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**DECISIONS
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DEPARTMENT OF THE INTERIOR**

EDITED BY
ETHEL B. FOLAND



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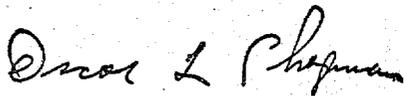
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- PREFACE*

This 60th volume of the Decisions of the Department of the Interior includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period from July 1, 1947, to December 31, 1951.

The Honorable J. A. Krug and the undersigned served successively as Secretary of the Interior during the period covered by this volume; the undersigned and Mr. Richard D. Searles served successively as Under Secretary of the Interior; Messrs. C. Girard Davidson, William E. Warne, Dale E. Doty, and Robert R. Rose, Jr., served at various times as Assistant Secretaries of the Interior; Mr. Vernon D. Northrop served as Administrative Assistant Secretary of the Interior during the latter part of the period; and Mr. Mastin G. White served as Solicitor of the Department of the Interior.

This volume will be cited within the Department of the Interior as "60 I. D."



Secretary of the Interior.

*Volume 60, containing the decisions of the Department from July 1947 to December 1951, was in the process of publication when the term of Secretary Chapman expired in January 1953. The volume was completed and published in 1954.

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DECISIONS OF THE DEPARTMENT OF THE INTERIOR

DOROTHY P. SOETH

A-24408

Decided July 2, 1947

Sodium Prospecting Permit—Application—Subsequent Withdrawal of Land.

Where public land has been withdrawn from all forms of appropriation under the public-land laws, including the mining and mineral leasing laws, it is proper to reject an application for a sodium prospecting permit even though the land was withdrawn after the application was filed.

School-Land Grants—Passage of Title.

The date on which a school section is identified by an accepted survey is the earliest date that the title to a school section can pass to a State already admitted to the Union.

School-Land Grants—Act of January 25, 1927.

The act of January 25, 1927, as amended (43 U. S. C. sec. 870), is applicable only to school-section lands known to be of mineral character at the effective date of the original school-land grant. Where the existence of a valid application has prevented the State's title, under section 2 of the act of January 25, 1927, from vesting in the State, the State's title would vest upon cancellation of that application. Applications initiated after January 25, 1927, cannot prevent the vesting of the State's title under the 1927 act.

School-Land Grants—Presumption of Nonmineral Character.

Unless it is shown that the land was mineral in character as of the effective date of the basic grant, the presumption is that the land was not then known to be mineral in character and hence that the title to school sections identified by an acceptable survey passed to the State under its basic school-land grant.

School-Land Grants—Sale or Disposition.

The filing of an application for a permit to prospect for minerals is merely a request that a permit be granted and does not constitute a sale or disposition of the land which would prevent the State of Utah from acquiring the title to a school section under its basic school-land grant.

Potassium Prospecting Permit.

A potassium prospecting permit entitles the holder thereof to the exclusive right to prospect for potassium on the land covered by the permit.

MOTION FOR REHEARING

Miss Dorothy P. Soeth filed an application¹ for a mineral prospecting permit (sodium, magnesium, potassium) covering the following lands:

T. 24 S., R. 20 E., S. L. M., Utah,

sec. 25, all.

sec. 26, all.

sec. 35, all.

sec. 36, all.

The Bureau of Land Management rejected her application for the following reasons:

(a) As to sec. 36: The title to this land was held to have vested in the State of Utah under the school-land grants,² and therefore this section is not now subject to the public-land laws.

(b) As to secs. 25, 26, and 35: Because the Geological Survey had reported (on September 4, 1942) that these lands were more valuable prospectively for potassium than for sodium, the issuance of a sodium permit was held to be inconsistent with the Department's Order No. 914 of April 5, 1935,³ which suspended certain action on applications for potash permits or leases.

By decision of November 12, 1946 (A-24408), the Department (a) affirmed the rejection of Miss Soeth's application insofar as it covered secs. 35 and 36, because these sections had, by Public Land Order No. 256 of January 4, 1945,⁴ been "withdrawn and reserved from all forms of appropriation under the public land laws, including the mining and mineral leasing laws"; (b) pointed out that there is no authority for issuing a sodium and magnesium prospecting permit, but that if secs. 25 and 26 are prospectively more valuable for potassium than for sodium, as reported in 1942 by the Geological Survey, any prospecting permit should be issued under the potassium laws (which authorize the Department to allow the taking also of sodium and magnesium under a potassium lease), rather than under the sodium laws (which do not authorize the taking of magnesium); (c) held

¹ Miss Soeth's application, Salt Lake City 063486, was filed on June 10, 1942, for "a prospecting permit for sodium, magnesium, and allied minerals." Sodium permits are issued under section 23 of the Mineral Leasing Act of 1920 (41 Stat. 447), as amended by the act of December 11, 1928 (45 Stat. 1019; 30 U. S. C. sec. 261). On March 16, 1943, in her appeal from the rejection of her application, she requested that her application be amended "so it will include potassium and associated minerals under Act of February 7, 1927 [44 Stat. 1057; 30 U. S. C. secs. 281-285, which authorizes the issuance of potassium prospecting permits and leases], and this amendment to be considered as of the original filing date June 10, 1942."

² Either under the act of July 16, 1894 (28 Stat. 107, 109, sec. 6), or under the act of January 25, 1927 (44 Stat. 1026), as amended by the act of May 2, 1932 (47 Stat. 140; 43 U. S. C. sec. 870).

³ 43 CFR, Part 194, footnote 56.

⁴ 10 F. R. 336; 43 CFR, 1945 Supp., App., p. 4067.

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that her application could be now considered under the potassium regulations of January 4, 1945,⁵ as to secs. 25 and 26 if these sections are prospectively valuable for potassium; and (d) held that there was no necessity to rule on Miss Soeth's contention that sec. 36 still belonged to the Federal Government, in view of the holding that her application should be rejected as to sec. 36 because of the withdrawal of that land by Public Land Order No. 256 from all forms of appropriation.

Miss Soeth has filed a motion for rehearing with respect to secs. 35 and 36, urging that since her application for these sections was filed before they were withdrawn, her application could not be affected by the withdrawal. Her contention that the kind of application which she filed could not be affected by a subsequent withdrawal order has been held by this Department to be unsound.⁶ However, on May 21, 1947, Public Land Order No. 256 was revoked by Public Land Order No. 370⁷ which became "effective immediately so as to permit the issuance of mineral prospecting permits and leases upon applications which were filed prior to the dates of the respective withdrawals and which are still pending in the Bureau of Land Management * * *." Miss Soeth's application falls within this category.⁸ Public Land Order No. 256 therefore is no longer a bar to Miss Soeth's application. Accordingly, her application may now be considered under the potassium regulations with respect to sec. 35, as well as with respect to secs. 25 and 26, if these sections are prospectively valuable for potassium. The Department's decision of November 12, 1946, is modified accordingly.

Insofar as sec. 36 is concerned, since Public Land Order No. 256 is no longer a bar to Miss Soeth's application, it now becomes necessary to pass on the merits of her contention that the land still belongs to the United States and has not passed to the State of Utah under the school-land grants. Miss Soeth's argument that the title to sec. 36 did not vest in the State of Utah rests on the following facts:

The plat of survey of T. 24 S., R. 20 E., S. L. M., Utah, was accepted on September 4, 1929. The date on which the school-land section is identified by an accepted survey is the earliest date that the title to sec. 36 could have passed to the State of Utah.⁹ On that date, however,

⁵ Circ. 1592, 10 F. R. 336; 43 CFR, 1945 Supp., Part 194, as amended by Circ. 1600, 10 F. R. 3647.

⁶ *James M. Conlon*, A-24498 (Salt Lake City 063488), December 31, 1946 (unreported); see, also, *Claude D. Crowell*, A-24492 (Salt Lake City 064049), January 27, 1947 (unreported); *Utah Magnesium Corporation*, 59 I. D. 289 (1946); and *O. O. Cooper et al.*, 59 I. D. 254 (1946), Motion for Rehearing, A-24208, October 28, 1946 (unreported).

⁷ 12 F. R. 3450.

⁸ *G. E. Pitts, etc.*, A-24098 (Salt Lake City 062626, etc.), June 11, 1947 (unreported).

⁹ See *Margaret Scharf, R. E. Havenstrite*, 57 I. D. 348, 354-355 (1941); 43 CFR 270.15; *United States v. Morrison*, 240 U. S. 192, 207 (1916); *United States v. Wyoming*, 331 U. S. 440 (1947).

sec. 36 was then subject to an application for a potassium prospecting permit filed by one J. B. Thompson on February 20, 1925 (Salt Lake City 035288). Miss Soeth filed her application on June 10, 1942. Thompson's application was not finally rejected until December 28, 1942. Miss Soeth therefore argues that sec. 36 was never free of a claim or application under Federal law and therefore the attachment of the State's title could not occur.

The grant to the State of Utah of school sections in place, not known to be of mineral character at the effective date of the grant, was made by the act of July 16, 1894.¹⁰ Mineral school sections in place were granted by the act of January 25, 1927.¹¹

The 1927 act is applicable only to school-section lands known to be of mineral character at the effective date of the original school-land grant.¹² If sec. 36 were of the character of land subject to the 1927 act, the issue raised by Miss Soeth would be disposable under section 2 of the 1927 act, as amended. Section 2 excluded from the operation of the 1927 act such lands, among others, as were "subject to or included in any valid *application*, claim, or right initiated or held under any of the existing laws of the United States, *unless or until such reservation, application, claim, or right is extinguished, relinquished, or canceled * * **" [Italics supplied.] The emphasized language of this provision plainly contemplates that where the existence of a valid application had prevented the vesting of the State's title, the State's title would vest upon the cancellation of that application. Thus, under this provision, upon the cancellation of the Thompson application on December 28, 1942, the State acquired the title to sec. 36. Nor could the existence of Miss Soeth's application bar the vesting of the State's title since the statute clearly contemplates, and it has been so held, that only applications, claims or rights initiated prior to January 25, 1927, are sufficient to defeat the vesting of the State's title under the 1927 act.¹³ Hence, if the act of 1927 were applicable, Miss Soeth's application could not be granted on sec. 36 because the title to that section would have passed to the State on December 28, 1942. However, unless it is shown that the land was mineral in character as of the otherwise effective date of the basic grant, the presumption is that the land was not then known to be mineral in character and hence that the title to school sections identified by an accepted survey has passed to the State under its basic school-section land grant.¹⁴ There

¹⁰ 28 Stat. 107, 109, sec. 6; see *United States v. Sweet*, 245 U. S. 563 (1918).

¹¹ 44 Stat. 1026, as amended by the act of May 2, 1932 (47 Stat. 140; 43 U. S. C. sec. 870).

¹² *Margaret Scharf, R. E. Havenstrite*, 57 I. D. 348, 358, 360 (1941); 43 CFR 270.23.

¹³ 43 CFR 270.27; Circ. 1114 of March 15, 1927, 52 I. D. 51, 53; *Sidney E. Bartlett v. State of Wyoming*, A. 22978 (Cheyenne 064925), June 23, 1941 (unreported); *Rodgers v. Berger*, 55 Ariz. 433, 103 P. (2d) 266, 268 (1940).

¹⁴ *Margaret Scharf, R. E. Havenstrite*, 57 I. D. 348, 356 (1941).

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has been no showing made by Miss Soeth in this case that the sec. 36 here involved was known to be of mineral character at the effective date of the grant. The presumption therefore remains that this sec. 36 is of the character which could pass to the State under its basic grant of July 16, 1894.

We turn, therefore, to consider the question whether the title to sec. 36 passed to the State of Utah under its basic grant of July 16, 1894. That act granted to the State of Utah, for the support of common schools, the nonmineral sections numbered 2, 16, 32, and 36, except those embraced in permanent reservations for national purposes and those which "have been sold or otherwise disposed of by or under the authority of any Act of Congress."

As of September 4, 1929, when the plat of survey was approved, sec. 36 was not within any reservation and was subject only to the application filed by Thompson for a potassium prospecting permit. No permit was ever issued on the basis of Thompson's application. "An application for a permit to prospect for minerals pursuant to the leasing act is a mere request that a license be granted, and confers upon the person making such application no interest in the land described or the mineral deposits therein."¹⁵ The Thompson application did not have the segregative effect, such as an entry, lease or permit would have had,¹⁶ which would constitute a sale or other disposition of the land within the meaning of the exception to the school-section grant act. A mere request to the Government to make a disposition of an interest in the land did not amount to a disposition and was thus not sufficient to prevent the attachment of the State's title to sec. 36 under the 1894 act at the time that the plat of survey was officially accepted and approved, i. e., on September 4, 1929. Thus, irrespective of whether the 1927 act or the 1894 act is applicable, Miss Soeth's application could not be granted for sec. 36, since the State's title to this section vested either on December 28, 1942, under the 1927 act, or on September 4, 1929, under the 1894 act, and Miss Soeth cannot secure a permit for sec. 36 on the basis of her application. The

¹⁵ *Enlow v. Shaw*, 50 L. D. 339, 340 (1924); *James M. Conlon*, A-24498 (Salt Lake City 063488), December 31, 1946.

¹⁶ *Barnhurst v. State of Utah*, 30 L. D. 314 (1900); *State of Utah*, 47 L. D. 359 (1920); *Louis C. Gross v. Robert B. Nowell*, A. 10786 (Salt Lake City 037126), August 30, 1927; *William C. Kraemer*, A. 10879 (Salt Lake City 037879), August 30, 1927. A potassium prospecting permit entitles the holder thereof to the exclusive right to prospect on the land, during the life of the permit, for potassium in any of the forms named in the act of February 7, 1927 (44 Stat. 1057; 30 U. S. C. sec. 281). See 43 CFR 194.1; Circ. 1120, 52 L. D. 84 (April 20, 1927). The effect that the cancellation of a subsisting permit or entry has on the vesting of title to school-section lands in place under the basic school-land grant to the State of Utah is discussed in the above cases. See, also, *State of New Mexico*, 52 L. D. 626, 628 (1929), citing but distinguishing the decision in *State of Utah*, 47 L. D. 359 (1920).

rejection of Miss Soeth's application by the Bureau of Land Management as to sec. 36 was, therefore, correct.¹⁷

As here modified, the Department's decision of November 12, 1946, is adhered to. Miss Soeth's motion for rehearing is denied and the case is remanded to the Bureau for further action not inconsistent with the Department's decisions in this case.

WILLIAM E. WARNE,
Assistant Secretary.

LIABILITY OF INNOCENT PURCHASER FROM WILLFUL TRESPASSER

Timber Trespass—Liability of Innocent Purchaser from Willful Trespasser— Departmental Memorandum of March 26, 1938.

The departmental memorandum of March 26, 1938, to the Commissioner of the General Land Office, concerning the measure of damages payable by an innocent purchaser from a willful trespasser, erroneously regarded headnote 3 in the official report of the Court's opinion in the case of *Wooden-ware Co. v. United States*, 106 U. S. 432, as fixing, in the absence of a State statute on the point, the measure of damages payable by said innocent purchaser as the value of the timber at the time of such purchase, irrespective of the extent of the liability of the willful trespasser.

Timber Trespass—Liability of Innocent Purchaser from Willful Trespasser— *Wooden-ware Co. v. United States*, 106 U. S. 432.

The case of *Wooden-ware Co. v. United States*, *supra*, determined that, in the absence of a State statute on the point, an innocent purchaser from a willful trespasser "must respond by the same rule of damages as his vendor should if he had been sued," and the contrary conclusion in the departmental memorandum of March 26, 1938, to the General Land Office was erroneous.

M-34960

JULY 16, 1947.

TO THE SECRETARY.

In connection with a timber-trespass case arising in Montana and involving one Roy Shook (2133982 "L"), the question has arisen as to the soundness of certain views expressed in the departmental memorandum of March 26, 1938, to the Commissioner of the General Land Office, concerning the measure of damages payable by an innocent purchaser from a willful trespasser.

That memorandum * * * dealt with the liability of an innocent purchaser of timber from a willful trespasser in a case where a State statute fixed the liability of the willful trespasser but was silent as to

¹⁷ The present case is not a proper one warranting a determination by this Department as to which act governs the passage of the title of sec. 36 to the State. A conclusive and authorized determination as to whether the title passed under the basic grant act or under the 1927 act may be made by this Department upon application for a patent by the State of Utah under the act of June 21, 1934 (48 Stat. 1185; 43 U. S. C. sec. 871a). See *Margaret Scharf, R. E. Havenstrite*, 57 I. D. 348, 365 (1941).

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that of the innocent purchaser. The memorandum referred to the case of *Wooden-ware Co. v. United States*, 106 U. S. 432 (1882), and asserted that "Rule 3 of the *Wooden-ware* case should be regarded as fixing the measure of damages" in the case of the innocent purchaser, even though the amount of the innocent purchaser's liability on that basis might be greater than the amount for which his vendor, the willful trespasser, would be liable under the measure of damages applicable to the latter's case pursuant to State law. The instructions contained in the memorandum of March 26, 1938, have been generally followed in the Department since that date.¹

In mentioning "Rule 3 of the *Wooden-ware* case," the memorandum of March 26, 1938, apparently referred to the portion of the headnote in the official report of the Court's opinion stating that—

Where the plaintiff, in an action for timber cut and carried away from his land, recovers damages, the rule for assessing them against the defendant is: * * * 3. Where he is a purchaser without notice of wrong from a willful trespasser, the value at the time of such purchase.

This headnote was erroneously regarded by the person who drafted the memorandum as fixing, in the absence of a State statute on the point, the measure of damages payable by an innocent purchaser from a willful trespasser irrespective of the extent of the liability of the willful trespasser. On the contrary, the Supreme Court's approval in the *Wooden-ware* case of the judgment of a circuit court holding the innocent purchaser liable for the value of the timber at the time and place of the purchase was based upon the ground that the vendor in that case (i. e., the willful trespasser) would have been liable on that basis if he had been sued "the moment before he sold" the timber. The opinion makes it clear that an innocent purchaser "must respond by the same rule of damages as his vendor should if he had been sued." (P. 435.)

The departmental memorandum of March 26, 1938, thus was based upon a misunderstanding of the *Wooden-ware* case, and the conclusion stated in the memorandum was erroneous.

I enclose for your consideration the draft of a memorandum to the Director of the Bureau of Land Management, withdrawing the erroneous instructions previously issued concerning the measure of damages payable by an innocent purchaser from a willful trespasser.²

MASTIN G. WHITE,
Solicitor.

