followed with respect to the survey, entry, and disposal of the lands, assessment of costs, etc.

10. *Forms.*—The following forms have been issued for use in connection with the regulations under the act of May 25, 1926: (a) Ap-

plication for deed by native Indian or Eskimo of Alaska, Form 4-231; (b) trustee's deed to native Indian or Eskimo of Alaska, Form 4-232; and (c) deed of native Indian or Eskimo of Alaska, Form 4-232a.

11. *Regulations superseded and amended.*—These regulations supersede the regulations contained in Circular 1082 and amend the regulations contained in Circular 491 insofar as they refer to the subject matter herein.

12. *Regulations revoked.*—Paragraph 8 of the regulations concerning town sites in Alaska entered by trustees under the act of March 3, 1891 (26 Stat. 1095) page 103, Circular 491, dated February 24, 1928, is hereby revoked. The section so revoked reads as follows:

Indian or native Alaskan occupants who have secured certificates of citizenship under the Territorial laws of Alaska shall be treated in all respects like white citizen occupants; but all land occupied by other Indians or Alaskan natives shall not be assessed by the trustee.

FRED W. JOHNSON,
Commissioner.

I concur: June 17, 1938.

WILLIAM ZIMMERMAN, Jr.,
Assistant Commissioner of Indian Affairs.

Approved: June 21, 1938.

OSCAR L. CHAPMAN,
Assistant Secretary.

EXCHANGES FOR THE CONSOLIDATION OR EXTENSION OF NATIONAL FORESTS

[Circular No. 863b]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
June 17, 1938.

1. *Statutory authority.*—The act of March 20, 1922 (42 Stat. 465), provides that when the public interests will be benefited thereby, the Secretary of the Interior is authorized, in his discretion, to accept on behalf of the United States title to any lands within national forests which, in the opinion of the Secretary of Agriculture, are chiefly valuable for national forest purposes, and in exchange therefor may patent not to exceed an equal value of such national forest land, in the same State, or the Secretary of Agriculture may authorize the grantor to cut and remove an equal value of timber within the national forests in the same State; the values in each case to be determined by the Secretary of Agriculture.

The act of March 20, 1922, was amended by the act of February 28, 1925 (43 Stat. 1090), by adding thereto section 2, which provides that either party to such an exchange may make reservations of timber, minerals, or easements, the values of which shall be duly considered in determining the values of the exchanged lands.

2. *Preliminary negotiations.*—All preliminary negotiations relating to an exchange under the act are to be conducted with the local representatives of the Forest Service, and any owner of land subject to exchange who desires to take advantage of the privilege conferred by this act must file with the local national forest officers an informal application describing the land to be conveyed as well as that to be selected, or if timber is desired in exchange the land on which such timber is located. The land must be specifically described according to Government subdivisions, and, as a rule, nothing less than a legal subdivision may be offered or selected, except where the applicant or the Government does not own the entire legal subdivision, or where a portion of a legal subdivision offered the Government is not valuable for national forest purposes, or where the United States desires to retain ownership of a portion or portions of a legal subdivision selected by the applicant due to the fact that such tract or tracts are chiefly valuable for national forest purposes. The selected land or timber must be entirely within national forest boundaries and in the same State in which the offered lands are located. The applicant must show by affidavit or other evidence satisfactory to the Forest Service that he is the owner of the land to be conveyed, and that such land is equal in value to the land or timber selected.

3. *Approval of informal application.*—When a tentative agreement has been reached between the applicant and the local national forest officer the case will be submitted to the Regional Forester and, if approved by him, to the Chief, Forest Service, Washington, D. C., for consideration. If the Chief, Forest Service, finds the exchange to be in the public interests and that the selected land or timber does not exceed the offered land in value, he will request the Secretary of Agriculture to advise the Secretary of the Interior that the acceptance of the certain described lands offered under the act and the granting in lieu thereof of other certain described lands, or of stumpage upon other described lands, meets with the approval of the Department of Agriculture; that the offered lands are chiefly valuable for national forest purposes, and that the appraised value of the land or timber selected does not exceed that of the land offered in exchange. The Secretary of the Interior, upon receipt of such letter from the Secretary of Agriculture, unless he has reason to do otherwise, will approve the exchange, subject to the submission of acceptable title to the offered lands and to full compliance by the applicant

with these regulations, and subject to any protests or other valid objections which may appear.

4. *Formal application.*—The General Land Office will notify the register of the district land office in whose district the land or timber to be selected is located of the approval of the exchange, and such register will in turn notify the person desiring to make such exchange of the approval thereof and that he is allowed 60 days from receipt of notice within which to file his formal application specifically describing the offered and selected lands, and in case timber is selected, the land on which the timber is located. The application must be accompanied by the necessary affidavits and fees.

Applications for exchange under this act, and the affidavits required by these regulations as to the offered and selected lands, should be in accordance with the appended form, or its substantial equivalent. Each application will be given a serial number and have the hour and date of filing stamped thereon. The register will note on his records against the land, "Selected under act of March 20, 1922 (42 Stat. 465), by ----- (date -----, serial No. -----, pending)."

5. *Affidavits required.*—An affidavit by the applicant that he or it is the owner of the land offered in exchange and that said land is not the basis of another selection or exchange must be filed. There must also be furnished an affidavit by the applicant or by some credible person possessed of the requisite personal knowledge, showing that the land selected is nonmineral in character; that it contains no salt springs or deposits of salt in any form sufficient to render it chiefly valuable therefor; that it is not in any manner occupied or claimed adversely to the selector.

Where the application is filed by an individual he will be required to show by affidavit that he is 21 years of age, and otherwise capable of carrying through the transaction.

These affidavits may be executed before any officer qualified to administer oaths.

Where the application is made by or in behalf of a corporation, a certified copy of the articles of incorporation must be furnished.

6. *Fees.*—Fees must be paid by the applicant at the rate of \$2 for each 160 acres, or fraction thereof, of the base lands offered and conveyed to the Government.

7. *Publication and posting.*—Within 30 days from the filing of his formal application to select land or timber the applicant will begin publication of notice thereof, at his own expense, in some newspaper or newspapers designated by the General Land Office and having general circulation in the county or counties in which the land offered and the land or timber selected are situated. Such notice must be published once each week for four successive weeks during which

time a similar notice of the application must be posted in the district land office. The notice should describe the land or timber applied for as well as the land offered in exchange and give the date of filing of the application and state that the purpose thereof is to allow all persons claiming the land selected or having bona fide objections to such application an opportunity to file their protests with the register of the land district in which the land selected is situated. Proof of publication shall consist of an affidavit of the publisher or of the foreman or other proper employee of the newspaper in which the notice was published, with a copy of the published notice attached. The register shall certify to the posting in his office. The dates of such publication and posting must in all cases be given.

8. *Action by register.*—If a protest is filed, all the papers should be transmitted to the General Land Office for consideration; but should no protest be filed against the allowance of the selection within 30 days from the date of the first publication of notice, and no objections appear on the records of the district land office, the register will notify the selector that he is allowed 60 days from receipt of notice within which to file the deed conveying the offered land to the Government, and abstract of title, as prescribed in paragraphs numbered 9, 10, and 11. The proof papers necessary to complete a selection should be filed at the same time. However, if additional time is necessary to complete the abstract, the same will be granted upon a proper showing. After the filing of the required deed of conveyance, abstract of title, and other proof, the register will certify the condition of the record on the application and will promptly transmit the original application and accompanying papers to the General Land Office by special letter.