¹ See Note 5, Part 288, 43 CFR.

² The draft of memorandum was signed by Assistant Secretary Davidson on July 23, 1947. Note 5, Part 288, 43 CFR, which referred to the instructions of March 26, 1938, was deleted on August 15, 1947 (12 F. R. 5731). [Editor.]

CLAIM OF S. ALBERT JOHNSON

Irrigation Claim—Act of Private Person.

Payment of a claim for damage to property allegedly arising out of the "survey, construction, operation, or maintenance of irrigation works" by the Bureau of Indian Affairs cannot be made when the damage resulted from the act of a person not in the service of the Government who placed a "check board" in an irrigation lateral and caused the water to overflow.

T-9

JULY 17, 1947.

TO THE SECRETARY.

S. Albert Johnson, Pocatello, Idaho, filed a claim on December 27, 1946, in no specified amount, against the United States for compensation because of damage to a beet crop as the result of the flooding of his land caused by a break in an irrigation lateral on the Fort Hall irrigation project operated by the Fort Hall Agency, Bureau of Indian Affairs. The question whether the claim should be paid under the Federal Tort Claims Act (28 U. S. C. sec. 921 *et seq.*), or under the act of February 20, 1929 (25 U. S. C. sec. 388), has been submitted to me for an opinion.

From the record before me, it appears that on May 9, 1946, several farmers whose lands were being irrigated by the Fort Hall irrigation project requested additional water. Accordingly, the ditchrider turned water into the facer lateral. During the night the water overflowed the banks of the lateral and, after washing away part of the bank, flowed down through the claimant's beet field and damaged his crop. Seven of the 19 water users on the lateral were drawing water at the time of the break. The only explanation for the break in the bank is that a "check board" was placed in the ditch at the farm below that of the claimant. The "check board" caused the lateral to overflow and break. A "check board" is sometimes placed in a ditch by the farmers when the water is low, in order to maintain the flow at an even level.

It does not appear from the evidence who put the "check board" in the ditch. There is evidence that the ditchrider was a new man, that he was not familiar with the habit of the farmers in placing "check boards" in the lateral, and that he did not compensate for this factor in regulating the flow of the water. The claimant's damage was determined by the Superintendent of the Fort Hall Agency to be \$297.

In the regulations applicable to the operation of the Fort Hall irrigation project, it is provided that—

The delivery of water will be made by the watermaster or ditchrider only, and any person interfering with delivery or diversion devices without specific authorization will be liable to prosecution. Consumers are prohibited from cutting the banks of canals or laterals. [25 CFR 106.10.]

July 21, 1947

The necessary headgates, checks and measuring devices will be installed by the project in canals, laterals and drainage ways operated and maintained by the project. * * * [25 CFR 106.15.]

In order for a claimant to recover from the United States under the Federal Tort Claims Act, the evidence must show that the damage resulted from a negligent or wrongful act or omission of an employee of the Government while acting within the scope of his employment. *Guy Rutledge*, Solicitor's determination, June 17, 1947 (M-34813). In this case there is no evidence of negligence on the part of the ditchrider. While a more experienced ditchrider would have known of the practice of farmers in placing "check boards" in the ditch, there was no duty on the part of the ditchrider to anticipate the practice and to compensate for it in regulating the flow of water. The placing of the "check board" in the lateral by the farmers was in violation of the regulations governing the operation of the irrigation project. Therefore, as there was no negligence on the part of an employee of the United States, the claim must be denied under the Federal Tort Claims Act.

In order for a claimant to recover under the act of February 20, 1929, the damage must be a direct result of some nonnegligent action on the part of an officer or employee of the United States in the survey, construction, operation, or maintenance of irrigation works. *Joseph Micka, Jr.*, Solicitor's opinion, June 3, 1940 (M. 30154). There is no evidence that the ditchrider or any other Government employee did any act which resulted in the claimant's damage. On the contrary, the evidence indicates that some unidentified third person placed the "check board" in the lateral. Consequently, the claim must be denied also under the act of February 20, 1929.

MASTIN G. WHITE,
Solicitor.

NATIONAL MONUMENTS

Reduction of Area—Oil and Gas Leasing.

The President is authorized to reduce the area of national monuments by reason of the provision of the statute which states that their limits "in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." 16 U. S. C. sec. 431.

Though section 1 of the Mineral Leasing Act specifically provides that its provisions are not applicable to lands in national monuments, in the event of actual or threatened drainage of oil or gas under lands within a national monument by wells on non-federally-owned lands, the authority to take the necessary protective action, including the making of contracts and the issuance of oil and gas leases, would impliedly exist.

M-34978

JULY 21, 1947.

TO UNDER SECRETARY CHAPMAN.

This is in response to your oral inquiry whether, with respect to Jackson Hole National Monument, (1) the area of the monument may be reduced by Executive action, and (2) whether the Department is authorized to issue oil and gas leases for areas within the monument in order to prevent the drainage of oil or gas from such areas by wells on adjacent non-federally-owned lands.

The answer to the first question may be found in an opinion of Solicitor Margold, dated January 30, 1935 (M-27657), in which he held that the President was authorized to reduce the area of a national monument. This authority has its source in the provision of the statute authorizing the establishment of national monuments, which states that their limits "in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." 16 U. S. C. sec. 431. The President has in fact exercised this authority in a number of instances. See 39 Op. Atty. Gen. 185, 188.

With respect to the second question, section 1 of the Mineral Leasing Act specifically provides that its provisions are not applicable to lands "in national parks and monuments." 30 U. S. C. sec. 181. However, the Attorney General has held that where oil is being drained from Government-owned land that is not subject to the Mineral Leasing Act, there is implied authority in the head of the department having jurisdiction over such land to take protective measures to offset the drainage, including the making of the necessary contracts. 40 Op. Atty. Gen. 41. The Attorney General's opinion involved lands which had been acquired by the United States for a specific public purpose and which in an earlier opinion the Attorney General had held not to be subject to oil and gas leasing under the Mineral Leasing Act. 40 Op. Atty. Gen. 9. The earlier opinion turned on the construction of the words "lands * * * owned by the United States" in section 1 of the act (30 U. S. C. sec. 181), and held that the lands under consideration were not intended to be included in that phrase. It might conceivably be argued that the authority mentioned by the Attorney General in 40 Op. Atty. Gen. 41 may not be implied in the case of lands which Congress has specifically excluded from the provisions of the Mineral Leasing Act, such as lands in the national monuments. However, the necessity for taking protective action to prevent loss of property of the United States exists in the one case as in the other. It follows, I believe, that in the event of actual or threatened drainage of oil or gas under lands within the

July 29, 1947

Jackson Hole National Monument by wells on non-federally-owned lands, the authority to take the necessary protective action, including the issuance of oil and gas leases, would impliedly exist.

MASTIN G. WHITE,
Solicitor.

ROSCOE L. PATTERSON v. CRAIG S. THORN

A-24481

Decided July 29, 1947

Taylor Grazing Act—Section 15 Grazing Leases—Grazing Lease Canceled to Extent Necessary to Meet Statutory Preference Right of Conflicting Applicant.

Where a grazing lease is issued to a non-preference-right applicant while the conflicting application of a preference-right applicant is pending, the lease will be canceled to the extent necessary to honor the other applicant's statutory preference.

Bureau Compliance with Statutory Duty.

The Bureau of Land Management may, under the circumstances of this case, correct its previous decision made in violation of its statutory duty.

Grazing Disputes—Settlement by Mutual Agreement Between the Parties.

The Department prefers grazing disputes between competing applicants to be settled by mutual neighborly agreement for an equitable and reasonable allocation of the grazing range in the light of proper range-management practices.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This case involves a dispute between Craig S. Thorn and Roscoe L. Patterson over the grazing use of 697.53 acres in sec. 11, T. 17 S., R. 29 E., M. D. M., California. The tracts in sec. 11 which are involved are lots 1 to 6, 10, 11, W $\frac{1}{2}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$, and NW $\frac{1}{4}$ SE $\frac{1}{4}$.

The pertinent facts are as follows: On June 3, 1944, Thorn filed an application to lease these lands under section 15 of the Taylor Grazing Act.¹ On December 21, 1944, Patterson filed a similar application. Both of these applications were filed in the local land office at Sacramento, California. Patterson's application did not reach Washington until December 29, and was not posted for action in the General Land Office (the predecessor of the Bureau) until February 6, 1945. On December 28, 1944, however, the General Land Office in Washington had rendered a decision approving the issuance to Thorn of a supplemental grazing lease (Sacramento 033331-A).

¹ Act of June 28, 1934 (48 Stat. 1269, 1275), as amended by section 5 of the act of June 26, 1936 (49 Stat. 1976, 1978; 43 U. S. C. sec. 315m).

This supplemental grazing lease was dated October 13, 1944, and was for a term of 9 years, in order to coordinate this supplemental lease with the expiration date of a 10-year grazing lease previously issued to Thorn on October 13, 1943. The lease forms were transmitted to Thorn for signature, and, after he signed them, they were executed in the regular course by the General Land Office, without awareness of Patterson's application. Thereafter, on March 5, 1945, Patterson filed a protest that the issuance of that lease to Thorn had been in disregard of Patterson's pending application. Patterson stated that he owned land adjoining sec. 11; that Thorn was not an adjoining landowner; and that Thorn refused to fence the land to keep his cattle from straying onto Patterson's property. Patterson therefore requested that Thorn's lease be canceled and that the lands be leased to Patterson.

On November 7, 1945, the General Land Office rejected Patterson's application as to the lands in sec. 11 on the ground that he had failed to present any facts showing a violation of the terms of Thorn's lease which would warrant modification or cancellation thereof. Simultaneously, Patterson was offered a 5-year grazing lease for other lands for which he had applied. Patterson signed the lease forms which had been transmitted to him. He did not appeal from the rejection of his application for the sec. 11 lands.

Some 3 months later, on February 20, 1946, Patterson filed a petition requesting, among other things, the reconsideration of the decision on his previous protest. The Land Office thereupon proceeded to reconsider the matter and concluded that it was bound under section 15 of the Taylor Grazing Act to issue to Patterson a lease on the lands here involved "to the extent necessary to permit proper use of" his "contiguous lands," since Patterson had, and Thorn did not have, a preference right under section 15 to that quantum of lease. By decision of March 15, 1946, the Land Office therefore required Thorn to show cause why his lease on sec. 11 should not be canceled in whole or part, and required Patterson to submit evidence as to what parts of sec. 11 were "necessary to permit proper use of" his contiguous lands and the appropriate term of any lease that should be offered to him for such lands. Both Patterson and Thorn filed responses. Patterson stated that he needed a 10-year lease on all the lands in sec. 11 covered by Thorn's lease. Thorn urged that he had built fences and made trails and otherwise acted in reliance on the lease and did not desire to relinquish any portion thereof.

Intensive investigations of this case were then made by the Land Office. On August 19, 1946, the Bureau of Land Management² ren-

² Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the new Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

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dered a decision, in which it held that Patterson did have, and Thorn did not have, a preference right to a lease on sec. 11, canceled Thorn's lease in its entirety, and then ruled on the amount of sec. 11 lands that Patterson needed to permit proper use of his contiguous lands and the appropriate term of any lease which might be offered to him. The Bureau found that a lease to Patterson of the southern half of the lands here involved (namely, lots 5, 6, 10, and 11, N $\frac{1}{2}$ SW $\frac{1}{4}$, and NW $\frac{1}{4}$ SE $\frac{1}{4}$) was sufficient to permit the proper use of his base lands in accordance with his preference right. The northern half of sec. 11 (namely, lots 1, 2, 3, 4, W $\frac{1}{2}$ NE $\frac{1}{4}$, and NW $\frac{1}{4}$) was included in a new lease to Thorn. Pursuant to this division, the Bureau fixed the term of each of these new leases at 1 year, and recommended that Thorn and Patterson endeavor to agree upon a reasonable allocation of the sec. 11 lands which the Bureau could consider when the future disposition of these lands was again sought. Patterson was also required to reimburse Thorn a reasonable amount for a fence constructed by Thorn on the lands awarded to Patterson, or in lieu thereof Patterson could at his expense arrange to move and reset the fence. Thorn and Patterson were required to submit an agreement as to the fence, or have the matter determined by the Bureau.

Both Thorn and Patterson have appealed (A-24481). Patterson urges that he is entitled to a lease of all of the sec. 11 lands for a period of 10 years. Thorn contends that the Bureau erred in reopening the case and that it could not cancel his lease to correct its mistake in having overlooked Patterson's application. He points out that Patterson had failed to appeal from the initial rejection of his application, and that Patterson did not own any adjoining lands when Thorn filed his application but only thereafter acquired them.

Section 15 of the Taylor Grazing Act places upon the Bureau a statutory duty to honor the preference, to a grazing lease of Federal range, which section 15 accords "to owners, homesteaders, lessees, or other lawful occupants of contiguous lands to the extent necessary to permit proper use of such contiguous lands." The Bureau was thus under a duty to adjudicate all pending applications in the light of that statutory mandate. Although Patterson was not a preference-right applicant at the time that Thorn filed his application, since Patterson appears to have acquired his base lands on December 9, 1944, a few days before he filed his application, the fact remains that, at the time he filed his application, he was a preference-right applicant and no lease had yet been issued or offered to any other applicant. Thorn, however, is not a preference-right applicant. Unlike section 17 of

* Although Thorn owns and leases lands in the vicinity of sec. 11, they are either not adjacent to sec. 11 or are sec. 15 lease lands which do not confer a preference right under section 15 of the Taylor Grazing Act. *U. S. v. Clara Parsons*, A. 22370, January 8, 1946 (unreported); *Claude G. Burson and Ellsworth B. Brown*, 59 I. D. 539 (1947).

the Mineral Leasing Act,⁴ section 15 of the Taylor Grazing Act does not award preference to the first applicant.⁵ The lag in the transmission of Patterson's application from Sacramento, California, to Washington, and the failure of the local land office to note the conflict between these two applicants unfortunately resulted in the issuance of a lease to Thorn by mistake. The issuance of that lease was a violation, although unintentional, of Patterson's statutory preference right, since his application was not accorded the consideration required by the statute. True, the lease had already been issued, and the Bureau could appropriately have ruled that Patterson's failure to file a prompt appeal from the initial decision of November 7, 1945, rejecting his application, foreclosed him from thereafter requiring the case to be reopened.⁶ Nevertheless, Patterson's inaction for these 3 months did not foreclose the Bureau from reconsidering the propriety of its action in failing to accord the consideration to Patterson's application required by its statutory duty.⁷

The function of the Bureau, therefore, was to consider Patterson's application in the light of his statutory preference. His preference, however, extended only to a lease of so much of the Federal grazing land as was "necessary to permit proper use" of his contiguous base lands. The Bureau found, and upon full and careful review of the records this Department concurs, that Patterson's preference would be satisfied by the lease of the southern portion of sec. 11, as above indicated. Patterson owns only a small amount of land. He does not at this time need more than the southern portion of sec. 11 (which furthermore has better grazing than the northern portion of sec. 11) for the grazing of the small amount of livestock he now has. His grazing operation will be adequately serviced from this land, from his owned land, and from the other lands he controls in the vicinity under Federal grazing lease. He has sufficient finances to conduct a successful grazing operation from these lands. There is insufficient basis on the present record to award Patterson more than the southern portion of the sec. 11 land here involved.⁸ Furthermore, it may be pointed out that had the lease to Thorn been issued only a few days earlier, Patterson would have been unable to assert any preference

⁴ 41 Stat. 437, 443, as amended, 46 Stat. 1007; 46 Stat. 1523; 49 Stat. 676; act of August 8, 1946 (60 Stat. 951; 30 U. S. C. sec. 226).

⁵ *Posvar v. Borland*, A-24403, April 21, 1947 (unreported).

⁶ *Hill v. Williams and Liddell*, 59 I. D. 370 (1947), and A-24248, April 30, 1947 (Motion for Rehearing).

⁷ *Florence A. Coffin*, 37 L. D. 112 (1908); *United States v. Dayton*, 23 L. D. 54 (1896). See *Garcia v. Cameron*, A-24447 (Phoenix 078168), February 14, 1947; *Myers v. Parker*, A-24165, January 31, 1947; *Jose del Castillo*, 57 I. D. 190, 193 (1941); *Thomas H. Fee*, 58 I. D. 125, 126 (1942); *Ruth R. Maupin*, A. 22925, July 16, 1941; *Alex Liska*, A. 23780, March 8, 1946; *Charles D. Fow*, A. 23661, October 21, 1943; *Solicitor's opinion*, 57 I. D. 547, 557 (May 11, 1942).

⁸ During the conferences with Thorn and the field examiner at the time of the field investigation, Patterson had offered to compromise the dispute on this basis.

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right over Thorn's lease, since the Department is not required to grant a lease on the application of a preference-right applicant where the application is filed on lands already leased⁹ or offered for lease.¹⁰ Thorn is, and has been for many years, engaged in the livestock business, he is a qualified grazing lessee under the Taylor Grazing Act, and he needs the northern portion of sec. 11 for his livestock operations. The Bureau should, therefore, have canceled Thorn's lease only to the extent necessary to satisfy Patterson's preference. There is no basis in the record justifying the cancellation of Thorn's lease in its entirety and the issuance to him of a new 1-year lease. His lease should, therefore, have been canceled as to the lands awarded to Patterson, and left intact as to the remainder under his original 9-year lease. The Bureau's decision is modified accordingly.

It appears that the Bureau repeatedly urged the parties to come to an amicable adjustment between themselves. Such an adjustment would undoubtedly have been followed by the Bureau.¹¹ The parties, however, have chosen not to do so but instead to throw the burden of the adjustment on the Department. The Department's comment on this type of dispute in the case of *J. S. and Clara Parsons*, 59 I. D. 210 (1946), is peculiarly applicable to this case:

This matter presents to the Department a controversy of a type which is becoming needlessly frequent. Neighbors each seek to lease the same public lands for grazing purposes under section 15 of the Taylor Grazing Act (48 Stat. 1269, 1275; 49 Stat. 1976, 1978; 43 U. S. C. sec. 315m). Unwilling to compose their differences among themselves they submit their claims to the competition of the administrative proceedings established to effectuate the act. Each vies in extolling his own worthiness and deprecating the needs and good faith of his neighbor. What is essentially a local matter between two or three stockmen is then submitted to the determination of the Secretary.