9. *Deed of conveyance.*—The deed conveying the land offered as a basis of exchange must be executed and acknowledged in the same manner as a conveyance of real property is required to be executed and acknowledged by the laws of the State in which the land is situated. The deed should also be duly recorded. The deed should recite that the consideration for the conveyance to the United States of the land offered is the exchange therefor of not exceeding an equal value of certain other land, or of timber equal in value to the land conveyed, depending upon whether the exchange is one of land for land, or land for timber. The act or acts under which the exchange is made should be cited in the deed.

Such revenue stamps as are required by law must be affixed to the deed and canceled.

Where the conveyance is made by an individual it must show whether the person conveying is married or single, and if married, the wife or husband of such person, as the case may be, must join in the execution of the conveyance in such a manner as effectually to bar any

right of curtesy or dower, or any claim whatsoever to the land conveyed, or it must be fully shown that under the laws of the State in which the conveyed land is situated such wife or husband has no interest whatsoever, present or prospective, which makes her or his joining in the conveyance necessary.

Where the conveyance is by a corporation, it should be recited in the instrument of transfer that it was executed pursuant to an order or by the direction of the board of directors or other governing body, a copy of which order or direction should accompany such instrument of transfer, and should bear the impression of the corporate seal.

10. *Evidence of title.*—Each conveyance must be accompanied by a duly authenticated abstract of title, showing that at the time the conveyance was recorded the title was in the party conveying, and that the land was free from conflicting record claims, tax liabilities, judgment or mortgage liens, pending suits, or other encumbrances.

(a) *Authentication of abstract.*—The certificate of authentication of the abstract must be signed by the recorder of deeds or other proper official, under his official seal, or, if it is preferred, the abstract may be authenticated by an abstractor or 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). The certificate must show the title memoranda to be a full, true, and complete abstract of all matters of record or on file in the appropriate office or offices of the county or counties in which the offered land is located, including all conveyances, mortgages, or other encumbrances, judgments against the various grantors, mechanics' liens, lis pendens, or other instruments which are required by law to be filed with the recording officers affecting in any manner whatsoever the title to the described land.

(b) *Taxes.*—The authenticity of the tax records must be certified showing that all taxes levied or assessed against the land, or that could operate thereon as a lien, have been fully paid; or whether there is a tax lien although such tax is not assessed, due, or payable; that there are no unredeemed tax sales and no tax deeds outstanding as shown by the records of the proper county office. 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 submit a sum equal to at least twice the amount of taxes paid on the land for the previous year or in lieu thereof furnish a bond in like amount with qualified corporate surety, in order to indemnify the United States against loss for the taxes assessed or levied but not yet due and payable.

(c) *Judgment liens, lis pendens, absence of.*—The absence of judgment liens or pending suits against the various grantors which might affect the title of the land conveyed must be shown by the official certificate of the clerks of the courts of record, whose judgments, under the laws of the United States or the State in which the land is situated, would be a lien on the land conveyed.

(d) *Title insurance.*—Title insurance issued by a company which is acceptable to the General Land Office may be furnished in lieu of an abstract of title and same accepted upon proof that the insuring company is solvent and properly qualified, provided the policy is free from conditions and stipulations unacceptable to the United States.

11. *Application for timber.*—If timber is desired in exchange for the land to be conveyed to the United States, proof that notice has been published and posted will be all the evidence necessary to be filed in regard to the timber, but all the proof required in connection with the land offered as a basis for the exchange must be filed.

12. *Action by the General Land Office.*—The application and accompanying proof will, upon receipt by the General Land Office, be examined at as early a date as practicable, and if found defective opportunity will be given the parties in interest to cure the defects, if possible. If the selection appears regular and in conformity with the law and these regulations, the selection will, in the absence of objections, if for land only, be formally approved for patent by letter to the district land office, but if timber is taken in exchange the Secretary of Agriculture will, upon advice of the Secretary of the Interior that the regulations have been fully complied with, issue proper permit or certificate for the cutting of the timber.

13. *Practice and procedure.*—Notice of additional or further requirements, rejections, or other adverse actions of registers, the Commissioner, or the Secretary, will be given and the right of appeal, review, or rehearing recognized in the manner now prescribed by the Rules of Practice, except as otherwise herein provided. A protest or other objection against the selection or the application to select, must be filed with the register to be forwarded to the General Land Office for consideration and disposal. If there is no district land office in the State in which the lands involved in an application for exchange are situated, the formal application for exchange and all papers required in connection therewith, as well as all protests or other objections against the application, should be filed in the General Land Office.

Application to enter filed subsequent to any conflicting application to select will be rejected, except where the subsequent application to enter is supported by allegations of prior right, in which event it will be transmitted to the General Land Office with appropriate recom-

mentation. Applications presented under these regulations not in substantial conformity with the requirements herein made, not accompanied by the prescribed proof, or where land offered as basis of exchange or the land selected is not situated within the boundaries prescribed by existing laws will be rejected, subject to appeal or curing of the defect where possible.

14. *Right reserved to reject applications.*—Applications to select either land or timber under the provisions of the act will not defeat the right of the United States to withdraw or reserve the land for such purposes or uses as may be proper prior to the filing in the district land office of an application complete in all particulars.

15. *Other forest exchanges.*—Other acts providing for exchanges of lands in national forests will be found in a list appended hereto. Special regulations governing these acts have not been prepared, but exchanges thereunder must be made under the foregoing regulations, modified however to meet the limitations, conditions, and provisions of the acts mentioned.

16. *Conveyed lands added to national forests.*—All lands conveyed to the United States pursuant to these regulations shall, upon acceptance of title, become parts of the national forests within whose boundaries they are located.

These regulations supersede those approved March 20, 1925 (51 L. D. 69).

The following acts of Congress authorize exchanges within the various national forests

Date	Act	Forest
Mar. 13, 1908	(35 Stat. 42)	Crow Creek National Forest.
Feb. 18, 1909	(35 Stat. 626)	Calaveras Big Trees.
May 7, 1912	(37 Stat. 108)	Calaveras Big Trees.
July 31, 1912	(37 Stat. 241)	State of Michigan.
Aug. 22, 1912	(37 Stat. 323)	Pecos-Zuni.
Apr. 16, 1914	(38 Stat. 345)	Sierra-Stanislais.
Mar. 3, 1917	(39 Stat. 1122)	National Forests in Montana.
June 5, 1920	(41 Stat. 986)	Harney.
Mar. 4, 1921	(41 Stat. 1366)	Rainier.
Dec. 20, 1921	(42 Stat. 350)	Shoshone.
Feb. 2, 1922	(42 Stat. 362)	Deschutes.
Mar. 20, 1922	(42 Stat. 465)	All.
Sept. 22, 1922	(42 Stat. 1018)	State of Idaho.
Sept. 22, 1922	(42 Stat. 1017)	All.
Sept. 22, 1922	(42 Stat. 1036)	Wenatchee, Olympic, Snoqualmie.
Feb. 14, 1923	(42 Stat. 1245)	Lincoln (For regulations see Circular 888, approved April 9, 1923, 49 L. D. 529).
June 7, 1924	(43 Stat. 643)	Forests in New Mexico.
Jan. 12, 1925	(43 Stat. 739)	Forests in New Mexico.
Feb. 20, 1925	(43 Stat. 962)	Plumas, Eldorado, Stanislaus, Shasta, Tahoe.
Feb. 28, 1925	(43 Stat. 1079)	Mt. Hood.
Feb. 28, 1925	(43 Stat. 1090)	All.
Feb. 28, 1925	(43 Stat. 1074)	Snoqualmie.
Mar. 3, 1925	(43 Stat. 1215)	All.
Mar. 3, 1925	(43 Stat. 1117)	Custer.
Mar. 4, 1925	(43 Stat. 1279)	Umatilla, Wallowa, Whitman.
Mar. 4, 1925	(43 Stat. 1282)	Whitman.
Apr. 21, 1926	(44 Stat. 303)	All Forests in New Mexico and Arizona.
May 26, 1926	(44 Stat. 655)	Absaroka, Gallatin, Yellowstone Park.
June 15, 1926	(44 Stat. 746)	National Forests in New Mexico.
Feb. 15, 1927	(44 Stat. 1099)	Black Hills and Harney.
Mar. 2, 1927	(44 Stat. 1262)	State of Oregon.
Mar. 3, 1927	(44 Stat. 1378)	Arapaho.
Mar. 4, 1927	(44 Stat. 1412)	Colville.

The following acts of Congress authorize exchanges within the various national forests—Continued

Date	Act	Forest
Mar. 26, 1923	(45 Stat. 370)	Manti.
Apr. 10, 1923	(45 Stat. 415)	Challis, Sawtooth.
Apr. 16, 1923	(45 Stat. 431)	Carson, Manzano, Santa Fe.
Apr. 23, 1923	(45 Stat. 450)	Crater.
May 17, 1923	(45 Stat. 598)	Missoula.
Jan. 30, 1929	(45 Stat. 1145)	Montana.
Feb. 7, 1929	(45 Stat. 1154)	Lincoln (For regulations see Circular approved March 22, 1929, "K" 1327799).
May 14, 1930	(46 Stat. 278)	Fremont.
Feb. 25, 1932	(47 Stat. 55)	Cache.
June 30, 1932	(47 Stat. 451)	Siuslaw.
Mar. 4, 1933	(47 Stat. 1563)	Modoc.
Mar. 4, 1933	(47 Stat. 1569)	Gunnison.
Apr. 30, 1934	(48 Stat. 649)	St. Joe.
June 13, 1935	(49 Stat. 338)	Siskiyou.
June 13, 1935	(49 Stat. 338)	Willamette.
June 25, 1935	(49 Stat. 422)	Lincoln.
Aug. 2, 1935	(49 Stat. 508)	Chelan.
June 19, 1936	(49 Stat. 1534)	Umatilla and Whitman.
July 27, 1937	(50 Stat. 534)	Rogue River.
Aug. 12, 1937	(50 Stat. 622)	Columbia.
Aug. 21, 1937	(50 Stat. 739)	Snoqualmie.

FORMAL APPLICATION AND AFFIDAVITS

[Act of March 20, 1922 (42 Stat. 465)]

Serial Number -----

Receipt Number -----

-----, of -----, a citizen
 (Applicant) (Post Office)
 of the United States, of the age of 21 years, or over -----
 hereby applies to exchange under the act of March 20, 1922 (42
 Stat. 465), ----- the following described land sit-
 uated in the ----- (amendatory acts, if any) ----- National Forest.

(Reservations or exceptions to which the land is subject should be recited) for (the
 following land) (timber from the following land) (cross out item not applicable)

situated in the ----- National Forest.

The undersigned, being first duly sworn according to law, deposes and says that _____ is the applicant in the proposed exchange, is the owner of the above first described land, and that said land is not the basis of any other selection or exchange.

Subscribed and sworn to before me, this _____ day of _____,
 19_____.

(Official Designation)

[The following affidavit to be executed only when land is selected]

The undersigned, whose post office address is _____, being duly sworn according to law, deposes and says that _____ is well acquainted with the character of the land selected in this exchange; that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not to his knowledge any valuable mineral of any character whatsoever within the limits thereof; that the land contains no salt springs or deposits of salt in any form sufficient to render it chiefly valuable therefor; that said land is essentially nonmineral and nonsaline in character, and is not in any manner occupied or claimed adversely to the selector.

Subscribed and sworn to before me, this _____ day of _____,
 19_____.

(Official Designation)

FRED W. JOHNSON,
Commissioner.

Approved: June 2, 1938.

E. K. BURLEW,

Acting Secretary of the Interior.

Approved: June 17, 1938.

W. R. GREGG,

Acting Secretary of Agriculture.

PHOSPHATE LEASES—NO ACTION TO BE TAKEN ON APPLICATIONS EXCEPT IN PARTICULARLY MERITORIOUS CASES

[Order No. 1294]

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,

July 2, 1938.

In the interest of the public, pending investigation by the Congress pursuant to the message of the President dated May 20, 1938, and Senate Joint Resolution 298, approved June 16, 1938, of the adequacy and use of the phosphate resources of the United States, it is hereby ordered that until further notice no action be taken in the matter of granting leases or use permits for the mining of phosphate under the act of February 25, 1920 (41 Stat. 437).

However, in any particularly meritorious case when, in the judgment of the Secretary of the Interior, the granting of a lease is in the public interest, the provisions of this order may be waived.

This order has no applicability to outstanding leases. Applications for phosphate leases may be filed while this suspension order is in effect but no rights of any kind are thereby acquired.

E. K. BURLEW,
Acting Secretary of the Interior.

REGULATIONS AND FOREST PRACTICE RULES FOR THE SALE OF TIMBER FROM THE REVESTED OREGON AND CALIFORNIA RAILROAD AND RECONVEYED COOS BAY WAGON ROAD GRANT LANDS SITUATED IN THE STATE OF OREGON

[Circular 1448]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

July 7, 1938.

I. THE ACT OF AUGUST 28, 1937 (50 STAT. 874)

Title I of the act of August 28, 1937, entitled, "An Act Relating to the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands situated in the State of Oregon," provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That notwithstanding any provisions in the Acts of June 9, 1916 (39 Stat. 218), and February 26, 1919 (40 Stat. 1179), as amended, such portions of the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands as are or may hereafter come under the jurisdiction of the Department of the Interior, which have heretofore

or may hereafter be classified as timberlands, and power-site lands valuable for timber, shall be managed, except as provided in section 3 hereof, for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principle of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream-flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities: *Provided*, That nothing herein shall be construed to interfere with the use and development of power sites as may be authorized by law.

The annual productive capacity for such lands shall be determined and declared as promptly as possible after the passage of this Act, but until such determination and declaration are made the average annual cut therefrom shall not exceed one-half billion feet board measure: *Provided*, That timber from said lands in an amount not less than one-half billion feet board measure, or not less than the annual sustained yield capacity when the same has been determined and declared, shall be sold annually, or so much thereof as can be sold at reasonable prices on a normal market.