It is the duty of the Secretary of the Interior to entertain the matter and to dispose of it as equity and the public interests may require (48 Stat. 1269, 1270; 43 U. S. C. sec. 315a; 43 Code of Federal Regulations 160.20). The Secretary does not seek to escape or avoid this duty. But every case does not call for a single

⁹ *Clayton v. Midthum*, A-24507, December 31, 1946.

¹⁰ See 43 CFR 160.11, as amended by regulations of July 2, 1947, on section 15 grazing leases (Circ. No. 1648; 12 F. R. 4642).

¹¹ In *The Swan Company v. Banzhaf*, 59 I. D. 262 (1946), the Department stated:

"* * * the Department prefers grazing disputes to be settled between the parties by mutual neighborly agreement for an equitable and reasonable allocation of the grazing range in the light of proper range-management practices."

In *H. Glendon Culverwell*, A. 24076, April 12, 1946, the Department stated:

"* * * Essentially, this case is one which should have been settled long ago, not by quarrels before the Department, but primarily by mutual agreement between the parties for an equitable division of the limited lands amongst themselves. In all probability, had such neighborly division been agreed to by the parties in this case, the Department would have confirmed it with leases accordingly. In cases like these, the Department would much prefer not being compelled to rule on differences which the parties should have been able to resolve amongst themselves. But if they are unable to do so, the Department must make a decision according to the legal rights and equitable considerations of each party and with due protection to the legal rights of each of the other parties * * *."

clear solution. Frequently, the Secretary is confronted with a situation where a number of possible divisions of the lands in conflict will meet the requirements of the public interest and, so far as can be conscientiously determined, do equity as among the contending neighbors. Such solutions, while correct under the governing statutory requirements, are not always in fact so satisfactory to the stockmen concerned as would be some other equally lawful and equitable solution effected by the stockmen themselves. While the Secretary will continue to settle these conflicts when they are presented to him, he cannot remain unaware that, as contemplated by the rules of the Department (43 CFR 160.21), a substantial proportion of these controversies could well be resolved by neighborly understanding among the competing stockmen as to the most satisfactory division of the desired grazing lands to be applied for by each of them. Cf. *Joe H. Hooker and Steve Villareal*, A. 24254, February 26, 1946 (unreported).

In view of the relationship between the competing claims of Patterson and Thorn, and in view of the necessary expenses which Patterson must incur in complying with the Bureau's decision that he reimburse Thorn for his fence or reset it, the Department is of the opinion that Patterson's lease should be issued to expire at the same time that Thorn's 9-year lease will expire. It is suggested, however, that if the decision made by the Bureau, as here modified by this Department, is unsatisfactory to the parties, they should endeavor to arrive at a fair agreement on any other division which may then be submitted to the Bureau of Land Management for appropriate modification of the existing leases. Unless the parties come to such an agreement, the division made by the Bureau appears to be the best solution to the dispute and will be allowed to stand.

As herein modified, the decision of the Bureau is affirmed, and the case is remanded to the Bureau for issuance of the leases as here prescribed, after the matter of the reimbursement for, or resetting of, the fence is determined in accordance with the Bureau's decision of August 19, 1946.

C. GIRARD DAVIDSON,
Assistant Secretary.

BIG HORN COAL COMPANY, APPLICANT
SHERIDAN-WYOMING COAL COMPANY ET AL., PROTESTANTS

A-24645 *Motion for Rehearing decided July 29, 1947*

Motion for the Exercise of Supervisory Power decided
October 22, 1947

Mineral Leasing Act—Coal Leases.

The policy of the Department against the issuance of coal leases, in the absence of a showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met, is not applicable in the case of an application for the extension of an existing mine from non-Federal to Federal land where such mine as of the time of

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the issuance of the proposed lease has been in successful operation for a number of years, mining and disposing of substantial quantities of coal extracted from adjacent non-Federal lands.

MOTION FOR REHEARING

On April 10, 1947, the Department approved a decision of the Bureau of Land Management, which dismissed the protests of Sheridan-Wyoming Coal Company and others against the granting of the application of the Big Horn Coal Company for a coal lease for certain lands in Wyoming. A motion for rehearing has been filed by Sheridan-Wyoming Coal Company, Coal Producers' Association of Washington, Montana Coal Operators' Association, Utah Coal Operators' Association, and Colorado and New Mexico Coal Operators' Association.

The record in this proceeding is relatively voluminous. Before the protests were dismissed a hearing was held. Numerous exhibits, affidavits, and counter-affidavits have been filed touching upon the details of innumerable matters, some of which are of questionable relevance. The entire matter, however, revolves, as all seem to agree, around the application of the following regulations of the Department:

The General Land Office¹ will make favorable recommendation that leasing units be segregated and that auctions be authorized only in cases where there has been furnished a satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met. [43 CFR 193.3.]

In essence, the protestants moving for rehearing contend that this is a case where a new coal mine has been opened which proposes to supply bituminous coal of a type, quality, kind, and size which will tend to supplant in competitive market areas the coals which they have been shipping. The applicant denies this and asserts that it has a mine in operation and merely seeks additional lands in order that its mine may not be forced to close for lack of coal reserves.

The present operation of the applicant is conducted on sec. 36, T. 58 N., R. 85 W., Sheridan County, Wyoming. This land is apparently owned by the State of Wyoming. In 1941, Isaac Turner procured from the State a coal lease for sec. 36. Through a stripping operation employing a tractor and scraper, Turner produced a modest tonnage, some of which he hauled in his three trucks to the truck tipple of another mine for sale to truckers for resale, and part of which he hauled directly to nearby consumers. In December 1942, the tractor and other equipment of the Turner mine were destroyed by fire and when Turner was unable to meet his commitments to the State, his lease was terminated.

¹ Now the Bureau of Land Management.

Thereafter, on December 2, 1943, the persons interested in the Big Horn Coal Company procured from the State a coal lease.² On December 18, 1943, the prospective Big Horn Coal Company, then being incorporated, filed an application for a coal lease of certain Government lands adjoining sec. 36, and on December 21 submitted copies of its articles of incorporation, showing it had come into existence on the preceding day. On August 24, 1945, the Company applied for additional lands.

The Big Horn Coal Company commenced production in sec. 36 in February 1944, with 390 tons. This was followed by 34 tons in March, no tonnage in April, and then a constantly mounting tonnage for the remainder of the year, so that total production for the year 1944 on a run-of-mine basis totaled 107,201 tons. For the year 1945, its production jumped to 264,722 tons, and in 1946 it reached 483,576 tons.³

Harking back to the events of December 1943, the protestants cite the quoted departmental regulation. They assert that Big Horn started a new mine on sec. 36 with the full knowledge that the coal deposits were inadequate; that the Company merely used the lease on the State land for the purpose of avoiding or evading the clear intendment of the departmental regulation. Big Horn, of course, takes the position that it assumed the operation of an existing mine and filed its application with the United States for the purpose of acquiring additional deposits to serve a mine already in existence.

Without attempting a definition of a mine, it seems clear that Big Horn did not simply continue the operation of the Turner mine. In essence, a new mine was created. Whereas the Turner mine had an insignificant production, sold mainly to truckers over the truck tipple of another mine, Big Horn launched into large production, installed new and modern equipment, including a large fleet of trucks for hauling coal to rail-loading facilities, and constructed a new highway from its pits to a rail siding where it built a tipple capable of handling its tonnage for rail shipment. The Turner mine had served small local consumers and truckers who operated within the economic limits of the truck haul; but the Big Horn mine converted to shipments by rail and served large consumers of coal at distances far beyond those which could be reached by the trucked production of the Turner mine.

² The lease ran to the Big Horn Construction Company, because the Big Horn Coal Company was still in process of formation. As soon as it was formed, the lease for sec. 36 was assigned to it.

³ These tonnage figures were obtained from reports filed by Big Horn Coal Company in the regular course of its business with the State Board of Equalization of Wyoming. Copies of the reports for the calendar years 1944 and 1945 comprised part of protestants' exhibit 3, introduced at the hearing. A certified copy of the return for the calendar year 1946 was furnished to the Department directly by the Board at the request of the applicant.

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True, both operations were of the stripping variety and both were conducted on the same section of land. But it is clear that the Big Horn operation was not a continuation or mere expansion of the Turner mine, either in terms of law, technology, or of economics. The Big Horn mine, a large rail-shipping operation with new, modern equipment, happened to undertake production on the same land where formerly there had been a relatively tiny operation which shipped its modest tonnage to those who would buy or burn its product in the vicinity. It does not appear that the size, methods of mining, equipment used, mode of shipment, or consuming areas served were influenced by the happenstance that the Turner mine had once operated on the same land. In these circumstances, it cannot be said that the Big Horn Coal Company did not open a new mine on the State land. Thus, if consideration of this matter were to be limited to the events of December 1943, it would follow that the requested lease would not issue.

Thus to limit consideration of this case, however, would be to ignore events subsequent to December 1943. The facts are that since December 1943, without encroaching on Federal lands, the Big Horn Coal Company has successfully opened a large mine and built a business of some proportion. To issue the lease as of today is merely to permit the continuance of what events have demonstrated conclusively to be a large, going business. It would accommodate the expansion of an existing mine which is running out of coal reserves.

Such an application would not run counter to the regulation quoted above. The leading case interpretative of the regulation, and it has been strongly relied upon by the protestants at all stages of this proceeding, is *Carl T. Olson*, 59 I. D. 207, decided March 25, 1946, rehearing denied December 19, 1946. Olson had applied for a lease for certain lignite lands. An investigation revealed that Olson proposed to open a new mine on Federal lands to supply a market already adequately served by existing mines. In the course of its decision which denied the application, the Department noted that the quoted regulation was based on a "policy * * * founded in the long economic history of the coal industry and the dread effect of that menacing history upon the public interest." Both the public interest in the maintenance of a healthy bituminous coal industry and the interest of the Government in the conservation and fruitful exploitation of its mineral properties were cited as reasons for sustaining the policy behind the rule. And Olson's application was rejected.

But the Department was also careful to note that its position "as the proprietor of coal deposits on the public lands is not a dominant one in the control of the industry. However sagacious the policy of the Department in the disposition of such coal deposits, it cannot

through this method alone enable the industry to elude the press of natural economic forces." In the *Olson* case, as in cases which have followed it,⁴ there was no question concerning the expansion of an existing, operating, going mine. In none of those cases had there been any substantial investment made in connection with operations on non-Federal lands. None of them involved a situation where, under leases issued by a State government, a mine operator had obtained markets, acquired customers, and established valuable good will, where machinery and equipment had been acquired and were being used currently in the business of mining a large tonnage of bituminous coal.

Thus, while the Department in the interpretation and application of its regulation has endeavored to prevent the creation of conditions of excessive competition, it has not undertaken to remove competition already established. To do so, as in this case, would result in the loss of individual investments in the mines to be closed. It would drive a mine out of business not because of poor management, or high cost of operations, or inability to meet competition in the market place, but because successful conduct of its business forced it to turn to Federal lands for additional coal reserves. There is no good reason why the operator whose mine is on or adjacent to federally owned lands should for that reason alone be placed at a disadvantage in conducting and maintaining his business, or, conversely, why the operator of one mine should be accorded an advantage over another operator merely because, as a consequence of successful operation, the latter needs coal deposits of the United States. As stated in the *Olson* case, the Department will endeavor to prevent recurrence of the devastating economic conditions which have characterized the bituminous coal industry in the past, but it will not do so at the expense of the arbitrary termination of a lawful, going, useful business enterprise.

Further, the purpose of the rule is to assist in keeping in operation mines already in existence. To apply the rule as proposed by protestants would certainly and definitely close the Big Horn operation. On the other hand, to grant a lease to Big Horn leaves open the possibility of continued existence of both the applicant and its present competitors.

The motion for rehearing is denied.

OSCAR L. CHAPMAN,
Under Secretary.

MOTION FOR THE EXERCISE OF SUPERVISORY POWER

On July 29, 1947, the Department denied the motion of Sheridan-Wyoming Coal Company and others for a rehearing of a decision of

⁴ See *Lyman Ray Co.*, A-24405, September 3, 1946 (unreported); *Andrew Maneotes*, A-24489, March 17, 1947 (unreported); *Frank Lilly*, A-24582, June 3, 1947 (unreported).

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the Bureau of Land Management, approved by the Department on April 10, 1947, which dismissed its protest against the applications of Big Horn Coal Company for coal leases on certain lands in Wyoming.

The facts are set forth at length in the decision approved April 10, 1947. To summarize them, Big Horn Coal Company obtained, in December 1943, a coal lease from the State of Wyoming, covering certain lands owned by the State. At about the same time the Company filed an application for a coal lease of adjacent Federal lands, and later filed a second application for additional adjacent Federal lands. Sheridan-Wyoming, joined by numerous others, protested the lease applications on the basis of the following regulation:

The General Land Office¹ will make favorable recommendation that leasing units be segregated and that auctions be authorized only in cases where there has been furnished a satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met. [43 CFR 193.3.]

The departmental decision of July 29, 1947, observed that Big Horn Coal Company "has successfully opened a large mine and built a business of some proportion. To issue the lease as of today is merely to permit the continuance of what events have demonstrated conclusively to be a large, going business." The decision concluded that "the Department will endeavor to prevent recurrence of the devastating economic conditions which have characterized the bituminous coal industry in the past, but it will not do so at the expense of the arbitrary termination of a lawful, going, useful business enterprise."

The motion for the exercise of supervisory power asserts that there exists an exigency demanding the exercise of such authority, and in support thereof recites the importance of a departmental interpretation of the quoted regulation favorable to the position of the protestant. But the same argument was presented to the Department in the motion for rehearing and was fully considered at that time.

Sheridan-Wyoming also contends that Big Horn Coal Company should have been aware at the time when it applied for a State lease that the coal reserves on State lands would be inadequate and that the availability of coal on the adjacent Federal lands would be shortly required if Big Horn Coal Company were to remain in business. But this is hindsight. The period of time which would be required by Big Horn to exhaust coal deposits on the State lands could not have been foretold in December 1943, because at that time the Company had no production history and no established outlets for its product upon the basis of which could be estimated the annual tonnage which it could produce and sell.

¹ Now the Bureau of Land Management.

The protestant also contends that it is losing business to its new competitor and cites the number of shifts it lost during the first 7 months of 1947 because of a lack of market for its coals. Such statistics, while no doubt accurate, are at best inconclusive. The coals produced by Sheridan-Wyoming and by Big Horn are sub-bituminous, high in moisture, and almost wholly lacking in stocking qualities. Because of these factors, consumers of this type of coal customarily buy it for immediate consumption and not for storage or reserve purposes. As a result, mines producing this sub-bituminous coal are unable in normal periods to maintain steady production throughout the year, but, on the contrary, they may even be compelled to close their operations during the hot months. Customarily, they produce at substantially less than capacity during the warm months of the year. No evidence is offered by Sheridan-Wyoming to distinguish between shifts lost as a consequence of its normal production pattern and those which may be lost by reason of the competition as may be offered by Big Horn Coal Company. Sheridan-Wyoming does show that its annual production is declining from the extraordinary peak it attained during the war years. It is noted, however, that from the period 1931 through 1941 the Company at no time attained an annual production in excess of 600,000 tons.² Nevertheless, its production for the calendar year 1946, of 828,269 tons, indicates that it has thus far fairly withstood any competition which it might have been offered by Big Horn Coal Company. And the prognosis made by Sheridan-Wyoming as to its own future is at best hypothetical. Such a forecast of the probable future production of a single unit in the bituminous coal industry necessarily depends for its accuracy upon fortuitous concurrence of numerous economic factors and the reactions of specific customers to conditions not yet in existence.

Sheridan-Wyoming states that, in reliance upon the freedom from competition offered by the quoted regulations, it has made investments in mining equipment amounting to well over 1 million dollars. Yet, the affidavit of the president of the Company, dated September 24, 1947, discloses—

* * * a true history of the indebtedness of the Sheridan-Wyoming Coal Company, Inc.;

The Sheridan-Wyoming Coal Company, Inc., was organized under the laws of the State of Delaware as of January 1, 1920. At that time there was authorized and issued First Mortgage Bonds in the amount of \$3,500,000.00 bearing 7% interest, and Debentures in the amount of \$3,500,000.00 bearing 7% interest. As of July 1, 1927, all of the Debentures were paid off with the exception of \$1,760,000.00, for which Preferred Capital stock was issued to the holders of the debentures. As of July 1, 1927, the First Mortgage Bonds had been retired down to \$1,733,000.00. As of July 1, 1927, a new First Mortgage Bond issue was

²The exact tonnages are tabulated by years on page 73 of the brief of protestants in support of their motion for rehearing.

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authorized and issued in the amount of \$3,000,000.00 bearing 6% interest. Out of this amount, \$1,733,000.00 was used to pay off \$1,733,000.00, which was the balance of the old bond issue not yet retired. The balance of the \$3,000,000.00 was used in the purchase of new machinery for the further mechanization of the Company's mines. This \$3,000,000.00 First Mortgage Bond issue was paid off in monthly instalments during the period July 1, 1927, and July 1, 1945, on which date the last instalment was paid.

A further affidavit of the same officer gives—

* * * a complete statement as to the advances made to Sheridan-Wyoming Coal Company, Inc., by United States Distributing Corporation and The Pittston Company in all the years from January 1, 1920, down to the present time, namely, 1947;

United States Distributing Corporation

	<i>Amount</i>	<i>Paid</i>
January 1, 1920-----	\$56, 250. 00	August 3, 1920
December 28, 1936-----	22, 200. 00	December 31, 1938

The Pittston Company

October 28, 1930-----	\$109, 000. 00	April 25, 1932
April 25, 1932-----	55, 000. 00	July 23, 1932
July 23, 1932-----	55, 000. 00	December 31, 1932
October 21, 1932-----	55, 000. 00	December 6, 1937
December 29, 1933-----	21, 000. 00	October 26, 1935

It thus appears that substantial portions of the investment in the Sheridan-Wyoming operations were made long prior to 1934, the date of the regulation. Furthermore, even if the regulation were to be interpreted as broadly as Sheridan-Wyoming desires, the Company would still face the risk of competition from mines opened and operated exclusively on non-Federal lands.