If the Secretary of the Interior determines that such action will facilitate sustained-yield management, he may subdivide such revested lands into sustained-yield forest units, the boundary lines of which shall be so established that a forest unit will provide, insofar as practicable, a permanent source of raw materials for the support of dependent communities and local industries of the region; but until such subdivision is made the land shall be treated as a single unit in applying the principle of sustained yield: *Provided*, That before the boundary lines of such forest units are established, the Department, after published notice thereof, shall hold a hearing thereon in the vicinity of such lands open to the attendance of State and local officers, representatives of dependent industries, residents, and other persons interested in the use of such lands. Due consideration shall be given to established lumbering operations in subdividing such lands when necessary to protect the economic stability of dependent communities. Timber sales from a forest unit shall be limited to the productive capacity of such unit and the Secretary is authorized, in his discretion, to reject any bids which may interfere with the sustained-yield management plan of any unit.

SEC. 2. The Secretary of the Interior is authorized, in his discretion, to make cooperative agreements with other Federal or State forest administrative agencies or with private forest owners or operators for the coordinated administration, with respect to time, rate, method of cutting, and sustained yield, of forest units comprising parts of revested or reconveyed lands, together with lands in private ownership or under the administration of other public agencies, when by such agreements he may be aided in accomplishing the purposes hereinbefore mentioned.

SEC. 3. The Secretary of the Interior is authorized to classify, either on application or otherwise, and restore to homestead entry, or purchase under the provisions of section 14 of the Act of June 23, 1934 (48 Stat. 1269), any of such revested or reconveyed land which, in his judgment, is more suitable for agricultural use than for afforestation, reforestation, stream-flow protection, recreation, or other public purposes.

Any of said lands heretofore classified as agricultural may be reclassified as timberlands, if found, upon examination, to be more suitable for the production of trees than agricultural use, such reclassified timberlands to be managed for permanent forest production as herein provided.

SEC. 4. The Secretary of the Interior is authorized, in his discretion, to lease for grazing any of said revested or reconveyed lands which may be so used without interfering with the production of timber or other purposes of this act as stated in section 1: *Provided*, That all the moneys received on account of grazing leases shall be covered either into the "Oregon and California land-grant fund" or the "Coos Bay Wagon Road grant fund" in the Treasury as the location of the leased lands shall determine, and be subject to distribution as other moneys in such funds: *Provided further*, That the Secretary is also authorized to formulate rules and regulations for the use, protection, improvement, and rehabilitation of such grazing lands.

SEC. 5. The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect. The Secretary of the Interior is further authorized, in formulating forest-practice rules and regulations, to consult with the Oregon State Board of Forestry, representatives of timber owners and operators on or contiguous to said revested and reconveyed lands, and other persons or agencies interested in the use of such lands.

In formulating regulations for the protection of such timberlands against fire, the Secretary is authorized, in his discretion, to consult and advise with Federal, State, and county agencies engaged in forest-fire-protection work, and to make agreements with such agencies for the cooperative administration of fire regulations therein: *Provided*, That rules and regulations for the protection of the revested lands from fire shall conform with the requirements and practices of the State of Oregon insofar as the same are consistent with the interests of the United States.

II. POLICY STATEMENT

The Act of August 28, 1937 (50 Stat. 874), is a measure providing for the conservation of land, water, forest, and forage on a permanent basis, the prudent utilization of these resources for the purposes to which they are best adapted, and the realization of the highest current income consistent with undiminished future returns. Title I of the Act seeks through application of the principles of sustained-yield management to provide perpetual forests which will serve as a secure foundation for continuing industry and permanent communities. The Act also provides for the flow of a full measure of the benefits produced by a well managed forest to the people of the region in which the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands are situated.

Proceeding in accordance with the requirements of the Act, it will be the policy of the Department of the Interior to restrict the cutting of timber on the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands to a total volume of 500,000,000 feet, b. m., per annum, pending an intensive examination of the property, the determination of the productive capacity of the land, and the formulation of a detailed forest working plan. It will further be the policy of the Department to direct such cut-

ting under rules of forest practice providing for partial or selective logging in its various forms of tree, group, and area selection. Tree selection will be required in stands of ponderosa pine and other intolerant species, and group and area selections will be favored in Douglas fir and the more tolerant species. There are many different ways in which selective cutting may be applied and a reasonable degree of discretion will be permitted field officers in the exercise of their judgment in prescribing the method or methods to be applied to a given sale unit. However, destructive methods which may tend to prevent an early restocking of the area under development are not authorized by the Act of August 28, 1937, and will not be permitted.

Prompt reforestation, following cutting of timber, so that the land may be kept continuously productive and to the end that the sustained yield of timber products may be maintained at a high level will be among the principal objectives of management.

Short term sales of restricted quantities of timber will be favored during the formulation of the detailed working plan, the division of the area into sustained-yield forest units, and the development of cooperative agreements with operators, private timber owners and State and Federal agencies. During this period the quantities of timber offered for sale will be sufficient to supply the normal needs of industry and to keep labor employed. Consideration will be given to the requirements of established operations to avoid unnecessary interference with their normal plans of development. However, contracts extending over periods of more than three years will not ordinarily be approved prior to the placing of the area under a permanent plan of management.

The property as a whole will ultimately be subdivided into local sustained-yield units, after making a careful study of the economic factors which must be weighed before the definite establishment of such units and after consultation with the local and State interests which are involved. The allocation of timber to particular units will be carried out as fairly and equitably as possible, giving full consideration to existing operations and the policy of stabilizing and perpetuating substantial dependent communities. Cutting will be encouraged in and directed toward mature and overmature Douglas fir stands and will be discouraged in young thrifty types that show a high current increment.

The Act refers to certain secondary benefits of the forest which are to be conserved by the new plan of management. It requires that the management practices employed shall provide agricultural opportunities, recreational facilities, watershed protection, and stream-flow regulation.

In compliance with this mandate, all lands classified for continuous timber production shall be so managed as to maintain or restore on them the best obtainable forest cover, to the end that soil may be protected from erosion, rainfall stored and its run-off retarded, floods avoided and the landscape kept green and attractive. In furtherance of this policy and in order to furnish recreational facilities, scenic strips of merchantable timber may be reserved adjacent to public roads, along stream courses, and surrounding lakes.

When reservations of this character are made they shall be of such form and extent as to minimize the danger of damage due to storms or other natural causes. They shall be so planned as to avoid unnecessary interference with the normal and proper conduct of logging operations on adjacent lands. Dead and dying and overmature trees may be selectively cut and removed from the reserved stands where this can be accomplished economically and without serious damage to recreational values.

Land shall be classified for agricultural use only where conditions indicate the probability of a permanent agriculture of better than marginal economy.

Grazing under regulation is authorized where it will not interfere with the attainment of the principal goal of forest management, namely, a high sustained yield of commercial timber from all areas classified as permanent forest land.

III. REGULATIONS GOVERNING THE SALE OF TIMBER

1. *Applications for the purchase of timber.*—Applications for the purchase of timber from the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands under authority of the Act of August 28, 1937, should be made in writing to the Chief Forester, O. & C. Lands at Portland, Oregon, on forms provided therefor. Upon the receipt of applications for purchase the Chief Forester will conduct an investigation of the timber applied for and if the sale as proposed meets with the requirements of the act of August 28, 1937, that officer will authorize the advertisement of the timber or recommend such advertisement to the Commissioner of the General Land Office or the Secretary of the Interior, as provided in these regulations. Offerings of timber for sale may also be made from time to time without the receipt of application when in the judgment of the Department such action is necessary to effective management.

2. *Qualifications of purchasers—Limitations on sales.*—No sale will be made for less than the appraised price, and the right to purchase at any sale will be limited, in accordance with law to citizens of the United States, associations of such citizens, and corporations organized under the laws of the United States, or any State, Territory, or

district thereof. Native-born citizens will be required to file an affidavit to that effect in connection with the first purchase, and naturalized citizens will be required to furnish either the original certificate of naturalization or duly certified or attested copy thereof, which copy, if of a certificate of naturalization issued after September 26, 1906, must be on the form prescribed by the Bureau of Naturalization. Corporations will be required to furnish either the original certificate of incorporation or a duly certified or attested copy thereof. A corporation organized outside of the State of Oregon must also show by a certificate by a proper State official that it has been authorized to do business within the State of Oregon.

3. *Examination and report.*—Before any timber is advertised or sold it shall be examined and appraised by the Chief Forester or his representative and a complete report covering the sale area filed with the officer who is to approve the sale. The report should consist of a description of the area, an estimate of the volume to be removed, an appraisal of the value of the timber by species, the plan of development best adapted to the area, the cost of development, the investment required, and the market value of the products manufactured from the timber.

The report should also include details with respect to the silvicultural practice to be followed, plans for brush disposal, fire protection, and any special considerations which should be incorporated in the contract in protection of the interest of the United States. The report should be accompanied by a copy of the form of advertisement to be used, a copy of the proposed contract and bond, and a map of the sale area.

4. *Advertisement of sales.*—All sales of timber of a stumpage value in excess of \$100 shall be made only after due advertisement and under sealed bids, and each advertisement must be approved by the officer who will approve the contract. If the stumpage value of the timber offered does not exceed \$2,000, the advertisement may be made in a newspaper or by posters and circular letters. If the stumpage value exceeds \$2,000, the advertisement must be made in at least one newspaper of general circulation in the locality where the timber is situated. For sales in which the stumpage value of the timber does not exceed \$10,000, the advertisement shall be for not less than two weeks; for sales exceeding \$10,000 but not over \$100,000, not less than four weeks; and for all sales exceeding \$100,000, not less than eight weeks.

5. *Deposits with bids.*—Cash deposits shall be submitted with each proposal for the purchase of timber from the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands. Such deposits shall be at least 20 percent of any estimated stumpage value which is less than \$1,000; at least 10 percent of any

estimated stumpage value between \$1,000 and \$10,000; at least 5 percent of any estimated stumpage value between \$10,000 and \$100,000; and at least 3 percent of any estimated stumpage value exceeding \$100,000. Every deposit must be made in cash or in the form of a duly certified check on a solvent national bank, drawn payable to the order of the Chief Forester of the O. & C. Lands. Deposits with bids are required as a guarantee of good faith, and when a bond is not executed the deposit of the successful bidder will be retained until the contract is completed. In the final settlement the deposit will be credited as a portion of the whole amount due for the timber purchased and any balance returned, provided the purchaser has faithfully performed the terms of the contract. If a bond is furnished and accepted, the deposit will be credited as a first installment in the payment for the timber. Checks of unsuccessful bidders will be returned upon the award of the bid.

6. *Acceptance and rejection of bids.*—Under ordinary circumstances the high bid received in connection with any advertisement issued under authority of these regulations will be accepted. However, the officer authorized to approve the contract shall have the right to reject the high bid and readvertise if he considers the high bidder to be unqualified to fulfill the contractual requirements of the advertisement. The right is also reserved to reject any bids which may interfere with the sustained-yield management plan of any sustained-yield unit.

7. *Financial position of purchasers.*—In all sales in excess of \$5,000, and in smaller sales when necessary, the successful bidder will be required, prior to the award of the timber, to submit a complete financial statement of his ability to fulfill the terms of the contract. Additional information with respect to the ability of the bidder to perform the contract, inclusive of data covering plant and equipment, etc., may be required before the award of the bid, in the discretion of the officer approving the contract.

8. *Contracts.*—Every timber sale contract shall be a clear statement of the obligations of the purchaser and of the Government. As a matter of convenience a standard form of timber contract has been provided and all sales of timber having a stumpage value in excess of \$100 will be consummated through the use of the standard form, unless a special form for a particular sale is approved by the Secretary of the Interior. The standard form provides for a reasonable degree of flexibility to meet variable conditions and no essential departure from the fundamental requirements thereof may be authorized, except with the approval of the Secretary. The Forest Practice Rules which have been incorporated in and made a part of these regulations shall be attached to and made a part of each timber sale contract.

All contracts should be executed in quadruplicate by the parties in interest. In connection with contracts approved by the Chief Forester, O. & C. Lands, that officer will sign as both party of the first part and as the approving officer. A copy of such contract, together with a complete report covering the essential facts in connection therewith, should be submitted to the Commissioner of the General Land Office for examination and filing. In contracts requiring the approval of the Commissioner of the General Land Office or the Secretary of the Interior, the Chief Forester, O. & C. Lands, will sign as the party of the first part, and all copies thereof, together with a report and a recommendation, will be submitted to the approving officer for final action.

9. *Bonds.*—In sales of timber in which the value of the stumpage does not exceed \$5,000 the initial deposit may be retained as a cash bond until the contract is completed. In sales of timber in which the stumpage value exceeds \$5,000 but is not over \$10,000 a bond of approximately 20 percent of the value of the timber will be required. In sales of timber in which the stumpage value exceeds \$10,000 but is not over \$100,000 a bond in an amount of approximately 10 percent of the estimated value of the timber will be required and in sales in which the stumpage value exceeds \$100,000 a bond will be required in an amount to be fixed by the Secretary of the Interior. Ordinarily corporate surety bonds will be required. However, if personal sureties are furnished in lieu thereof, such sureties will be accepted and the bond approved only upon a clear showing by the principals and the bondsmen that they are fully capable of carrying out the terms of the agreement.

10. *Approval of contracts and bonds.*—Contracts covering sales of timber having a stumpage value of \$25,000 or less may be approved by the Chief Forester, O. & C. Lands. Contracts covering sales of timber having a stumpage value between \$25,000 and \$50,000 will be approved by the Commissioner of the General Land Office. Contracts covering sales in which the stumpage value exceeds \$50,000 shall be made only with the express approval of the Secretary of the Interior. Bonds guaranteeing the faithful performance of contracts shall be approved by the officer approving the contracts.

11. *Payments for timber.*—Payments for timber shall be required in advance of cutting, either as a single payment or in the form of installments. In sales having a stumpage value of not more than \$1,000 payment will ordinarily be required in full before cutting is started. In sales of timber having a stumpage value of \$1,000 to \$5,000 payment shall be made in installments of not less than \$1,000 each; in sales of from \$5,000 to \$25,000 in installments of not less than \$2,500 each; and in sales of from \$25,000 to \$100,000 in installments

of not less than \$5,000 each; provided that the last installment on any sale may be in an amount equal to the balance due and payable thereon. In sales in which the stumpage value is in excess of \$100,000 the amount of the installments shall be determined at the time such sales are authorized; provided that the amount so fixed shall not be less than \$5,000 for each installment.

12. *Time for cutting and removal of timber.*—The maximum periods which shall be allowed for the cutting and removal of timber after the date the contract has been approved shall be as follows: For sales having a stumpage value of from \$1,000 to \$5,000, two years; for sales of timber having a stumpage value of \$5,000 to \$10,000, three years; for sales over \$10,000 but not exceeding \$25,000, five years; and for sales exceeding \$25,000 the number of years to be fixed by the Commissioner of the General Land Office or the Secretary of the Interior at the time such sales are authorized.