It is also suggested that the Department's interpretation of the regulation in its decision of July 29, 1947, will encourage evasion of the regulation by those who will seek to extend their mining operations onto Federal lands from a mere foothold on non-Federal lands. But the decision of July 29, 1947, carefully described the large, going business enterprise established on the State land by Big Horn.³ The very competition of which Sheridan-Wyoming complains is evidence that Big Horn has secured more than a mere foothold in the industry without the use of Federal coal reserves. What the decision would be were a case presented where a new mine opened on non-Federal lands, with inadequate reserves to enable it either to exist for any period of years or to establish a position of importance in the industry through successful mining and sales of its coal in relatively large volume, is not a matter for determination in this proceeding.

³ For photographs and a detailed description of Big Horn's mining techniques and equipment, see "Coal Age" (McGraw-Hill), October 1947, pp. 102-106.

All persons interested in this matter have had abundant opportunity to present their facts and arguments in writing. Sheridan-Wyoming and Big Horn have taken full advantage of this opportunity. In addition, a hearing attended by both Companies was conducted by the Under Secretary prior to the original decision in this case. The record appears to be complete. A further hearing would adduce only cumulative matter. Accordingly, the request of Sheridan-Wyoming for a hearing on its motion for the exercise of supervisory power is denied.

The motion for the exercise of supervisory power is denied. *Cobb v. Crowther*, 46 L. D. 473 (1918).

J. A. KRUG,
Secretary.

UNITED STATES GYPSUM COMPANY

A-24503

Decided July 30, 1947

Mining Claim—Lode Claims—Placer Claims—Dimensions of Deposit.

Neither the width of the deposit nor its sedimentary origin is determinative of whether a mining claim is of placer or lode character. If it is a vein or lode of rock in place bearing valuable mineral, it is a lode; if of some other form of valuable mineral deposit, such as scattered particles of gold found in the softer covering of the earth, it is a placer deposit.

Mining Claim—Lode Claims—Placer Claims—Gypsum.

Gypsum rock in place lying between two persistent beds of limestone, which in the circumstances are taken as the hanging and footwalls of the gypsum deposit, is to be located as a lode rather than a placer claim.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The United States Gypsum Company has applied for patents for the Nevada Placer Gypsum mining claim and for the West Nos. 1, 2, and 3, lode mining claims. The three lode claims are within the exterior boundaries of and were located subsequent to the placer claim. The Bureau of Land Management ordered the applicant to show cause why the application for the lode claims should not be rejected and the entry for the entire area patented as the Nevada Placer Gypsum mining claim. As grounds for this decision, the Bureau stated that the deposits of gypsum involved in the lode claims are as wide as each of the lode claims, and in addition that they are of sedimentary origin. The applicant has appealed.¹

¹ It filed, as well, a response to the order to show cause. The substance of the response has been considered along with its appeal in arriving at this decision.

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No cases have been found to indicate that, nor is there any reason apparent why, the width of a mineral deposit is determinative of whether it is a lode or placer. Lindley on Mines (3d ed.) sec. 294. The fact that the deposits involved in these lode claims are sedimentary in origin is immaterial to the determination of the question whether the deposit exists in lode or placer form. *Harry Lode Mining Claim*, 41 L. D. 403 (1912). The critical test is the manner in which the deposit occurs rather than the origin of the deposit. If the discovery is of a vein or lode of rock in place bearing valuable mineral, a lode location may be sustained; if of some other form of valuable mineral deposit, such as scattered particles of gold found in the softer covering of the earth, a placer location may be sustained. *Cole v. Ralph*, 252 U. S. 286, 295, 296 (1920).

In this case, although the structural geology of the land included in the mining locations is largely hidden by alluvium, exposures of limestone on one portion of the tract, supplemented by an exposure of a bed of limestone on the east side of a quarry situated on the West No. 1 lode location, show plainly that the gypsum deposit for which lode patents are sought lies between two persistent beds of limestone which outcrop on the slope of the mountain. These limestone ledges, which **have been exposed by erosion of the softer gypsum deposit lying between them**, must be taken as the hanging and footwalls of the gypsum deposit. A limestone exposure on the east side of the quarry, which is situated about midway between the two ledges, indicates that the surface exposure of the gypsum on one portion of the tract is the crest of a steep fold, and that the full width of the fold represents twice the thickness of the gypsum vein as measured at a right angle to the tip. Outcrops of limestone on the other lode locations as exposed by erosion and by open cuts and trenches, excavated by the applicant, show definitely that the gypsum beds occurring here are standing at an almost vertical angle; that below the disintegrated gypsum appearing on the surface the gypsum rock is in place occurring between definite limestone walls; and that the gypsum beds take on all the aspects of veins. In the circumstances, it is clear that the deposits described are to be located as lode rather than placer claims. *Cole v. Ralph, supra*.

The decision of the Bureau of Land Management is reversed, and the case is remanded for disposition of the question raised by the applicant as to the permissible width of lode claims in the particular circumstances of this case.

OSCAR L. CHAPMAN,
Under Secretary.

MINERAL LEASING ACT

Submerged Lands—Continental Shelf—Oil and Gas Leases.

The Mineral Leasing Act of February 25, 1920, as amended (41 Stat. 437; 30 U. S. C. sec. 181 *et seq.*), does not authorize the issuance of oil and gas leases with respect to the submerged lands below low tide off the coasts of the United States and outside the inland waters of the States.

M-34985

AUGUST 8, 1947.

TO THE SECRETARY.

You have orally requested my opinion on the question whether the Mineral Leasing Act of February 25, 1920, as amended (41 Stat. 437; 30 U. S. C. sec. 181 *et seq.*), authorizes the issuance of oil and gas leases with respect to the submerged lands below low tide off the coasts of the United States and outside the inland waters of the States. This question arises by reason of the fact that there are awaiting disposition in the Department a number of applications for oil and gas leases in submerged areas of the Pacific Ocean and the Gulf of Mexico below low tide and outside the inland waters of the adjacent States.

On September 28, 1945, the President issued Proclamation No. 2667, announcing that the "United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control." (10 F. R. 12303.) And by Executive Order No. 9633 of the same date, the resources of the continental shelf were placed under the jurisdiction and control of the Secretary of the Interior "for administrative purposes, pending the enactment of legislation in regard thereto." (10 F. R. 12305.) On June 23, 1947, the Supreme Court held in *United States v. California*, 332 U. S. 19, 38, that the Federal Government has paramount rights in and power over the 3-mile marginal belt along the coast, "an incident to which is full dominion over the resources of the soil under that water area, including oil."

The answer to the question submitted by you turns on the construction of the following portion of section 1 of the Mineral Leasing Act, as amended:¹

That deposits of coal, phosphate, sodium, potassium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Act known as the Appalachian Forest Act, * * * and those in incorporated cities, towns, and villages and in national parks and monuments, those acquired under other Acts subsequent to February 25, 1920, and lands within the naval petroleum and oil

¹ The language quoted is from the amendatory act of August 8, 1946 (60 Stat. 950, sec. 1). It is in no material respect different from that used in the original 1920 act (41 Stat. 437).

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shale reserves, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act * * *.

It is conceivable that some of the submerged land areas and minerals may turn out to be in one of the categories of lands expressly excluded from the provisions of the Mineral Leasing Act (e. g., naval petroleum reserves). As to them, of course, no problem will arise. In the main, however, this will not be the case.

With regard to the submerged lands and mineral deposits that are not expressly excluded from the provisions of the act, they appear at first glance to be included in the phrase "deposits * * * and lands containing such deposits owned by the United States" quoted above. However, the Attorney General has held that this language is limited in its application to the "public lands" of the United States,² principally by reason of the presence of the words "public domain" in the title of the act.³ Therefore, the Mineral Leasing Act is a statute providing generally for the disposition of "public lands."

Land situated below high watermark has not been regarded heretofore as included in the term "public lands."⁴ For this reason alone, it may be concluded that the Mineral Leasing Act does not apply to the submerged lands, as they are, of course, below low tide. In fact, in the Government's brief in the *California* case, the Attorney General so argued (p. 195).

Apart from the reasoning indicated above, the Mineral Leasing Act, like other general public-land laws, applies to any particular category of lands only if Congress has indicated that such lands are held for disposal under it.⁵ For the reasons that follow, I do not believe that Congress has indicated that the submerged coastal lands are held for disposal under the Mineral Leasing Act.

In one aspect, the act is clearly inconsistent with any assumption that it was intended to apply to submerged lands. The act contains provisions that lands affected by it are to be surveyed and described by the legal subdivisions of the public-land surveys,⁶ and the public-land surveys have not heretofore extended beyond high tide.⁷

² 40 Op. Atty. Gen. 9 (1941); 34 Op. Atty. Gen. 171 (1924); see p. 195, Government's brief, *United States v. California*, United States Supreme Court (Original No. 12).

³ The words "public domain" appear in the title of the amendatory act of August 8, 1946, as well as in the original act of February 25, 1920.

⁴ *Barney v. Keokuk*, 94 U. S. 324, 338 (1876); *Mann v. Tacoma Land Co.*, 153 U. S. 273, 284 (1894); *Frederick A. Curtiss et al.*, General Land Office decision, September 18, 1934, affirmed by Department February 7, 1935, A-18167 (unpublished).

⁵ See *Oklahoma v. Texas*, 258 U. S. 574, 599-602 (1922); *West v. Work*, 11 F. (2d) 828 (1926), cert. denied 271 U. S. 689.

⁶ Oil and gas, secs. 13 and 14, 41 Stat. 441, 442; 49 Stat. 675, 676; 30 U. S. C. sec. 223; oil shale, 30 U. S. C. sec. 241; phosphate, 30 U. S. C. sec. 212; sodium, 30 U. S. C. sec. 262; potash, 30 U. S. C. sec. 282.

⁷ *Barney v. Keokuk*, 94 U. S. 324, 338 (1876); *Mann v. Tacoma Land Co.*, 153 U. S. 273, 284 (1894); Manual of Instructions, Survey of the Public Lands, Department of Interior, 1930 (Reprint 1934), p. 5; *Frank Burns*, 10 L. D. 365, 369 (1890).

Furthermore, as the Court said in its opinion in the *California* case, "the record plainly demonstrates that until the California oil issue began to be pressed in the thirties, neither the states nor the Government had reason to focus attention on the question of which of them owned or had paramount rights in or power over the three-mile belt." (P. 39.) No suit was brought by the Federal Government until May 29, 1945, when an action was brought by the United States against the Pacific Western Oil Company in the United States District Court for the Southern District of California. That suit was thereafter dismissed by the Government at the same time that it filed the original suit against California in the Supreme Court on October 19, 1945. In the latter suit, the Government took the position (brief, p. 70), and the Court in its opinion agreed (pp. 37, 38), that the case judicially raised the issue of Federal versus State ownership for the first time. Therefore, until the Court decided the case in favor of the United States on June 23, 1947, no one could have known with any degree of certainty whether the Federal Government or the States owned this vast area of coastal submerged lands. Consequently, in the absence of evidence to the contrary (and there is none), we cannot assume that Congress intended on February 25, 1920, and August 8, 1946, the respective dates of the original Mineral Leasing Act and the amendatory act, to address itself to these submerged lands when it used in section 1 of the act general language indicating that the act was to be applicable to "lands * * * owned by the United States."

Congress recently enacted the Mineral Leasing Act for Acquired Lands (act of August 7, 1947, 61 Stat. 913). The "Acquired Lands" which are the subject of the act are, so far as relevant, defined in section 2 to "include all lands heretofore or hereafter acquired by the United States to which the 'mineral leasing laws' have not been extended * * *." In the same section, the term "mineral leasing laws" is defined to include the act of February 25, 1920, and all acts amendatory of or supplementary to it. It is significant that while this legislation was being considered in the House (as H. R. 3022), it was amended on July 23, 1947—a month after the decision of the Supreme Court in the *California* case—so as expressly to exclude the submerged lands and the continental shelf from its purview. (Sec. 3 of the act; 93 Cong. Rec. 9880.) The language which conceivably could have been regarded as including the submerged lands and the continental shelf in the absence of the amendment was the reference to lands "to which the 'mineral leasing laws' have not been extended." The reason for the amendment was not discussed in either the House or the Senate (93 Cong. Rec. 9880, 9922, 10061). In adopting it, Congress may be regarded as assuming that the mineral leasing laws, including the 1920 act, as amended, had not been extended to the sub-

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merged lands, and, therefore, that such lands would be covered by the new act unless expressly excluded from its provisions.⁸

Finally, I should point out that in executing, on July 26, 1947, the stipulation in the *California* case regarding interim oil and gas operations in the submerged lands off the coast of California pending the establishment of the line separating the inland waters of California from the marginal seas, the Attorney General held by implication that the Mineral Leasing Act was not applicable to the submerged land areas. If the act had been applicable to such areas, the stipulation presumably would have been unauthorized.

For the reasons indicated above, it is my opinion that the Mineral Leasing Act of February 25, 1920, as amended, does not authorize the issuance of oil and gas leases with respect to the submerged lands below low tide off the coasts of the United States and outside the inland waters of the States.⁹

MASTIN G. WHITE,
Solicitor.

RUSSELL HUNTER REAY v. GERTRUDE H. LACKIE

A-24670

Decided August 12, 1947

Noncompetitive Oil and Gas Lease—Cancellation of Lease Erroneously Issued in Violation of Preference Right of Another Applicant.

A noncompetitive oil and gas lease which was issued to a junior applicant, the prior application having been inadvertently overlooked, will be canceled in order to honor the preference right to a lease which the prior applicant has under section 17 of the Mineral Leasing Act.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On August 19, 1941, Gertrude H. Lackie filed an application for an oil and gas lease,¹ Los Angeles 054899, covering lot 4, sec. 31, T. 5 N., R. 16 W., S. B. M., California. This application was suspended and held in the district land office pending the adjudication of a conflict with a prior oil and gas lease application, Los Angeles 054113, which was later rejected. While the Lackie application was suspended, Russell Hunter Reay filed a similar application covering lot 4 on

⁸ Another possible inference is that Congress viewed the submerged lands as "acquired" rather than as "public lands." (See secs. 2 and 3.) And acquired lands were held by the Attorney General to be outside the scope of the Mineral Leasing Act. See footnote 2, *supra*.

⁹ The Attorney General subsequently rendered an opinion on this same subject. 40 Op. Atty. Gen. 540. [Editor.]

¹ Under section 17 of the Mineral Leasing Act (41 Stat. 437, 443, as amended, 46 Stat. 1007; 46 Stat. 1523; 49 Stat. 676; act of August 8, 1946, 60 Stat. 950, 951; 30 U. S. C. sec. 226).

November 3, 1943, Los Angeles 055644. Since the district land office overlooked the existing conflict with the Lackie application, a lease was eventually issued to Reay, dated December 1, 1945. After the rejection of application, Los Angeles 054113, it was discovered that the Reay lease had been issued without consideration of the preference right granted by the statute to Lackie as the prior noncompetitive oil and gas applicant. By decisions of January 16 and April 21, 1947, the Bureau of Land Management offered a lease to Lackie and held Reay's lease for cancellation. Lackie has executed the lease forms. Reay has appealed (A-24670). He states that he paid rental on the lease; that he relied on the Government tract books; that the lease was issued to him without any fault on his part and therefore that it should not now be canceled.

At the time these applications were filed, section 17 of the Mineral Leasing Act granted a preference right 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." This preference right has been continued in section 17, as amended by the act of August 8, 1946 (60 Stat. 950, 951), which states:

* * * When the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding. * * *

Section 17 thus placed upon the Bureau a statutory duty to honor the preference thus accorded to the first applicant for a noncompetitive oil and gas lease on lands not within a geologic structure of a producing oil and gas field. The Bureau was under a duty to adjudicate all pending applications in the light of that statutory mandate. Lackie's application was filed more than 2 years prior to Reay's application, and thus she had a statutory preference right under the statute.

The Department regrets that Lackie's application was overlooked by the district land office and that the Reay lease was thus erroneously issued.² Nevertheless, the fact remains that the issuance of the Reay lease was a violation, even though unintentional, of Lackie's statutory preference right since her application was not accorded the preference to which she was entitled under the statute. The issuance of the Reay lease, therefore, was unauthorized to the extent that it violated the statutory preference which Lackie had. It appears that Lackie is a qualified applicant for the lease of the entire lot 4. A govern-

² It appears that the existence of the Lackie application was noted on the tract books of the district land office but not on the tract books of the Bureau of Land Management in Washington, where the adjudication of the Reay lease application took place. Reay, however, was adequately placed on notice of the Lackie application by the notation thereof on the district land office tract books.

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mental officer may not bind the Government by any act beyond his authority.³ Accordingly, there is no alternative except to cancel Reay's lease in order to honor the statutory preference which Lackie plainly has.⁴

The decision of the Bureau of Land Management is affirmed.

OSCAR L. CHAPMAN,
Under Secretary.

**VALIDITY OF THE NORTH CAROLINA STATUTE OF APRIL 5, 1947,
RELATING TO THE EASTERN BAND OF CHEROKEE INDIANS**

Indians—Federal Authority—State Authority.

Congress is vested with plenary authority to legislate for the regulation of the affairs and economic welfare of Indian tribes and bands such as the Eastern Cherokees of North Carolina, and neither the constitution of a State nor any act of its legislature can withdraw the Indians from the operation of an act which Congress passes in the exercise of its paramount authority. Since section 1 of the North Carolina statute of April 5, 1947, which section merely provides for the exercise of certain property rights by members of the Eastern Band of Cherokees, subject to existing and future Federal laws, neither interferes nor attempts to interfere with the jurisdiction of the Federal Government over the property of the Eastern Band, there is no occasion for an official of the Federal Government to question the validity of the section.

Section 2 of said act of April 5, 1947, which undertakes to prescribe the qualifications which members of the Eastern Band must possess in order to hold office in the tribal government, is ineffective for the reason that the authority to determine such matters is now vested in the band as a result of the enactment of the Indian Reorganization Act of June 18, 1934, and the acceptance of the provisions of the act by the Eastern Band.

M-34989

AUGUST 28, 1947.

TO THE COMMISSIONER OF INDIAN AFFAIRS.

You have requested that I express an opinion upon the question of the validity of the act of April 5, 1947,¹ adopted by the Legislature of North Carolina, with reference to the affairs of the Eastern Band of Cherokee Indians. Section 1 of the act provides that the members of the band and their lineal descendants shall have the capacity to acquire, hold, and dispose of property "as fully and completely * * * as any other citizen of the State of North Carolina," subject, however,

¹*Pine River Logging Co. v. United States*, 186 U. S. 279, 291 (1902); *United States v. City and County of San Francisco*, 310 U. S. 16, 31, 32 (1940); *Jeems Bayou Fishing & Hunting Club v. United States*, 260 U. S. 561, 564 (1923); *Lee Wilson & Co. v. United States*, 245 U. S. 24 (1917); *Utah Power & Light Co. v. United States*, 243 U. S. 389, 408, 409 (1917); *Pilot v. United States*, 9 Wall. (76 U. S.) 45, 49 (1869).