13. *Reappraisals.*—Timber sale contracts of more than five years' duration will provide for the redetermination of stumpage prices after reappraisal at stipulated intervals. Ordinarily reappraisals will be made and new rates established by the Secretary every three years subsequent to the year in which cutting operations are initiated. Special contract forms similar to the standard form but inclusive of a reappraisal clause will be formulated and approved by the Secretary for all sales of more than five years' duration.

14. *Timber cutting permits.*—All timber cutting which is not done under formal contract may be authorized on the standard permit form. The permit form has been devised as a convenience in meeting the requirements of homesteaders, ranchers, and local persons for limited quantities of timber for domestic, agricultural, and grazing purposes. It should not be used as a substitute for the regular contract form. The maximum value of the stumpage which may be cut under permit in one year by any individual shall not exceed \$100. Permits for the cutting of dead and down timber or for stand improvement may be issued by O. & C. officers without charge. However, a reasonable charge should be made for such merchantable timber as may be authorized for cutting under permit.

15. *Measurement of products.*—All living timber cut under authority of the standard form of contract or permit provided for herein shall be marked or otherwise designated by an authorized forest officer of the General Land Office. Timber shall be paid for on the basis of the cruised volume which, in group and area selection, will be determined in the accepted commercial manner, and in tree selection, will be determined by individual tree scale.

In view of the scattered location of a large part of the revested Oregon and California Railroad and reconveyed Coos Bay Wagon

Road grant lands the determination of volume by cruising or tree measurement will be more or less generally applied.

On comparatively large timber sales when the regular method of log scaling is practicable of application this method may be used since it insures a higher degree of accuracy than does cruising or the tree measurement method. The Scribner Decimal C log rule shall be used on all sales where the logs are scaled after the timber is cut, and this rule shall be the basis of volume determination in cruising or tree measurement.

16. *Records and reports.*—A complete record of timber sale activities shall be maintained in the Office of the Chief Forester, O. & C. Lands at Portland, Oregon, and that officer shall make monthly and annual reports to the Commissioner of the General Land Office concerning all details of administration.

The field record of timber sales shall consist of scale books, scale reports, and a register of scale reports showing the volume scaled or measured on each sale unit, the payments received therefor, and the disposition of the moneys so received.

Progress reports of the timber scaled or measured in each unit under development should be mailed each month to the Commissioner of the General Land Office, together with a summary of all sales and an analysis of the cost of administration. At the close of the fiscal year a detailed annual report must be rendered to the Commissioner by the Chief Forester, O. & C. Lands. This report should include a summary of the business conducted during the year, an analysis of the cost of administration, a detailed budget set-up of administrative requirements, and a complete statement of the progress achieved in connection with the formulation of a permanent forest working plan for the property.

17. *Acquisition of rights of way.*—The procedure governing the filing of applications and the granting of rights of way over public domain land under the various rights of way acts will be followed with respect to rights of way over the revested and reconveyed lands; provided, a sum sufficient to cover the estimated damage shall be deposited with the Chief Forester prior to construction, and provided further, that suitable stipulations will be required in connection with the granting of all rights of way for the protection of the various conservation measures contemplated by law.

IV. FOREST PRACTICE RULES AND GENERAL CONTRACT STIPULATIONS

The following forest practice rules and general contract stipulations are hereby prescribed for use in all contracts for the sale of timber from revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands situated in the State of

Oregon, except as special provision shall be made by the Secretary of the Interior with respect to particular sales.

18. *Definitions.*—The word “Chief Forester” as used in these forest practice rules and contract stipulations signifies the Chief Forester, O. & C. Lands. His office and principal place of business shall be in the City of Portland, Oregon.

The term “officer in charge” whenever used in these stipulations signifies the forest officer of highest rank assigned to the administration of timber sales within the district in which the sale is located, or such other officer as may be designated by the Chief Forester to supervise the sale.

Foresters, logging engineers, log scalers, and other officers authorized to administer timber sales will be appointed by the Secretary of the Interior and receive their instructions from the Chief Forester or the officer in charge.

19. *Basis of sale.*—Timber shall be sold on the basis of cruise, tree scale or log scale, and no timber except that necessary for improvements or that which interferes with the economical conduct of a logging enterprise shall be cut unless it has been marked or designated in advance by the officer in charge. Where volumes are determined on the basis of a scale of the standing trees, such volumes shall be checked for accuracy by a periodic scaling of the logs on sample areas. The purchaser shall be permitted to witness such check scaling. Where the volume is determined by log measurement the Scribner Decimal C log rule will be used in scaling the logs.

20. *Deposits.*—Cash deposits in advance of cutting will be required as stipulated in the contract. The title to standing timber or forest products covered by the contract will not pass to the purchaser until such timber or products are paid for. If at any time the stumpage value of the timber cut and unpaid for shall approach or equal the total amount then on deposit, an additional advance deposit shall be required.

21. *Logging areas designated by.*—The priority of areas to be logged, when economically feasible, may be designated by the officer in charge if such action is necessary to prevent deterioration from fire, insects, or disease, and fully to protect the interests of the United States.

22. *Selective logging.*—The logging of areas in such manner as to preserve a part of the merchantable timber, promote the growth of young trees, or preserve the forest cover, shall be practiced on all lands chiefly valuable for the production of timber. The general plan of selective logging to be followed may take any of the various forms of tree selection, group selection, or area selection, or combinations thereof, which in the judgment of the Chief Forester will assure

the successful conservation and protection of the resources under development.

23. *Reservations for public purposes.*—In the discretion of the officer in charge, a strip of suitable width on each side of lakes, streams, roads, and trails and in the vicinity of camping places and recreation grounds may be reserved, in which little or no cutting will be allowed. In carrying out the selective cutting in these areas all reasonable care shall be taken to avoid injury to the remaining standing timber. Within these reserved areas trees shall be felled in such manner as to leave the right-of-way, streams, and lake shores free from slash deposits.

24. *Protection of young growth.*—The young growth shall be protected as fully as possible in every branch of the logging operations and its use in the construction of improvements may be restricted by the officer in charge.

25. *Fire code.*—Section 5 of the act of August 28, 1937, provides in part, "That rules and regulations for the protection of the revested lands from fire shall conform with the requirements and practices of the State of Oregon insofar as the same are consistent with the interests of the United States," and proceeding in accordance therewith, contractors will be required to comply with applicable provisions of the State fire code, as well as the following:

(a) The slash resulting from logging operations shall be burned only under written permit from the Chief Forester acting in cooperation with the State Forester. In the Douglas fir type on areas logged in the group or area selection manner the burning of slash, where required, shall be carried out in accordance with the best and safest practices recognized in the "Forest Practice Handbook" of the Pacific Northwest Loggers and the West Coast Lumbermen's Associations. Adequate special protection shall be given to all reserved timber. Proper fire trails shall be constructed as required by the Chief Forester where necessary in advance of slash burning to protect green timber areas, islands of immature timber and previously logged areas that have been cleared of slash. Where the tree selection method of logging is used special methods economically possible shall be worked out by the Chief Forester in cooperation with the State Forester and the purchaser. In the ponderosa pine type slash disposal shall be carried out in accordance with the Rules of Forest Practice (Oregon) of the Western Pine Association. Special provisions may be developed by the Chief Forester in cooperation with the State Forester and the purchaser.