⁴*Patterson v. Thorn*, 60 I. D. 11 (1947).

³Session Laws of North Carolina, 1947, S. B. 184, ch. 978. [Editor.]

to "restrictions and conditions now existing or hereafter imposed under Federal statutes and regulations, or treaties, contracts, agreements, or conveyances between such Indians and the Federal Government." Section 2 of the act declares that any lineal descendant of any member of the band is eligible to hold any elective or appointive office in the band, including the office of principal chief, if such descendant is himself a member of the band and is domiciled on lands of the band.

Section 1 of the North Carolina statute presents no serious problem. The section does not seek to impose any limitations with respect to the exercise of property rights by members of the band, but, on the contrary, it apparently is intended to make certain that the members of the band shall not labor under any State restrictions upon their capacity to acquire, hold, or dispose of property. Moreover, as the section expressly states that it is subject to existing and future Federal laws, it does not constitute any interference or attempted interference with the jurisdiction of the Federal Government over property of the Eastern Band of Cherokees. Consequently, there does not seem to be any occasion for an official of the Federal Government to question the validity of this section. I pass, therefore, to a consideration of section 2 of the act.

For many years legislation of the State of North Carolina has purported to govern the eligibility of members of the Eastern Band of Cherokees to serve as officers of the band. Prior to the passage of the act of April 5, 1947, the law of North Carolina covering this subject provided that the principal chief and assistant chief of the band must be of at least one-fourth Eastern Cherokee blood, and that the members of the council must be of at least one-sixteenth Eastern Cherokee blood. (Section 17 of the North Carolina law of March 8, 1895.)² Section 2 of the act of April 5, 1947, abolishes these requirements as to the minimum degree of Indian blood necessary to establish eligibility for an office in the band.

Although the Indians originally comprising the Eastern Band of Cherokees declined to move west of the Mississippi River with the main body of the Cherokee Nation after the Treaty of New Echota in 1835, choosing instead to remain in the State of North Carolina and to become citizens of that State and subject to its laws,³ it is well settled that, as a result of developments since the separation of the band from the main body of the tribe, this band now has the status of a "distinctly Indian community"; that it is under the guardianship and protection of the Federal Government, and that it is subject to the paramount authority of Congress to legislate for the regulation of the affairs of the band and for its economic welfare.⁴ There-

² Private Laws of North Carolina, ch. 166. [Editor.]

³ See *The Cherokee Trust Funds*, 117 U. S. 288 (1886).

⁴ *United States v. Wright*, 53 F. (2d) 300, 306-307 (C. C. A. 4th, 1931), cert. denied 285 U. S. 589.

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fore, it is necessary to determine whether the April 1947 legislation of the State of North Carolina concerning the eligibility of members of the Eastern Band of Cherokees to serve as officers of the tribal organization conflicts or is inconsistent with legislation enacted by the Congress under its paramount authority over these Indians.

In the consideration of the point mentioned in the last sentence of the preceding paragraph, it is unnecessary to dwell on the congressional statutes adopted prior to the enactment of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U. S. C. sec. 461 *et seq.*), other than to point out that they were reviewed at length in the case of *United States v. Wright*,⁵ and were found to support the conclusion that Congress had recognized the Eastern Band of Cherokees as a "distinctly Indian community" and had placed the band in a status similar to that of other Indian tribes. As a band of Indians subject to Federal jurisdiction, the provisions of the Indian Reorganization Act were extended to the Eastern Band of Cherokees by section 19 of the act (25 U. S. C. sec. 479), subject to their acceptance of the act by formal vote as provided in section 18 (25 U. S. C. sec. 478). The Eastern Band of Cherokees accepted the act on December 20, 1934.⁶ The band thus became entitled to all the rights, powers, and privileges granted by the act to the tribes accepting its terms. Among these is "the right to organize for its common welfare." Sec. 16; 25 U. S. C. sec. 476.

The "right to organize" which Congress in section 16 of the Indian Reorganization Act specifically conferred upon, or recognized as existing in, Indian tribes includes the determination of the form of tribal government to be adopted. As former Solicitor Margold said in an opinion dated October 25, 1934:⁷

Since any group of men, in order to act as a group, must act through forms which give the action the character and authority of group action, an Indian tribe must, if it has any power at all, have the power to prescribe the forms through which its will may be registered. The first element of sovereignty, and the last which may survive successive statutory limitations of Indian tribal power, is the power of the tribe to determine and define its own form of government. Such power includes the right to define the powers and duties of its officials, the manner of their appointment or election, the manner of their removal, the rules they are to observe in their capacity as officials, and the forms and procedures which are to attest the authoritative character of acts done in the name of the tribe. * * *

The authority of an Indian tribe to define its form of government necessarily includes the power to prescribe the qualifications which must be possessed by its officers and the members of its governing body.

⁵ Cited in footnote 4.

⁶ See "Ten Years of Tribal Government under Indian Reorganization Act," Table A, page 18.

⁷ 55 I. D. 14, 30.

No other power is more inherent in or more intimately related to self-government.

It is my opinion, therefore, that section 2 of the act of April 5, 1947, of the North Carolina Legislature is ineffective to prescribe the qualifications which members of the band must possess in order to hold office in the tribal government, for the reason that the authority to determine such matters is now clearly vested in the band as a result of the enactment of the Indian Reorganization Act by Congress and the acceptance of the provisions of the act by the band. It is immaterial in this connection that the band has not as yet adopted a constitution or received a charter under the act. As the "right to organize" is lodged in the band, and as Congress in pursuance of its paramount authority has legislated with respect to the exercise of the right, the State is without power to control matters of tribal organization. "Neither the constitution of a State nor any act of its legislature, whatever rights it may confer on Indians or withhold from them, can withdraw them from the operation of an act which Congress passes concerning them in the exercise of its paramount authority." *Sperry Oil Co. v. Chisholm*, 264 U. S. 488, 497 (1924).

Nothing contained in this opinion is to be construed as questioning the validity of the charter of incorporation issued to the Eastern Band of Cherokees by the State of North Carolina or the validity of the legislation enacted by the State with respect to matters of tribal organization prior to the passage of the Indian Reorganization Act. Aside from the fact that such legislation appears to have been enacted with the approval of the Indians, there was then no Federal law to the contrary on the subject. My opinion goes no further than to say that the power to make changes in the form of tribal government no longer rests in the State by virtue of the preemption of the field by Congress. Such changes may be made only in the manner prescribed by the Indian Reorganization Act, i. e., through the adoption of a constitution and bylaws as prescribed by section 16 of that act.

MASTIN G. WHITE,
Solicitor.

LIMITATION ON APPROPRIATION FOR FEDERAL AID IN WILDLIFE RESTORATION

Federal Aid in Wildlife Restoration—Limitation in Interior Department Appropriation Act, 1948—Fish and Wildlife Service.

The proviso in the Interior Department Appropriation Act, 1948 (act of July 25, 1947, 61 Stat. 460, 488), placing upon funds apportioned to any State for the purpose of effectuating the act of September 2, 1937 (16 U. S. C. sec. 669 *et seq.*), a limitation of 20 percent "for the construction of improve-

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ments," is applicable to Federal funds expended to build or make physical structures or other works which are expected to constitute valuable additions to or betterments of lands.

The following types of works would be subject to the limitation in the proviso: buildings; dams, dikes, and levees; canals and channels; bridges; roads; telephone and electrical lines; and fences.

The operation of the limitation is determined by the purposes for which the funds are expended, and not by the nature of the method used by a State to expend them.

M-34993

SEPTEMBER 4, 1947.

TO THE DIRECTOR, FISH AND WILDLIFE SERVICE.

In your memorandum of August 29, you request my advice with respect to the proper interpretation of a proviso in the Interior Department Appropriation Act, 1948 (act of July 25, 1947, 61 Stat. 460, 488), placing upon funds apportioned to any State for the purpose of effectuating the act of September 2, 1937 (16 U. S. C. sec. 669 *et seq.*), a limitation of 20 percent "for the construction of improvements." In particular, you inquire whether the expenditure by a State of these funds upon the following types of works would constitute "the construction of improvements" within the meaning of the proviso: buildings; dams, dikes, and levees; canals and channels; bridges; roads; telephone and electrical lines; and fences.

The scope of the phrase "construction of improvements" is not spelled out in the Appropriation Act, and the legislative history of the act does not throw any light upon the problem. Consequently, the key words of the phrase must be given their ordinary meaning. On this basis, the limitation is applicable to the expenditure of apportioned Federal funds by a State in order to build or make physical structures or other works which are expected to constitute valuable additions to or betterments of lands within or related to wildlife restoration projects. (See the definitions of "construct" and "improvement" in Webster's New International Dictionary, 2d ed., unabridged.)

It seems clear to me that the expenditure of apportioned funds upon the several types of works referred to in the first paragraph above would be subject to the limitation in the proviso.

I am also of the opinion that the operation of the limitation is determined by the purposes for which the funds are expended, and not by the nature of the method used by a State to expend them. That is to say, it would make no difference whether a State constructed an improvement by the use of its own equipment and personnel or through the services of an independent contractor, so long as the expenditure of apportioned Federal funds was involved.

MASTIN G. WHITE,
Solicitor.

VALIDITY OF PATENTS ISSUED TO NORTHERN CHEYENNE INDIANS

Indian Reservations — Indian Allotments — Statutory Construction — Northern Cheyenne Indians.

When Congress, by the act of July 1, 1898 (30 Stat. 571, 596), called for recommendations as to the manner in which a controversy between the Northern Cheyenne Indians and white settlers might be ended, and when it later, by the act of May 31, 1900 (31 Stat. 221, 241), approved recommendations that certain lands be added to the then existing Executive order reservation and appropriated the money with which to purchase such lands, those actions by Congress had the effect of adding to the reservation the lands acquired pursuant to the 1900 act, including those lands situated outside reservation boundaries fixed by the Executive order of March 19, 1900.

The phrase "the Northern Cheyenne Indian Reservation heretofore set apart by Executive order dated the 19th day of March, 1900" appearing in the act of June 3, 1926 (44 Stat. 690), authorizing allotments to Northern Cheyenne Indians, was used as a means of identification rather than as a limitation upon the allotment authority of the Secretary of the Interior.

Patents issued to Northern Cheyenne Indians for lands acquired under the act of May 31, 1900, although outside of the boundaries of the reservation established by Executive order of March 19, 1900, were properly issued pursuant to the act of June 3, 1926, as it was the purpose of Congress to authorize the allotment in severalty of the agricultural and grazing lands within the reservation as then constituted.

M-34758

SEPTEMBER 5, 1947.

TO THE ACTING COMMISSIONER OF INDIAN AFFAIRS.

This responds to the memorandum from the Assistant Commissioner of Indian Affairs submitting to this office the question whether trust patents issued to Pat and Jean Spottedwolf, Northern Cheyenne Indian Allottees Nos. 1090 and 1091, insofar as the patents cover land in section 27, T. 2 S., R. 44 E., P. M., Montana, on the east bank of the Tongue River, were properly issued under the act of June 3, 1926 (44 Stat. 690).

Section 1 of that act declared, "the Northern Cheyenne Indian Reservation heretofore set apart by Executive order dated the 19th day of March, 1900, for the permanent use and occupation of the Northern Cheyenne Indians, in Montana," to be "the property of said Indians." Section 2 required the Secretary of the Interior to cause to be prepared "a list of the lands of said Indian reservation" and to classify the same as agricultural land, grazing land, or land chiefly valuable for its timber; and authorized the Secretary to allot in severalty the lands classified as agricultural or grazing lands, with a reservation to the tribe of the coal and other minerals. The patents issued to the Spottedwolfs contain the mineral reservation.

The question as to the validity of the patents arises by virtue of the fact that the Executive order of March 19, 1900 (1 Kappler 860), es-

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established the middle of the channel of the Tongue River as the eastern boundary of the Northern Cheyenne Reservation, while certain portions of the allotments covered by the two patents in question lie east of the Tongue River, which intersects section 27. Those particular portions of the allotments, therefore, were not derived from the reservation as established by the Executive order.

In determining the propriety of allotting the land in section 27 lying east of the Tongue River to Northern Cheyenne Indians under the act of June 3, 1926, consideration must be given not only to the Executive order of March 19, 1900, and to the 1926 act, but to the manner in which section 27 was acquired for the use and benefit of the Northern Cheyenne Indians. The acts of Congress under which the land was acquired and the steps taken by this Department in the acquisition of the land and its allotment to the Indians will be reviewed in order that the true status of the land in question may be revealed.

By an Executive order dated November 26, 1884 (1 Kappler 860), certain unsurveyed land in the Territory of Montana, bounded on the west by the Crow Indian Reservation, was set apart as a reservation for the use and occupancy of "the Northern Cheyenne Indians, now residing in the southern portion of Montana Territory * * *." Tracts of land within the boundaries described in the Executive order which had been "located, resided upon, and improved by bona fide settlers, prior to the 1st day of October, 1884," were excluded from the reservation, as were all lands to which valid rights had attached under the public-land laws.

By orders dated June 22 and September 3, 1886, the Secretary of the Interior withdrew from settlement certain lands along the Tongue River outside the boundaries of the 1884 reservation, until the needs of the Northern Cheyenne Indians could be determined.¹

For many years there was trouble between the Indians and the non-Indians in the area, due in part to the agitation by the non-Indians for the removal of the Indians from the area and to the impossibility of determining the boundaries of the reservation.² Reports to this Department and to the War Department indicated that if the reservation were cleared of white settlers, who occupied much of the best land on the reservation, and if a sufficient amount of other desirable land could be added to the reservation, many of the difficulties of the Northern Cheyennes could be eliminated.

¹ See letter of Commissioner of Indian Affairs dated February 6, 1892 (S. Ex. Doc. No. 58, 52d Cong., 1st sess., 1892).

² See reports of the agent at the Tongue River Agency contained in the reports of the Commissioner of Indian Affairs, 1889-1890, 1891, 1896, and 1898, and the reports contained in S. Ex. Doc. No. 58, 52d Cong., 1st sess. (1892).

By section 10 of the act of July 1, 1898 (30 Stat. 571, 596), the Secretary of the Interior was directed to send an inspector to the Northern Cheyenne Reservation. The inspector was required to determine if it were feasible to secure the removal of the Northern Cheyenne Indians to the Crow Reservation; to ascertain and report in detail the number and names of white settlers legally on the Northern Cheyenne Reservation and the number of acres of land owned by them; and to report on the number of white settlers who were illegally on the reservation and the circumstances attending their settlement. He was instructed by Congress to enter into negotiations with the white settlers who were found to have valid titles for the purchase of their lands and improvements by the Government, and he was authorized to make written purchase agreements with such settlers, but the agreements were to be binding only if ratified and approved by the Secretary of the Interior. The inspector was required, also, to make recommendations as to the settlement of the claims of any white settlers who had gone on the reservation under circumstances which gave them equitable rights in reservation lands.

The inspector made his first report and recommendations on November 14, 1898.³ He found that the Northern Cheyennes were unwilling to move to the Crow Reservation and that the Crows were unwilling to receive them. He proposed that the Northern Cheyenne Reservation be extended east to the Tongue River. He included in the report information concerning his negotiations with white settlers for lands and improvements owned and occupied by them within the limits of the reservation, as set apart by the Executive order of November 26, 1884, with whites who owned or claimed lands and improvements in the area proposed to be added to the reservation, and with Indians living east of the Tongue River for their removal to lands west of the river.

On February 3, 1900, the inspector submitted his second report, in which he told of his negotiations for the purchase of certain sections of land previously patented to the Northern Pacific Railway Company and situated within "the proposed reservation for the Northern Cheyenne Indians." He reported that the Railway Company still owned 4,656.35 acres out of more than 10,000 acres patented to it within the area, and that he had entered into an agreement with the Company for the purchase of the land still owned by it. He said that he had also entered into an agreement with one Hugh Hunter for the purchase of 3,732.28 acres of land which Mr. Hunter had acquired from the Railway Company; and that he was negotiating with a Capt. A. E. Neate concerning the purchase of land acquired by the latter from the Railway Company. The purchase agreement which the inspector

³ H. Doc. No. 153, 55th Cong., 3d sess. (1899).

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made with the Northern Pacific Railway Company included the land in section 27, T. 2 S., R. 44 E., on the east bank of the Tongue River.

On February 16, 1900, the inspector submitted a third report, stating that the negotiations with Captain Neate had ended in an agreement for the purchase of 1,701.36 acres of land. The inspector also reported that it would be necessary for Congress to appropriate \$171,615.44 to carry out the agreements which he had entered into with the settlers, the Railway Company, and the Indians.

Thereafter, the Executive order of March 19, 1900, was issued. It withdrew from sale and settlement the land described in the order, which included the area previously covered by the Executive order of November 26, 1884, and set the same apart as a reservation for the permanent use and occupancy of the Northern Cheyenne Indians.⁴ As previously stated, the middle of the channel of the Tongue River was fixed as part of the eastern boundary of the reservation, and no land east of that river was affected by the order.

On May 31, 1900, Congress appropriated the sum of \$171,615.44—

To enable the Secretary of the Interior to pay for certain lands and improvements, as recommended by United States Indian Inspector James McLaughlin in his three reports to the Secretary of the Interior dated, respectively, November fourteenth, eighteen hundred and ninety-eight, and February third and sixteenth, nineteen hundred * * *⁵

On December 18, 1900, the Secretary revoked his orders of June 22 and September 3, 1886, thereby releasing lands east of the Tongue River for location and settlement.

A subsequent survey of the northern boundary of the reservation disclosed that there were seven settlers who remained within the reservation. They were found to be without title to the land occupied by them. Their improvements were estimated to aggregate \$2,965, and Congress appropriated this amount in the Indian Appropriation Act of March 3, 1903 (32 Stat. 982, 1000), for the payment of their claims.

On July 14, 1930, the Commissioner of Indian Affairs transmitted to the Secretary a schedule showing the classification of the lands on the Northern Cheyenne Reservation, as required by the act of June 3, 1926. The schedule was approved on July 15, 1930.

On February 4, 1932, the Commissioner of Indian Affairs trans-

⁴ "It is hereby ordered that the following-described tract of land lying in the State of Montana, the same being the tract described in Senate bill 2173, 56th Congress, 1st session, which tract includes the lands embraced in the boundaries set forth in Executive order issued November 26, 1884, relative to the Northern Cheyenne reserve, be, and the same is hereby, withdrawn from sale and settlement and set apart as a reservation for the permanent use and occupation of the Indians now occupying or belonging upon the Northern Cheyenne Reservation, which reservation shall be known as the Northern Cheyenne Indian Reservation * * *"

⁵ 31 Stat. 221, 241.

mitted a schedule listing 1,457 allotments made to Indians of the Northern Cheyenne Reservation under the 1926 act. Allotments Nos. 1090 and 1091 appeared on that schedule. The General Land Office, now the Bureau of Land Management, recommended that action be suspended on certain allotment selections, including those of Pat and Jean Spottedwolf, because its records showed that the selections of the Indians conflicted with patents already issued. The records of the General Land Office showed that all of section 27 had been patented to the Northern Pacific Railway Company in 1895.

On August 30, 1932, the Bureau of Indian Affairs forwarded to the General Land Office deeds and abstracts of title covering the lands involved in the conflicts. The Indian Bureau stated that the lands "were purchased as evidenced by the enclosed deeds during the years 1900, 1901, and 1902, for the Indians of the reservation in accordance with the Act of May 31, 1900 (31 Stat., 241)," and requested the General Land Office to advise it, after noting the deeds on its records, "whether there still exists any reason why the allotment selections listed in your memorandum should not be approved and patents issued to the allottees." The papers forwarded to the General Land Office showed, among other things, that the entire section 27 was reacquired by the United States for the Indians of the Northern Cheyenne Reservation and had been reconveyed to the United States by deed from the Railway Company dated February 14, 1901, in accordance with the act of May 31, 1900.⁶ On March 2, 1933, the General Land Office addressed to the Commissioner of Indian Affairs a memorandum listing the allotment selections which then appeared free from conflicts. Allotments Nos. 1090 and 1091 appeared on that list. Thereafter, on June 21, 1933, the Commissioner of Indian Affairs recommended that the allotments be approved and that patents be issued to the allottees. This recommendation was approved on June 22, 1933, and on August 25, 1933, trust patents were issued to the two Spottedwolves.

The inclusion of lands acquired under the act of May 31, 1900, in patents issued to Northern Cheyenne Indians was, in effect, a ruling by the Department that the 1926 act permitted the allotment not only of lands set apart for the benefit of the Northern Cheyenne Indians by the Executive order of March 19, 1900, but also of lands acquired for the use and benefit of the Indians pursuant to the act of May 31, 1900. In my opinion, that ruling was proper.

It is fundamental that no valid existing rights in any lands included within the exterior boundaries of the reservation created by the Executive order of March 19, 1900, were affected by that order, and that only those lands within the reservation boundaries to which no

⁶ Vol. 83, p. 141, Montana Tract Book.

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rights had attached were set apart for the use and benefit of the Indians. It must be remembered in this connection that, when the Executive order of March 19, 1900, was issued, non-Indians had already acquired valid rights in many tracts of land within the exterior boundaries of the reservation, including a substantial portion of the best agricultural and grazing land, and that Congress subsequently provided in the act of May 31, 1900, for the purchase of these tracts, as well as certain land outside but adjacent to the reservation boundaries fixed in the Executive order, for the use and benefit of the Indians. It would not be reasonable to conclude that Congress, when it provided in the act of June 3, 1926, for the allotment in severalty of the agricultural and grazing lands of "the Northern Cheyenne Indian Reservation heretofore set apart by Executive order dated the 19th day of March, 1900," intended merely to legislate with respect to those lands which had been affected by the original issuance of the Executive order, thus excluding from the allotment program agricultural and grazing lands purchased for these Indians subsequent to March 19, 1900.

A more reasonable construction of the act of June 3, 1926, than that suggested in the preceding paragraph is that, in view of the historical background previously related, it was the purpose of Congress to authorize the allotment in severalty of the agricultural and grazing lands within the reservation *as then constituted*, and that the phrase, "the Northern Cheyenne Indian Reservation heretofore set apart by Executive order dated the 19th day of March, 1900," was used as a means of identification rather than as a limitation upon the **allotment authority of the Secretary of the Interior.**

Furthermore, it appears that when Congress, by the act of July 1, 1898, called for recommendations as to the manner in which the controversy then raging between the Northern Cheyenne Indians and the white settlers might be ended, and when it later, by the act of May 31, 1900, approved the recommendations that certain lands be added to the then existing Executive order reservation and appropriated the money with which to purchase such lands, these actions by the Congress had the effect of adding to the reservation the lands acquired pursuant to the 1900 act, including those situated outside the reservation boundaries fixed by the Executive order of March 19, 1900.

Accordingly, it is my opinion that the trust patents issued to Pat and Jean Spottedwolf were properly issued under the act of June 3, 1926.

MASTEN G. WHITE,

Solicitor.

AUTHORITY OF SECRETARY OF THE INTERIOR TO PERMIT SEARCH FOR BURIED TREASURE ON GAME REFUGE UNDER JURISDICTION OF FISH AND WILDLIFE SERVICE

Treasure Trove—Authority of Secretary to Issue Permit for Exploration—Respective Rights of Government and Finder in Property Discovered—Fish and Wildlife Service.

The Secretary of the Interior possesses the authority under the act of June 15, 1935 (16 U. S. C. sec. 715s), to permit the owner of an electronic instrument to search for buried treasure on a game refuge under the jurisdiction of the Fish and Wildlife Service.

In the absence of an agreement to the contrary, a finder of treasure trove (i. e., gold or silver coins or bullion buried in the earth) on a game refuge has title to such property valid against anyone, including the owner of the soil, except the true owner.

A finder, while exploring on a game refuge, has no title to any property other than treasure trove which he may discover in the earth.

M-34919

SEPTEMBER 5, 1947.

TO THE CHIEF COUNSEL, FISH AND WILDLIFE SERVICE.

This responds to your request for my opinion as to whether the Secretary of the Interior, acting through the Fish and Wildlife Service, possesses the authority necessary to permit Ray B. Dean, of Horton, Missouri, to search for buried treasure within the boundaries of the Wichita Mountains Wildlife Game Refuge in southwestern Oklahoma. Your request grew out of a letter to the Secretary from Mr. Dean, in which he explained that he owns an electronic instrument that is capable of locating oil and minerals beneath the surface of the earth and that this instrument had indicated the existence of "two large express strong boxes that registers gold money and some jewels" about 12 feet below the surface of the Wichita Mountains Wildlife Game Refuge. He stated that his proposed exploration would do no damage to the refuge.

As you pointed out in your memorandum, the authority exists in the act of June 15, 1935 (16 U. S. C. sec. 715s), under which this Department could transform Mr. Dean from a trespasser into a licensee and thus allow him to explore for the treasure that he alleges is buried beneath the surface of the game refuge. (See Solicitor's opinion, M. 34516, August 5, 1946.) That statute provides, in part "That the disposition or sale of surplus animals, and products, and the grant of privileges on said wildlife refuges may be made upon such terms and conditions as the Secretary of the Interior shall determine to be for the best interests of government * * *." However, because of the result which would follow under existing law controlling the respective rights of the finder of buried treasure and those of the owner of the soil in which it was found, the successful

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exploitation by Mr. Dean of any privilege of exploration granted to him might place the Department in the position of having given him a title to the treasure valid against anyone except the true owner. Accordingly, the "best interests of government" would seem to require Mr. Dean to give substantial consideration in return for the privilege of exploring on the refuge.

Only two decisions have been found in which the Federal courts considered the problem of conflicting interests where property had been lost, mislaid, or abandoned. *Norris v. Camp*, 144 F. (2d) 1 (C. C. A. 10th, 1944), bonds found in safe deposit box by successor to former owner of the box; *In re Savarino*, 1 F. Supp. 331 (S. D. N. Y., 1932), money abandoned in taxicab by prisoner. In each instance the Federal court drew heavily on leading State cases in the field.

When the law of the States is studied, it becomes possible to draw several quite definite conclusions. In the first place, a Federal court deciding the question would receive no assistance from either the statute or case law of Oklahoma. No Oklahoma statute, for example, was found similar in scope to section 22-203, Wyoming Compiled Statutes, 1945, which provides, in part, as follows:

All property, real and personal, within the limits of this state, which does not belong to any person, belongs to the state. * * *

Neither was any decision found in which the courts of Oklahoma had considered the problem of conflicting interests in the matter of lost, mislaid, or abandoned property.

Next, the American decisions hold consistently that where the subject matter is treasure trove the finder prevails over the owner of the soil. *Weeks v. Hackett*, 104 Me. 264, 71 Atl. 858 (1908); *Danielson v. Roberts*, 44 Ore. 108, 74 Pac. 913 (1904); *Vickery v. Hardin*, 77 Ind. App. 553, 133 N. E. 922 (1922); *Groover v. Tippins*, 51 Ga. App. 47, 179 S. E. 634 (1935); *Zornes v. Bowen*, 223 Iowa 1141, 274 N. W. 877 (1937); *French v. McNabb*, 170 Md. 318, 184 Atl. 233 (1936). See *Erickson v. Sinajkin*, 223 Minn. 232, 26 N. W. (2d) 172 (1947).

The attitude of the American courts in the matter of treasure trove is clearly expressed in *Vickery v. Hardin*, *supra*. A workman employed by the owner of an old house to dig a cellar under it found an earthen jar containing gold coins. In holding that the workman held the title to the coins as against the owner of the soil, the court said:

The question here presented involves the law of treasure trove, which is defined as any gold or silver, in coin or bullion, found concealed in the earth or in a house or other private place, but not lying on the ground, the owner of the treasure being unknown. The rule as to such property in this country, in the

absence of legislation, is that the title belongs to the finder as against all the world except the true owner, the principle being the same as to lost property. * * * *The owner of the soil in which treasure trove is found acquires no title thereto by virtue of his ownership of the soil* * * *. [Italics supplied.]

Finally, the rule stated above has not been modified by the decisions stemming from *South Staffordshire Water Co. v. Sharman*, 2 Q. B. 44, 65 L. J. Q. B. 460 (1896), wherein the owner of the land was allowed to recover in detinue two gold rings which had been found in the mud by two workmen who were cleaning out a pool. In every instance in which the owner of the land has prevailed over the finder, the property in question was not treasure trove but some other article embedded in the earth. Thus, in *Elwes v. Brigg Gas Co.*, 33 Ch. Div. 562, 55 L. J. Ch. 734 (1886), a leading case, the subject matter was an ancient boat embedded in the earth. In *Ferguson v. Ray*, 44 Ore. 557, 77 Pac. 600 (1904), a specimen of gold-bearing quartz was found buried in a cloth bag in the earth. In *Goodard v. Winchell*, 86 Iowa 71, 52 N. W. 1124 (1892), an aerolite weighing 66 pounds was dug from the soil by a person other than the owner of the land. In none of these cases was the treasure-trove rule applied, and in *Ferguson v. Ray* the treasure-trove cases were discussed and distinguished.

While no decision was found in which the sovereign, as the owner of the land in which the treasure trove was buried, contested the right of the finder to the property, there is no reason to suppose that an American court would treat the sovereign in any fashion different from that in which private landowners have been treated. At least, such is the inference which is drawn by Professor David Riesman, Jr., of the University of Buffalo Law School, in the most recent study of the problem of lost or abandoned property. In this discussion, entitled "Possession and the Law of Finders," 52 Harv. L. Rev. 1105, 1112 (1939), he concludes:

* * * Although a few decisions indicate compliance, the American finder statutes requiring escheat appear to be treated as dead letters, and the courts have generally dealt even with treasure trove as with other lost property, despite the English precedents. Indeed where any independent use has been made of its doctrines * * * it has been to permit the finder to prevail over the occupier. Thus the law * * * refuses to allow either the state or the landlord to upset the finder's luck.

In the light of these authorities, it is my opinion that (1) the Secretary possesses the authority under the act of June 15, 1935, to grant Mr. Dean the privilege of exploring for buried treasure on the Wichita Mountains Wildlife Game Refuge, and (2) in the absence of any agreement to the contrary, the title to whatever property in the category of treasure trove (i. e., gold or silver coin or bullion) that Mr. Dean might find under such a permit would be in Mr. Dean.

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If a permit is granted to Mr. Dean, it seems that it should be conditioned upon the execution of an agreement by him under which, in consideration for the privilege of exploring for the buried treasure, he would be required to turn over to the United States a considerable part of any treasure trove, and the whole of any property other than treasure trove, which he discovers.

MASTIN G. WHITE,
Solicitor.

MINERAL CHARACTER OF BAT GUANO DEPOSITS ON PAPAGO INDIAN RESERVATION

Mining Laws—Classification of Bat Guano Deposits on Papago Indian Reservation—Authority of Tribal Council to Issue Permit.

Deposits of bat guano found in caves on the Papago Indian Reservation, which is subject to exploration and location under the existing mining laws of the United States, are properly classifiable as mineral in character. The lands containing such deposits are subject to location and entry under the act of August 28, 1937 (50 Stat. 862; 25 U. S. C. sec. 463), and the deposits are therefore not subject to disposition by the Papago Tribal Council.

M-34976

SEPTEMBER 10, 1947.

TO THE COMMISSIONER OF INDIAN AFFAIRS.

In a memorandum dated July 11, your office requested that I express an opinion on the following question:

Are the deposits of bat guano, found in caves on the Papago Reservation, mineral deposits subject to location and entry under the act of August 28, 1937 (50 Stat. 862), or are they nonmineral and subject to disposal by the Papago Tribe?

The statutory provision mentioned in the question makes the lands of the Papago Indian Reservation subject "to exploration and location, under the existing mining laws of the United States * * *." 25 U. S. C. sec. 463. These mining laws are applicable, generally, to public lands containing "valuable mineral deposits." 30 U. S. C. sec. 22.

Guano, the excrement of sea birds or bats, seems to be outside the scope of the usual meaning of the word "mineral," i. e., "Any chemical element or compound occurring naturally as a product of inorganic processes." (Webster's New International Dictionary, 2d ed., unabridged.) However, as the Supreme Court said in the case of *Northern Pacific Railway Co. v. Soderberg*, 188 U. S. 526, 530 (1903):

The word "mineral" is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case.

The question of the classification under the mining laws of public lands containing valuable guano deposits was considered by the Secretary of the Interior in the proceeding entitled *Richter et al. v. State of Utah*, 27 L. D. 95 (1898). The Secretary held (p. 98)—

* * * that guano is a mineral, and that lands valuable for deposits of guano are mineral lands within the meaning of the mining and other laws of the United States.

The Secretary's decision was based upon the grounds that the guano involved in the proceeding (it had been deposited by sea birds on Gunnison Island) was composed of substantially the same chemical elements as certain phosphate deposits in the State of Florida, and that the Florida phosphate lands had previously been held (in *Florida Central and Peninsular Railroad Co.*, 26 L. D. 600 (1898)) to be "mineral lands within the intent and meaning of the laws relating to the disposal of the public domain."

The administrative classification by this Department of public lands containing guano deposits as mineral lands was mentioned by the Supreme Court, apparently with approval, in *Northern Pacific Railway Co. v. Soderberg*, 188 U. S. 526, 534.

The fact that the guano found on the Papago Reservation is bat guano, whereas the guano that was involved in the Secretary's decision in the *Richter* case had been deposited by sea birds, is not significant. Webster's New International Dictionary (2d ed., unabridged) includes bat guano under the definition of the term "guano," and the Encyclopedia Britannica states that bat guano is similar to other types of guano. This Department has regarded bat guano deposits as "mineral deposits," within the meaning of the mining laws. (See the file relating to the approval, on October 17, 1932, of a mineral lease in favor of T. J. Rex, A. H. Kempton, and Charles A. Kumke, covering bat guano deposits on the San Carlos Indian Reservation; and *Ernest R. Woolley, Brookfield Products Co.*, A-24490, August 18, 1947.)

I do not believe that the long-settled administrative practice with respect to this matter should be disturbed. It is my opinion, therefore, that the lands on the Papago Indian Reservation containing valuable deposits of bat guano are subject to location and entry under the mining laws of the United States, and, hence, that the guano deposits are not subject to disposition by the Papago Tribal Council.

MASTIN G. WHITE,
Solicitor.

**WAGE RATES FOR UNGRADED PERSONNEL—
BOULDER CANYON PROJECT**

Bureau of Reclamation—Prevailing Wage Rates—Boulder Canyon Project.

The wage rate for ungraded laborers or mechanics employed by the Bureau of Reclamation for a particular type of work in connection with operation or maintenance activities at the Hoover Dam may be established at a level different from the wage rate of personnel performing the same type of work in connection with construction activities on the project or in the locality of the project.

M-34994

SEPTEMBER 15, 1947.

TO THE COMMISSIONER OF RECLAMATION.

This responds to the memorandum of September 3 from the Acting Commissioner to the Secretary, asking whether, under section 15 of the Boulder Canyon Project Adjustment Act (54 Stat. 774, 779; 43 U. S. C. sec. 618n), the wage rate for ungraded laborers or mechanics employed by your Bureau for a particular type of work in connection with operation or maintenance activities at the Hoover Dam may be established at a level different from the wage rate of personnel performing the same type of work in connection with construction activities on the project or in the locality of the project.

Section 15 provides that—

All laborers and mechanics employed in the construction of any part of the project, or in the operation, maintenance, or replacement of any part of the Boulder [Hoover] Dam, shall be paid not less than the prevailing rate of wages or compensation for work of a similar nature prevailing in the locality of the project. In the event any dispute arises as to what are the prevailing rates, the determination thereof shall be made by the Secretary of the Interior, and his decision, subject to the concurrence of the Secretary of Labor, shall be final.

The use of two phrases, separated by a comma and the disjunctive "or," to modify "employed" in the first sentence of the section indicates that two categories of laborers and mechanics are covered by the section, (1) those employed in construction activities on the project, and (2) those employed in operation, maintenance, or replacement activities at the Dam, and that neither group is to be paid less than the prevailing rate of compensation paid to other persons of a similar category for the same type of work in the locality of the project. The prevailing rate in the locality for a certain type of work when performed by construction personnel may be the same as or different from the prevailing rate for the same type of work when performed by operation, maintenance, or replacement personnel.