(b) Smoking and lunch fires shall be restricted during periods of fire hazard and shall be permitted only in especially prepared places.

(c) The contractor shall be required to stop logging operations in especially hazardous fire weather upon request from the Chief Forester.

26. *Responsibility for damage.*—The contractor shall be held accountable for any damage to virgin timber, reserve stands or young growth, occurring as a result of slash burning or other fires originating on the sale area or adjacent lands and shall be required to pay for such damage on the basis of an appraisal to be conducted by the Chief Forester; provided the purchaser, his subcontractors or employees are directly or indirectly responsible for the origin or spread of the fire.

27. *Sales—Rights of way.*—Other sales within a sale area may be made of products and kinds of timber not sold under a previous sale, provided such sales will not, in the judgment of the officer having authority to make such sale, interfere with the operations of the previous purchaser. The previous purchaser shall not be held liable for any damage by fire or other causes for which such additional purchasers are directly or indirectly responsible. Rights of way may be granted through portions of the sale area during the contract period, provided they do not interfere with the operations of the previous purchaser.

28. *Firewood—Improvements.*—As far as possible only unmerchantable timber other than young growth shall be used for firewood and improvements, and material so used will not be charged to the purchaser. Wood and improvements taken from merchantable material will be scaled or measured, charged, and paid for at its appraised value.

29. *Stumps.*—Stumps will be cut low so as to avoid unnecessary waste.

30. *Waste.*—Unnecessary waste of merchantable timber not previously paid for in high stumps, butts, tops, breaks, skids, and partially sound logs and all trees designated for logging which are not logged and all trees which are left felled or lodged or badly damaged by the logging operations will be scaled for their merchantable contents and charged against the purchaser.

31. *Carelessness—Breakage.*—Carelessness on the part of fellers or other employees of the purchaser that results in unnecessary breaking of trees not previously cruised or scaled will be penalized by scaling such trees full as if they had not been broken.

32. *Sanitation.*—The vicinity of logging camps and stables will be kept in a clean and sanitary condition, and rubbish will be removed and properly burned or buried during the occupancy and upon the removal of the camps and stables.

33. *Pollution—Obstruction of streams.*—Streams shall not be obstructed by felled trees or otherwise, nor shall they be polluted by sawdust, manure, or any other refuse from a camp or mill.

34. *Utility facilities.*—Existing telephone lines, fences, roads, trails, and other improvements shall be protected as far as possible

in the logging operations, and whenever they are broken or obstructed the purchaser shall promptly repair the damage. If he fails to make the repairs promptly, the officer in charge may make the repairs and purchasers may be charged with double the expense thereof.

35. *Necessary improvements.*—Improvements necessary to execute his contracts, such as camps, sawmills, railroads, roads, telephone lines, chutes, bridges, sluices, and dams may be constructed and maintained by the purchaser on and across the contracted area, subject to regulation by the Commissioner of the General Land Office.

36. *Existing improvements.*—Improvements already on the area which are necessary for logging purposes may be used by the purchaser, subject to regulation by the Commissioner of the General Land Office.

37. *Time for removal of improvements.*—The time limit for the removal of the improvements and other property of the purchaser is one year after the expiration of the contract. After that time the title to improvements, including camps, will attach to the land, and no personal property of the purchaser will thereafter be removed except with the written consent of the officer in charge: *Provided*, That improvements necessary for the logging of other O. & C. timber may be left for such time and on such terms as may be prescribed by the Commissioner of the General Land Office.

38. *Extension of time.*—Extension of time for the performance of any contract may be granted the purchaser by the officer approving the contract, in his discretion and subject to such conditions as he may impose.

39. *Extension of time denied.*—If extension of time to cut and remove the timber is not granted by the officer approving a contract, the purchaser shall not cut timber after the expiration of the contract, but he may remove the timber previously cut and paid for, within one year of the expiration of the contract. If not removed within the time allowed, the title will revert to the United States notwithstanding the purchaser may have paid for the timber.

40. *Assignments by purchaser.*—Assignment of any contract in whole or in part by the purchaser will not relieve him of his contract obligations unless the assignment is approved by the officer approving the contract and the bond is satisfactorily renewed.

41. *Records—Reports.*—The purchaser shall furnish the Chief Forester annually on forms provided therefor a report of the amount of lumber sold and the average grade prices received f. o. b. the mill during the preceding year; the amount of ties and timber sold, with average price per M; and the amount of byproducts sold and the total receipts for the same, and such other information as may be requested. These reports will be regarded as confidential.

42. *Suspension of operations—When.*—Suspension of the purchaser's operations may be made by the Chief Forester after due notice if any requirements of the contract and of these stipulations are disregarded and until there is satisfactory compliance. Failure to comply with any one of the requirements of the contract after written notice addressed to the purchaser by the officer in charge will be ground for revocation by the officer approving the contract of all rights of the purchaser under this and other contracts, and the forfeiture of his bond and of all moneys paid, and the purchaser will be liable for all damage resulting from his breach of contract.

43. *Appeal.*—An appeal as provided by the Rules of Practice of the Department of the Interior may be taken to the Commissioner of the General Land Office and Secretary of the Interior from the final decision of the Chief Forester or his staff.

44. *Bond unsatisfactory.*—Whenever any bond furnished to guarantee obligations under a sale shall be unsatisfactory to the officer approving the sale he may require a new bond which shall be satisfactory to him.

45. *Default.*—Wilful failure of the purchaser to complete his contract or to log as promptly as economically possible an area damaged by fire, wind, insects, or other causes, or the commission by him of any act for which the officer approving his contract shall declare the contract forfeited, will render the purchaser and his bondsmen liable for the depreciation in the value of the remaining timber on an estimate of value and quantity to be made under the direction of the officer approving this contract.

46. *Persons excluded.*—No member of or delegate to Congress shall be admitted to any share, part, or interest in any contract, or to any benefit derived therefrom (see Secs. 114 and 116, Act of March 4, 1909, entitled "An Act to codify, revise, and amend the penal laws of the United States," 35 Stats. 1088, 1109), and no person undergoing a sentence of imprisonment at hard labor shall be employed in carrying out any contract (see Executive order of May 18, 1905).

47. *Forms.*—Forms for application, bid, contract, and bond heretofore approved by the Secretary of the Interior will be made available through the Commissioner of the General Land Office.

48. These regulations shall be effective and operative sixty days from the date of approval.

FRED W. JOHNSON,
Commissioner.

Approved: July 7, 1938.

HAROLD L. ICKES,
Secretary of the Interior.

**DISPOSITION OF FILING FEES ACCOMPANYING APPLICATIONS FOR
LEASES, PERMITS, AND OTHER RIGHTS UNDER THE MINERAL
LEASING ACTS**

[Circular 1383a]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

July 13, 1938.

1. *When filing fees will be applied as earned or returned to applicant.*—Fees paid with applications for leases, permits, 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), under the potash leasing act of February 7, 1927 (44 Stat. 1057), or under the sulphur leasing act of April 17, 1926 (44 Stat. 301), shall be applied as earned by the register immediately upon receipt of notice from the General Land Office that the application has been adjudicated and the lands found subject to lease, permit, or other right. Pending such notification, or notice of the final disposition of an application, the register will hold the fee as “deposits, unearned proceeds, lands, etc.”