Therefore, it is my opinion that the wage rate for ungraded laborers or mechanics employed by the Bureau of Reclamation for a

particular type of work in connection with operation or maintenance activities at the Hoover Dam may, under section 15 of the Boulder Canyon Project Adjustment Act, be established at a level different from the wage rate of personnel performing the same type of work in connection with construction activities on the project or in the locality of the project if, *in fact*, such a differential between the wages of the two categories of workers prevails in the locality of the project.

The problem of determining the "prevailing rate" in the locality of the project obviously presents a question of fact in each case. If a dispute arises as to what is the prevailing rate for construction personnel or for operation, maintenance, or replacement personnel engaged in any particular type of work, the procedure to be followed is clearly outlined in section 15. The Secretary of the Interior is to make a determination, and his decision, subject to the concurrence by the Secretary of Labor, is final.

It is noted that some confusion with respect to the scope of section 15 has arisen from the failure to distinguish clearly between the prevailing rates of pay that are to be determined under section 15 by the Secretary of the Interior, subject to the concurrence of the Secretary of Labor, and the prevailing rates of pay which are determined by the Secretary of Labor under the Bacon-Davis Act (40 U. S. C. sec. 276a) and which become the minimum wages for laborers and mechanics employed at the project by independent contractors with the Department under contracts involving more than \$2,000. The minimum wages to be paid by such independent contractors at the project are outside the scope of the procedure provided for in section 15, inasmuch as these minimum rates of pay are based upon determinations already made by the Secretary of Labor.

MASTIN G. WHITE,
Solicitor.

DUAL EMPLOYMENT

Federal Employees—Consultant to Alaska Development Board—Executive Assistant to Governor of Alaska.

The simultaneous holding by an individual of the position of Executive Assistant to the Governor of Alaska at a salary of \$7,381.50 per annum and a position as consultant to the Alaska Development Board at a salary of \$2,400 per annum would not violate the Federal dual compensation laws, inasmuch as the salary received as consultant would not be derived from funds appropriated by Congress, and the position as consultant would not be an office of the United States.

The Secretary of the Interior may, under Executive Order No. 7796, permit an employee of this Department to accept and hold a position with a State, Territory, or municipality, or the Secretary may approve the appointment of a person employed by a State, Territory, or municipality, to

September 15, 1947

a position in this Department, if the duties of the two positions are related to a cooperative program which is being carried on jointly by the Department and the State, Territory, or municipality.

M-34998

SEPTEMBER 15, 1947.

TO THE DIRECTOR, DIVISION OF TERRITORIES AND ISLAND POSSESSIONS.

The * * * order for the signature of the Secretary to permit the simultaneous holding by Mr. George Sundborg of the position of Executive Assistant to the Governor of Alaska (which carries a beginning salary of \$7,381.50 per annum, according to information received informally from your office) and a position as consultant to the Alaska Development Board, at a salary of \$2,400 per annum, raises several legal questions.

The applicability of the Federal dual compensation laws to the holding of the two positions by Mr. Sundborg must first be considered.

Section 6 of the act of May 10, 1916, as amended by the act of August 29, 1916 (5 U. S. C. sec. 58), provides, in part, as follows:

Unless otherwise specifically authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary when the combined amount of said salaries exceeds the sum of \$2,000 per annum.

This provision has been held by the Comptroller General to be inapplicable in a case where a Federal employee receives two salaries but only one of them is derived from funds appropriated by Congress. 17 Comp. Gen. 1055 (1938). As funds for the activities of the Alaska Development Board are provided by the Territorial Legislature of Alaska and not by the Congress, the provision of law quoted above would not prevent a Federal employee, such as the Executive Assistant to the Governor of Alaska, from receiving an additional salary from the Alaska Development Board.

Section 2 of the act of July 31, 1894 (5 U. S. C. sec. 62), provides, in part, as follows:

No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially authorized thereto by law; * * *

The word "office," as used in this section, was interpreted by the Court of Claims in *Dalton v. United States*, 71 Ct. Cl. 421 (1931), to mean "an office of the United States, a public station or employment established or authorized by Congress and conferred by appointment of the Government." As the post of consultant to the Alaska Development Board clearly is not an office of the United States, for the reason that the Board was created and is financed by the Legislature of the Territory of Alaska, the Executive Assistant to the Governor of

Alaska could simultaneously hold a position as consultant to the Board without filling two "offices" within the prohibitory language of section 2 of the act of July 31, 1894.

There is also to be considered section 1765 of the Revised Statutes (5 U. S. C. sec. 70), which provides:

No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for * * * any * * * service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation.

In 11 Comp. Dec. 702 (1905), the Comptroller of the Treasury stated with respect to the application of this section:

The prohibition in that section is only against receiving extra or double compensation out of United States funds, for in the absence of any specific reason to the contrary, there is nothing to prevent an officer or employee of the United States receiving compensation from outside sources and at the same time his salary from the Government. The question of conflict of duties or of diminished efficiency is one of administration and does not affect the payment of his salary so long as the employment by the Government exists.

As previously indicated, persons employed by the Alaska Development Board are paid from funds of the Territory of Alaska and not "out of United States funds." Accordingly, this section would not be applicable to the situation under consideration.

Another question to be disposed of is whether the simultaneous holding by Mr. Sundborg of a position as consultant to the Alaska Development Board and the position of Executive Assistant to the Governor of Alaska could properly be approved by the Secretary of the Interior as an exception to Executive Order No. 9, dated January 17, 1873. That order establishes the general policy of prohibiting persons who hold "any Federal Civil office by appointment under the Constitution and laws of the United States" from accepting or holding "any office under any State or Territorial Government, or under the Charter or ordinances of any Municipal Corporation; * * *." However, Executive Order No. 7796 (January 21, 1938; 3 F. R. 197) amends the earlier order so as—

* * * (1) to permit officers and employees of the Department of the Interior, upon approval of the Secretary of the Interior, to hold office under state, territorial, and municipal governments engaged in cooperative and related work with the Department of the Interior, as authorized by Federal and state laws: *Provided*, That the services to be performed by them shall pertain to such work and shall not in any manner interfere or conflict with the performance of their duties as officers or employees of the Federal Government; and (2) to permit state, territorial, and municipal officers or employees engaged in cooperative and related work with the Department of the Interior, unless prohibited by law, to accept appointment in and serve under the Department of the Interior when the Secretary of the Interior deems such employment necessary to secure a more efficient administration of the said work: * * *.

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Executive Order No. 7796 was apparently the outgrowth of a communication which the Administrative Assistant to the Secretary of the Interior addressed to the Civil Service Commission on May 12, 1937, recommending the issuance of an Executive order which would make it possible for employees of the Geological Survey engaged in authorized cooperation with States, Territories, or municipalities to hold at the same time appointments from the respective States, Territories, or municipalities involved in the cooperative programs.

It appears from the language and background of Executive Order No. 7796 that the authority of the Secretary of the Interior in the matter of permitting exceptions to the general rule against dual employment is not unlimited, but that the Secretary may permit an employee of this Department to accept and hold a position with a State, Territory, or municipality, or the Secretary may approve the appointment of a person employed by a State, Territory, or municipality, to a position in this Department, if the duties of the Federal position and the duties of the State, Territorial, or municipal position pertain to related activities under a cooperative program which is being conducted jointly by the Department of the Interior and the State, Territory, or municipality.

* * * * *

MASTIN G. WHITE,
Solicitor.

L. B. BEER ET AL.

A-20806 et al.

*Decided October 6, 1947***Oil and Gas Leases—Applications—Mineral Leasing Act—Submerged Lands.**

Applications for oil and gas leases on submerged lands lying below ordinary low watermark in the 3-mile marginal belt of the Pacific Ocean must be denied because such lands are not subject to disposition under the Mineral Leasing Act of February 25, 1920 (41 Stat. 437, as amended; 30 U. S. C. sec. 181 *et seq.*).

Oil and Gas Leases—Applications—Mineral Leasing Act—Tidelands—Inland Waters of State.

Applications for oil and gas leases under the Mineral Leasing Act of February 25, 1920 (41 Stat. 437, as amended; 30 U. S. C. sec. 181 *et seq.*), on tidelands and lands which underlie the inland waters of California must be denied because the Federal Government does not claim to own any interest in such lands.

DECISION

On various dates during the years 1934, 1935, and 1936, the above-listed persons¹ applied for oil and gas prospecting permits under the

¹ The list has been omitted for purposes of brevity. [Editor.]

Mineral Leasing Act of February 25, 1920 (41 Stat. 437), or for oil and gas leases under the amendatory act of August 21, 1935 (49 Stat. 674; 30 U. S. C. sec. 181 *et seq.*), on lands lying along the coast of California. The General Land Office, now the Bureau of Land Management, rejected the applications and the applicants appealed.

Action on the appeals was suspended pending a determination of the nature and extent of the rights in and jurisdiction over lands lying in the Pacific Ocean off the coast of California as between the United States and the State of California.²

In October 1945, the United States brought an original suit in the United States Supreme Court against the State of California in which it asserted that it was the owner in fee simple of, or possessed of paramount rights in and powers over, the lands, minerals, and other things of value underlying the Pacific Ocean, lying seaward of the ordinary low watermark on the coast of California and outside of the inland waters of the State, extending seaward 3 nautical miles and bounded on the north and south, respectively, by the northern and southern boundaries of the State of California. The plaintiff prayed for a decree adjudging and declaring the rights of the United States as against the State of California in the area claimed.

On June 23, 1947, the United States Supreme Court held in *United States v. California* "that California is not the owner of the three-mile marginal belt along its coast, and that the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil."³

It appears that the lands involved in these applications are either (1) submerged lands lying below ordinary low watermark in the 3-mile marginal belt of the Pacific Ocean, or (2) tidelands and lands which underlie the inland waters of California, including ports, bays, and harbors.⁴

On August 8, 1947, the Solicitor for this Department ruled that the Mineral Leasing Act of February 25, 1920, as amended, does not authorize the issuance of oil and gas leases with respect to the submerged lands below low tide off the coasts of the United States and outside the inland waters of the States.⁵ On August 29, 1947, the Attorney General of the United States, in response to a request of the

² The decisions of the Bureau from which the earlier appeals were taken were affirmed by the Department, but the applicants in those cases filed motions for rehearing, petitions for the exercise of supervisory authority, and other requests for reconsideration. Although some of the motions and petitions were denied, the applicants have in all cases kept their appeals alive by filing further requests for reconsideration. This decision will dispose of all matters now pending before the Department in connection with the applications, whether the applications are before the Department on appeal, motion, petition, or request for reconsideration.

³ 332 U. S. 19, 38. * * *

⁴ Some of the tidelands applied for appear to be within the boundaries of confirmed private land grants.

⁵ 60 I. D. 26.

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Secretary of the Interior, rendered an opinion⁶ in a letter to the Secretary, reading as follows:

You have asked my opinion on the question whether the Mineral Leasing Act of February 25, 1920, as amended (41 Stat. 437; 30 U. S. C. 181, *et seq.*), authorizes the issuance of oil and gas leases with respect to the submerged lands below low tide off the coasts of the United States and outside the inland waters within the States.

In considering the steps which should be taken to protect the interests of the United States in the submerged lands off the Coast of California, following the decision of the United States Supreme Court rendered on June 23, 1947, in *United States v. California*, No. 12 Original, October Term, 1946 [332 U. S. 19], one of the questions which your Department and this Department had to examine was whether the provisions of the Mineral Leasing Act required that the procedures set forth in that act be followed with regard to the property which the Supreme Court held in that case to be that of the United States. The Acting Solicitor General and the Solicitor of your Department concluded that the act imposed no such requirement. After consideration, I reached the same conclusion, and I now adhere to it. The stipulations [in *United States v. California*, *supra*] were signed on that basis.

It follows that so many of the above-listed applications⁷ as cover submerged lands lying below ordinary low watermark in the 3-mile marginal belt of the Pacific Ocean and outside the inland waters of the State of California should be denied.

In the conduct of the litigation with the State of California, the Government conceded that it was not laying claim to the tidelands or to the lands which underlie the inland waters of California, including ports, bays, and harbors, or to the minerals therein. It asserted ownership only to the lands, minerals, and other things of value underlying the Pacific Ocean in the 3-mile belt seaward of the ordinary low watermark, and outside the inland waters of California.⁸ Hence, so many of the above-listed applications⁹ as cover tidelands and lands which underlie the inland waters of California should be denied.¹⁰

Accordingly, the decisions from which appeals were taken are affirmed and the motions, petitions, and other requests for reconsideration of decisions by the Department are denied.¹¹

J. A. KRUG,
Secretary.

⁶ 40 Op. Atty. Gen. 540. [Editor.]

⁷ See footnote 1. [Editor.]

⁸ Motion for Leave to File Complaint, and Complaint, pp. 2, 6, 7; *United States v. California*, 332 U. S. 19; Decree Proposed by the United States and Memorandum in Support of Proposed Decree, pp. 1, 5.

⁹ See footnote 1. [Editor.]

¹⁰ On July 27, 1947, the Attorney General of the United States and the Attorney General of California entered into a stipulation in which it was conceded that certain parts of San Francisco Bay, San Diego Bay, and San Pedro Bay were not claimed by the United States. Some of the applications appear to be for lands within these areas.

¹¹ To same effect, see decision of Director, Bureau of Land Management, September 8, 1947 (Los Angeles 053115, etc.).

VALIDITY OF ORDERS TEMPORARILY WITHDRAWING PUBLIC LANDS IN AID OF LEGISLATION LOOKING TO THE ESTABLISHMENT OF INDIAN RESERVATIONS

Public Lands—Temporary Withdrawals by Secretary of the Interior.

Prior departmental rulings that the Secretary of the Interior may withdraw public land temporarily in aid of legislation looking to the establishment of Indian reservations by the Congress are not in conflict with the acts of May 25, 1918 (40 Stat. 570), June 30, 1919 (41 Stat. 34), and March 3, 1927 (44 Stat. 1347).

Such withdrawals when made remain in full force and effect until revoked either by the Congress or by the Secretary, even though the contemplated legislation fails of enactment.

M-35003

OCTOBER 8, 1947.

TO THE SECRETARY.

In a letter to you under date of June 20, 1946, Senator McCarran, of Nevada, strongly questioned the legality and propriety of the practice of this Department of making temporary withdrawals of public land in aid of legislation looking to the establishment of Indian reservations, and made the assertion, based on a legal memorandum prepared by one Frank K. Nebeker,¹ that this practice nullifies the act of May 25, 1918 (40 Stat. 570), the act of June 30, 1919 (41 Stat. 34), and the act of March 3, 1927 (44 Stat. 1347).

The policy issues raised by Senator McCarran have been met in part by revisions of departmental procedure with respect to the establishment and continuance of temporary land withdrawals. This memorandum will therefore be restricted to the purely legal issues.

The Nebeker memorandum, which was directed primarily to the validity of Secretarial order of September 26, 1933, withdrawing temporarily certain vacant, unentered, and undisposed-of public lands in Uintah County, Utah, was discussed at some length in a letter dated May 3, 1944, from Acting Secretary Fortas to Senator McCarran. In that letter, the prior rulings of this office were reviewed, and the conclusion was reached that the temporary withdrawal "was clearly within the authority of the Secretary." I find no reason to disturb that conclusion.

The power to withdraw permanently, or temporarily in aid of legislation, the public lands of the United States, including with-

¹The Nebeker memorandum is referred to at page 46 of the Third Partial Report of the Committee on Public Lands and Surveys (S. Rept. No. 808, 79th Cong., 1st sess. (1945)). For full text of the memorandum see Hearings before the Committee on Public Lands and Surveys, Washington, D. C., June 15, 16, and 21, 1943, pp. 2472-2475 (pursuant to S. Res. 241, 76th Cong., 3d sess., 1940, etc.).

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drawals for Indian use, is one that has been exercised by the executive department from an early date. The authority so to do, implied from long-continued usage, with the acquiescence of the Congress, has been considered and upheld in the courts.²

The act of May 25, 1918, prohibits the creation or enlargement of Indian reservations in the States of New Mexico and Arizona, except by act of Congress. Section 27 of the act of June 30, 1919, made this prohibition general. Section 4 of the act of March 3, 1927, prohibits changes in the boundaries of Indian reservations wherever located, with the proviso that the prohibition shall not apply to temporary withdrawals by the Secretary of the Interior. While the acts of 1918, 1919, and 1927 thus take away the implied power of the executive department to create, enlarge, or make changes in the boundaries of Indian reservations, the power theretofore exercised of making temporary withdrawals was expressly recognized and preserved.

The legislative situation with respect to the establishment of Indian reservations appears to be on all fours with that considered by the court in *Shaw v. Work*, *supra*. In that case, Congress, by the act of June 25, 1910 (36 Stat. 847; 43 U. S. C. secs. 141-142), had made express the implied authority of the Executive to withdraw public lands temporarily for certain purposes, with a provision prohibiting the creation or enlargement of forest reserves in certain States, including Oregon. In 1912, the President issued an order temporarily withdrawing public lands in Oregon. The object of the order was to withdraw the lands from disposition pending legislative action by the Congress looking to inclusion of the lands within a national forest. The validity of the order was upheld. The Court said:

The contention of counsel for plaintiff that the state of Oregon is exempt from the operation of the Act of June 25, 1910, vesting the President with the power of withdrawal, is without foundation, since the exemption relates solely to an attempt to create a forest reserve, or an addition to an existing reserve, otherwise than by an act of Congress. The President, in the order here in question, is attempting neither to create a forest reserve, nor add to one already existing. He merely withdrew the land from settlement pending action by Congress, which alone has the power under the act to create forest reserves within the states therein named. In other words, the President withdrew the land, not to create a forest reserve, but that Congress might. However, the power of withdrawal is inherent in the President without the express authority of Congress. *United States v. Midwest Oil Co.*, 236 U. S. 459, 35 S. Ct. 309, 59 L. Ed. 673.