Fees paid in connection with applications for coal leases, permits or licenses which are rejected will not be returned in any event unless and until authorized by the General Land 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 for which payment has not been made.

2. *Regulations superseded.*—These regulations supersede the regulations contained in Circular No. 1383, approved April 14, 1936 (55 I. D. 483), effective August 1, 1938.

FRED W. JOHNSON,
Commissioner.

Approved: July 13, 1938.

HAROLD L. ICKES,
Secretary of the Interior.

**STIPULATION REQUIRED IN CONNECTION WITH LEASES AND PER-
MITS UNDER THE MINERAL LEASING ACTS, FOR LANDS IN
NATIONAL FORESTS**

[Circular No. 1450]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

August 12, 1938.

The following regulation is promulgated, pursuant to departmental instructions of March 30, 1938:

Sec. 191.4. *Stipulation required of applicants for leases and permits for lands in national forests.*—All applicants on and after March 30, 1938, for permits and leases under the mineral leasing act of February 25, 1920 (41 Stat. 437), as amended, for lands in the national forests, will be required to file a stipulation prior to issuance of permit or lease substantially as follows:

If permittee or lessee shall construct any camp on the land, such camp shall be located at a place approved by the forest supervisor, and such forest supervisor shall have authority to require that such camp be kept in a neat and sanitary condition. This requirement is subject to the permittee's or lessee's right of appeal to the Secretary of the Interior in case he disagrees with the forest supervisor.¹

FRED W. JOHNSON,
Commissioner.

Approved:

E. K. BURLEW,
Acting Secretary of the Interior.

**FREE USE OF TIMBER UPON PUBLIC LANDS IN ALASKA BY
CHURCHES, HOSPITALS, AND CHARITABLE INSTITUTIONS—CIR-
CULAR 1394, AMENDED**

[Circular No. 1449]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.

1. *Free use privilege extended to churches, hospitals, and charitable institutions.*—The act of June 15, 1938 (52 Stat. 699), amends section 11 of the act of May 14, 1898 (30 Stat. 414), so as to extend the free use timber-cutting privilege on the unreserved public lands in Alaska to churches, hospitals, and charitable institutions.

2. *Governing regulations.*—The cutting of timber on such lands by churches, hospitals, and charitable institutions will be governed by the regulations contained in Circular No. 1394, dated June 20, 1936, as herein amended.

3. *Regulations amended.*—The introductory paragraph and paragraphs 1 and 6 of Circular No. 1394 have been carried into the Code of Federal Regulations as sections 79.1, 79.2, and 79.7, respectively, which regulations and sections are hereby amended to read as follows:

79.1. *Statutory authority.*—Section 11 of the act of May 14, 1898 (30 Stat. 414; 48 U. S. C. 423), empowers the Secretary of the Interior to permit the use of timber found upon the public lands in Alaska by actual settlers, residents, individual miners, and pros-

¹ Issued under authority of Sec. 32, 41 Stat. 450; 30 U. S. C. 189.

pectors for minerals, for firewood, fencing, buildings, mining, prospecting, and for domestic purposes as may actually be needed by such persons for such purposes. This section was amended by the act of June 15, 1938 (52 Stat. 699), so as to permit the use of such timber by churches, hospitals, and charitable institutions for firewood, fencing, buildings, and for domestic purposes.¹

79.2. *Free use privilege; cutting by agent.*—The only timber which may be cut under these regulations for free use in Alaska is timber on vacant public lands in the Territory not reserved for national forest or other purposes. The timber so cut may not be sold or bartered. The free use privilege does not extend to associations or corporations, except churches, hospitals, and charitable institutions. Any applicant entitled to the free use of timber may procure it by agent, if desired, but no part of the timber may be used in payment for services in obtaining it or in manufacturing it into lumber. Timber may not be cut by an applicant hereunder after the land has been included in a valid homestead settlement or entry or other claim, except that any applicant for the free use of timber who has given notice of intention to take it as hereinafter provided, will have the right to cut it while the notice remains in force as against a subsequent applicant who may wish to obtain the same timber by purchase.¹

79.7. *Amount of timber which may be cut.*—During each calendar year each applicant entitled to the benefits of the act may take a total of 100,000 feet board measure or 200 cords in saw logs, piling, cordwood, or other timber. This amount may be taken in whole in any one of such classes of timber or in part of one kind and in part of another kind or other kinds. Where a cord is the unit of measure, it shall be estimated in relation with saw timber in the ratio of 500 feet board measure to the cord. Permits to take timber in excess of the amount stated may be granted to churches, hospitals, and charitable institutions upon a showing of special necessity therefor, and with the approval of the Commissioner of the General Land Office. The restrictions as to quantity do not apply to timber cut for Government purposes under section 79.3 (par. 2, Cir. 1394).¹

FRED W. JOHNSON,
Commissioner.

Approved: August 13, 1938.

OSCAR L. CHAPMAN,
Assistant Secretary.

¹ Issued under authority of sec. 11, 30 Stat. 414; 48 U. S. C. 423.

ASSIGNMENTS OF ROYALTY INTERESTS IN OIL AND GAS PROSPECTING PERMITS AND LEASES PRIOR TO A DISCOVERY WILL NOT RECEIVE APPROVAL

[Circular No. 1453]

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
November 18, 1938.

SEC. 192.42a. (1) *Royalty interests in oil and gas prospecting permits and assignments thereof.*—Royalty interests in oil and gas prospecting permits do not constitute holdings or control of lands and deposits within the meaning of section 27 of the act of February 25, 1920 (41 Stat. 437), as amended. Prior to the discovery of a valuable deposit of oil or gas, assignments of royalty interests in permits will not be approved, recognized, or considered in any way and should not be filed with the Department. After discovery such assignments should be filed in the appropriate district land offices and be accompanied by a showing in affidavit form by the assignees as to their citizenship and holdings in other oil and gas prospecting permits and leases in the same State.¹

SEC. 192.42b. (2) *Royalty interests in oil and gas leases and assignments thereof.*—Royalty interests in oil and gas leases constitute holdings or control of lands and deposits within the meaning of section 27 of the act of February 25, 1920 (41 Stat. 437), as amended. Assignments of such interests in leases must be filed for record purposes in the appropriate district land offices accompanied by a showing in affidavit form by the assignees as to their citizenship and holdings in other oil and gas prospecting permits and leases in the same state, but they will not be approved unless and until a discovery of a valuable deposit of oil or gas is made.¹

SEC. 192.42c. (3) *Effective date and applicability.*—These regulations shall be effective on the date of their approval and are applicable to all assignments of royalty interests in oil and gas prospecting permits and leases not heretofore approved by the Department regardless of the date the assignment was made.¹

(4) *Regulations superseded.*—To the extent that section 1 (g) of the regulations approved April 4, 1932 (53 I. D. 640), is inconsistent herewith it is hereby modified. Circular No. 1331 approved July 31, 1934 (54 I. D. 549), Sec. 192.42 of the Code of Federal Regulations is hereby superseded.¹

ANTOINETTE FUNK,
Acting Commissioner.

Approved:

HARRY SLATTERY,
Acting Secretary of the Interior.

¹ Issued under authority of sec. 32, 41 Stat. 450; 30 U. S. C. 189.

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