In 1916, the Attorney General had reached a like conclusion in a similar case. 31 Op. Atty. Gen. 53. The question before the At-

² *United States v. Midwest Oil Co.*, 236 U. S. 459 (1915); *Mason v. United States*, 260 U. S. 545 (1923); *Grisar v. McDowell*, 6 Wall. 363, 381 (1867); *Shaw v. Work*, 9 F. (2d) 1014 (1925), *cert. denied* 270 U. S. 642 (1926).

torney General was whether withdrawals of public lands might be made in aid of pending legislation looking to the inclusion of the lands within existing national forests in those States in which the creation of national forests, or additions to national forests, except by act of Congress, was prohibited by the act of March 4, 1907 (34 Stat. 1271), as reenacted by the act of June 25, 1910 (36 Stat. 847), as amended. The Attorney General ruled that such a temporary withdrawal was not legally objectionable and said:

What the legislation of 1907 aimed to prevent (in the States named) was the increase, by Executive action based on the acts of 1891 and 1897, *supra*, of the areas designated and set apart as national forests and administered as such pursuant to the forest reserve legislation. If such increases were to occur, that act intended that they should be brought about only by the direct action of Congress. *Pro tanto*, it worked a repeal of the acts of 1891 and 1897, *supra*. They had given the President authority to create forest reservations in these States; the act of 1907 simply took that authority away. It did not purport to interfere with the President's authority, then implied (*United States v. Midwest Oil Company*, 236 U. S. 459), and since made express (act of 1910, *supra*), to withdraw land from the operations of the general land laws in aid of proposed legislation, nor do I perceive any sound reason for inferring such an intention. The withdrawal power could not create forest reservations or add to those already created; the result of its exercise would merely be to preserve the status of the land withdrawn until Congress had determined whether to bring about the creation or addition by its own enactments.

It seems to be obvious that the prohibitions contained in the acts of 1918, 1919, and 1927, were intended to prevent the creation of permanent reservations or permanent additions to existing reservations except by act of the Congress. Temporary withdrawals in aid of legislation, which create no rights and merely suspend the operation of the public-land laws, are not forbidden. On the contrary, the power to make such orders, held to be implied by the Supreme Court in the *Midwest Oil Co.* case, was given express recognition and confirmation by section 4 of the act of March 3, 1927.

In his letter of June 20, 1946, Senator McCarran also sharply criticizes the Department for permitting temporary withdrawals to remain in effect indefinitely and over a long period of years despite the fact that in some instances no attempt was made to obtain legislation and that in others Congress declined to enact the contemplated legislation. While this criticism raises a question of policy on which I express no opinion, I deem it advisable to point out that when the word "temporary" is used with respect to withdrawals in aid of legislation, the word "temporary" is used in contradistinction to the word "permanent." The executive practice upheld in the *Midwest Oil Co.* case embraced two types of public-land withdrawals—permanent withdrawals intended to be effective immediately for the purposes

October 8, 1947

for which the lands were withdrawn, and temporary withdrawals such as those now under consideration, in which public land was withdrawn for the purpose of maintaining the status of the land free of private claims until such time as the Congress itself had taken action. The latter type of withdrawal derives its temporary character from the fact that, although it might remain in force indefinitely, it is subject to revocation or discontinuance at any time without impairing the rights of anyone. Both types of withdrawal were considered and discussed in the *Midwest* case. The power of withdrawal not only was held to extend to both, but the Court recognized that, even in the case of the temporary withdrawal, the order would remain effective until revoked, irrespective of the period of time that might elapse. The Court said (p. 479) :

* * * But in the majority of cases there was no subsequent legislation in reference to such lands, although the withdrawal orders prevented the acquisition of any private interest in such land until after the order was revoked.

To the same effect is *Shaw v. Work, supra*, in which it was contended that a temporary withdrawal in aid of legislation then pending before the Congress, which withdrawal had been in effect for more than 10 years at the time of the decision, terminated with the adjournment of the final session of that Congress. The court rejected the contention, and held that the order remained effective until revoked.

While it is my opinion that the temporary orders of withdrawal to which Senator McCarran refers were validly issued, and that those orders will remain in effect until formally revoked, either by the Congress or by the Department, I deem it advisable to call your attention to the case of *Bibo v. Pueblo of Acoma*, Civil No. 940, now pending on appeal before the Tenth Circuit Court of Appeals, and to the case of *United States v. Bibo*, Civil No. 1253, in the United States District Court for the District of New Mexico. In these cases, Bibo claims the right to use public lands temporarily withdrawn in aid of legislation by departmental order of December 23, 1938 (4 F. R. 401), and it is my understanding that he is contending that the order of withdrawal is invalid on substantially the same grounds as those urged by Senator McCarran. The pending cases should thus result in a judicial determination of the question of the authority of the Department to make temporary withdrawals of public lands in aid of legislation looking to the establishment of Indian reservations.

FELIX S. COHEN,
Acting Solicitor.

CLAIM OF G. C. DERMA

Tort Claim—Licensee.

A person who enters upon the land of the United States by permission of the owner but solely for his own purpose and benefit has the legal status of a licensee.

Under the Federal Tort Claims Act, the legal duty of the United States to a licensee is determined by the law of the State in which the incident giving rise to a claim by a licensee occurred; and in most jurisdictions a landowner is not under a legal duty to take affirmative steps to make the premises safe for a licensee.

T-22

OCTOBER 22, 1947.

G. C. Derma, of Route 1, Box 26-A, Ysleta, Texas, filed a claim against the United States on September 7, 1946, in the amount of \$462.31 because of damage to his truck and \$937.50 because of the loss of the use of the truck. On January 31, 1947, an amended claim was filed for \$628.01 because of damage to the truck and for \$249.13 to cover the resulting loss of business.

The question whether the claim should be allowed under the Federal Tort Claims Act (28 U. S. C. sec. 921 *et seq.*) has been submitted to me for determination.

The Bureau of Reclamation constructed a timber-pile bridge in 1928 or 1929 to provide access across the Riverside Canal in the Ysleta, Texas, division of the Rio Grande project. On September 5, 1946, claimant, a contractor hauling hay for Henry Winn, a farmer living in the vicinity of the bridge who had been permitted by the Bureau to use the bridge from time to time, drove a truck across the bridge. The bridge was constructed for use by a vehicle of 5-ton capacity, and it is estimated that the weight of the claimant's truck was about 12,000 to 14,000 pounds. The piling failed at or below the water line, causing the truck to fall into the canal.

The liability of an owner of real property for damages resulting from unsafe conditions upon the premises frequently depends upon the status of the claimant at the time of the incident, i. e., whether he was an invitee, a licensee, or a trespasser. An invitee is one who is on the premises solely on invitation express or implied, where there is benefit to both the visitor and the occupier, or to the occupier alone. *Wimberly v. Gulf Production Co.*, 274 S. W. 986 (Tex. Civ. App., 1925). It is not shown by any evidence, or even contended, that the claimant was upon the bridge in response to any express or implied invitation. A licensee is one who comes upon the premises by permission solely for his own purposes and benefit. *Texas Pacific Coal & Oil Co. v. Bridges*, 110 S. W. (2d) 1248, 1251 (Tex. Civ. App., 1937). I believe that the claimant had implied permission to use the bridge, because it appears that it was customary to permit the public to use

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it. The claimant was therefore a licensee who crossed the bridge for a purpose personal to himself, and not for the mutual benefit of himself and the Government or of the exclusive benefit of the Government.

In Texas, the owner of realty is not required to make the premises safe for a licensee. The latter must take the premises as he finds them. The owner merely owes to a licensee a duty not to injure him or to damage his property by an affirmative act of negligence or by willful or wanton conduct. *Texas Pacific Coal & Oil Co. v. Bridges*, 110 S. W. (2d) 1248 (Tex. Civ. App., 1937); Note, 12 Texas Law Rev. 96 (1933); *Kruse v. Houston & T. C. R. Co.*, 253 S. W. 623, 625 (Tex. Civ. App., 1923).

There was no affirmative act of negligence, and no wanton or willful conduct, by Government personnel toward the claimant in this case. Consequently, the Government, if it were a private person, would not be liable to the claimant under the law of Texas for the damages resulting from the sagging of the bridge.

As a matter of fact, the evidence indicates that the Government made every reasonable effort to maintain the bridge in a safe condition. The claimant, on the other hand, attempted to cross a bridge constructed wholly of wood with a load that exceeded the capacity of the bridge. This was an act of negligence that caused the damage to his property and to the bridge.

DETERMINATION

Therefore, in accordance with the provisions of the Federal Tort Claims Act and the authority delegated to me by the Secretary of the Interior (43 CFR 4.21; 12 F. R. 924), I determine that—

(a) The damage to the property of G. C. Derma, on which the claim is based, was not caused by a negligent or wrongful act or omission of an employee of the United States Department of the Interior; and

(b) The claim of G. C. Derma must be denied.

MASTIN G. WHITE,
Solicitor.

ENFORCEMENT OF WILDLIFE CONSERVATION LAWS ON FEDERAL MILITARY RESERVATIONS

Federal Employees—Federal Laws—State Laws—State and Federal Game Wardens and Agents—Military Reservations—Exclusive Jurisdiction of United States—Military and Civilian Personnel.

By virtue of the Assimilated Crimes Act (18 U. S. C. sec. 468) any wildlife conservation laws of a State which were in effect on February 1, 1940, and

which remain in force are applicable as Federal laws to military reservations and other areas within the State which are under the exclusive jurisdiction of the United States.

State game wardens have no jurisdiction to enforce State or Federal game laws on lands ceded to the exclusive use of the United States. Violations of law occurring on such lands are enforceable only by the proper authorities of the United States.

United States game management agents and United States deputy game wardens are appointed with specific authority to enforce designated laws only, and they cannot take action with respect to the enforcement on military reservations of State wildlife conservation laws adopted as Federal laws under the provisions of the Assimilated Crimes Act, or otherwise.

Violations by military personnel of wildlife conservation laws or regulations on military reservations, irrespective of the Assimilated Crimes Act, can be prosecuted before courts martial under Article of War 96 (10 U. S. C. sec. 1568).

Violations of the Federal game laws by civilians on a military reservation over which the United States has exclusive jurisdiction, and which fall within the category of a petty offense (18 U. S. C. sec. 541) may be prosecuted by military personnel before a proper United States commissioner.

United States attorneys and marshals can apprehend and prosecute offenders of Federal game laws, including federally adopted State laws, upon military reservations which are under the exclusive jurisdiction of the United States.

M-35079

OCTOBER 24, 1947.

TO THE DIRECTOR, FISH AND WILDLIFE SERVICE.

Attached are a letter dated December 26, 1946, from Assistant Attorney General Theron L. Caudle and the enclosure which accompanied it, a communication dated December 16 to the Attorney General from United States Attorney Joseph T. Votava, Omaha, Nebraska. These documents* relate to the problem of the enforcement of wildlife conservation laws on military reservations over which the United States has exclusive jurisdiction. The delay in transmitting them to you is greatly regretted.

It appears that the problem mentioned above has arisen because within the State of Nebraska there are several military reservations over which the Federal Government has exclusive jurisdiction and upon which indiscriminate killing of game, particularly pheasants, is taking place in violation of the Nebraska hunting laws.

The Army commander within the region, by an order dated November 20, 1945, adopted the Nebraska hunting laws as Federal laws on the military reservations in Nebraska over which the United States has exclusive jurisdiction. Moreover, by virtue of the Assimilated Crimes Act (54 Stat. 234; 18 U. S. C. sec. 468) any wildlife conservation laws of the State of Nebraska (or of any other State) which were in effect on February 1, 1940, and which remain in force are applicable

*The documents referred to may be found in the files of the Fish and Wildlife Service.
[Editor.]

October 24, 1947

as Federal laws to military reservations and other areas within the State which are under the exclusive jurisdiction of the United States, without regard to administrative action of the sort involved in the military order of November 20, 1945. See *McCoy v. Pescor*, 145 F. (2d) 260 (C. C. A. 8th, 1944), *cert. denied* 324 U. S. 868, *rehearing denied* 325 U. S. 891 (1945); *Bowen v. Johnston*, 306 U. S. 19 (1939). The question of who shall enforce the hunting laws upon such military reservations must be resolved.

State game wardens have no jurisdiction to enforce State or Federal game laws on lands ceded to the exclusive use of the United States for military reservations or other purposes. Violations of law occurring on such lands are enforceable only by the proper authorities of the United States. *Bowen v. Johnston*, *supra*. See, also, opinion of the Judge Advocate General of the Army, Dig. Op. J.A.G., 1912-1940, page 7; par. 2a of Army Regulations 210-80, December 21, 1925.

United States game management agents and United States deputy game wardens are appointed by the Secretary of the Interior specifically to enforce the provisions of the Migratory Bird Treaty Act of July 3, 1918, as amended (16 U. S. C. sec. 703 *et seq.*); the Lacey Act, as amended (18 U. S. C. sec. 390 *et seq.*); the Migratory Bird Conservation Act, as amended (16 U. S. C. sec. 715 *et seq.*); the Migratory Bird Hunting Stamp Act, as amended (16 U. S. C. sec. 718 *et seq.*); the Bald Eagle Act (16 U. S. C. sec. 668 *et seq.*); and the Black Bass Act, as amended (16 U. S. C. sec. 851 *et seq.*). As the authority in the appointments is specific, it is my opinion that such personnel of this Department is only authorized to enforce the laws mentioned in this paragraph, and that they cannot properly take action, in the absence of additional authorizing legislation from the Congress, with respect to the enforcement on military reservations of State wildlife conservation laws adopted as Federal laws under the provisions of the Assimilated Crimes Act, or otherwise. *Of. 22 Op. Atty. Gen. 512.*

It is clear that any violations by military personnel of wildlife conservation laws or regulations on military reservations (aside from the application of the Assimilated Crimes Act and military orders similar to that of November 20, 1945, the Army prohibits hunting and fishing on military reservations without a permit of the commanding officer; par. 3b, Army Regulation 210-80) could be the basis of criminal prosecutions before courts martial under Article of War 96 (10 U. S. C. sec. 1568).

A violation of the Federal game laws (including State laws adopted as Federal game laws) committed by a civilian on a military reservation over which the United States has exclusive jurisdiction, and which falls within the category of a petty offense, as that term is defined in 18 U. S. C. sec. 541, may be prosecuted by qualified military personnel

before a United States commissioner designated to try such crimes (18 U. S. C. sec. 576, as amended). See Dig. Op. J.A.G., 1862-1912, page 267.

The Department of Justice, through its United States marshals and United States attorneys, can take action to apprehend and prosecute persons who commit any types of offenses (including violations of State wildlife conservation laws adopted as Federal laws) upon military reservations which are under the exclusive jurisdiction of the United States (28 U. S. C. secs. 504, 485).

If you believe that further legislation relating to the enforcement of wildlife conservation laws on military reservations and other areas over which the United States has exclusive jurisdiction is desirable, this office will be glad to collaborate with your agency in the drafting of a proposed bill on the subject.

MASTIN G. WHITE,
Solicitor.

K. S. ALBERT

A-24514

Decided October 28, 1947

**Mineral Leasing Act—Oil and Gas Leases—Known Geologic Structure—
Competitive Bidding.**

It is not the policy of the Department to redefine a geologic structure until all sands or formations therein having prospective value for oil and gas have been exhausted or proved barren.

Land within a known geologic structure is subject to lease only by competitive bidding, as provided in the Mineral Leasing Act of February 25, 1920, as amended (30 U. S. C. sec. 226).

APPEAL FROM THE GENERAL LAND OFFICE¹

This is an appeal by K. S. Albert from a decision by the General Land Office affirming the rejection by the register of an application for an oil and gas lease, Cheyenne 072054, embracing lot 2, sec. 1, T. 40 N., R. 79 W., 6th P. M., Wyoming, without competitive bidding.

The General Land Office held that the land applied for was within the limits of the known geologic structure of the Salt Creek Field, defined on April 2, 1920, and that being within such limits the land was subject to leasing only to the highest responsible, qualified bidder by competitive bidding.

The basis of Albert's appeal is that the decision is contrary to the public interest. He states that although oil and gas was at one time

¹ Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

October 28, 1947

produced from the field, there has been no production for over 20 years. He requests that the field be redefined and that his application for a noncompetitive lease be held in suspense pending such redefinition of the field.

The appeal is without merit. Production has been obtained in the Shannon Pool area of the field, the area in which the land applied for lies. Notwithstanding the fact that wells drilled in the area have been closed for many years, the Geological Survey reports that there is undoubtedly oil in the field and that it could be profitably operated under modern production methods at a time of favorable prices.

It is not the policy of the Department to redefine a geologic structure until all sands or formations therein having prospective value for oil and gas have been exhausted or proved barren. *John H. Moss v. A. D. Schendel*, A. 6287, March 24, 1924 (unreported); *John F. Richardson and Charles F. Consaub*, 56 I. D. 354, 358 (1938). The land is within a known geologic structure and is subject to lease only by competitive bidding, as provided in the Mineral Leasing Act of February 25, 1920, as amended (30 U. S. C. sec. 226). *John H. Moss v. A. D. Schendel*, *supra*; *John F. Richardson and Charles F. Consaub*, *supra*; *George C. Vournas*, 56 I. D. 390, 394 (1938); *W. E. Rennie*, A. 24086, July 3, 1945 (unreported).

The decision of the Commissioner is affirmed.

C. GIRARD DAVIDSON,
Assistant Secretary.

JANE M. SANDOZ ET AL.

A-24638

Decided October 28, 1947

A-24641

Taylor Grazing Act—Grazing Leases.

One who used the public domain for grazing purposes prior to the enactment of the Taylor Grazing Act acquired no grazing rights in the land by reason of such usage.

Where none of the conflicting applicants for grazing leases under the Taylor Grazing Act is entitled to a preference right to a lease because of his ownership or control of contiguous land, or where all of the conflicting applicants for grazing leases are entitled to preference rights because of such ownership or control of contiguous land, an award of grazing leases to the conflicting applicants will be made upon the basis of range-management factors.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On March 31, 1947, the Director of the Bureau of Land Management rendered decisions adverse in large part to the several grazing-lease applications, Sacramento 036475-K and 036468-K, of Jane M. Sandoz, of Mitchell Mill, California, and Eugene Fuchs of Rail Road Flat,

and favorable, first, to the joint application of Henry E. and Ernest W. Bosse, father and son, respectively, of Rail Road Flat, Sacramento 036164-K, filed November 1, 1944, with supplemental applications on November 18, 1944, and March 2, 1945, and, second, to the separate application, Sacramento 035844, filed by Henry E. Bosse alone on March 11, 1944.

On April 23, 1947, Mrs. Sandoz and Mr. Fuchs, who for many years have been associated in cattle raising and who cooperate in their range management, filed appeals A-24641 and A-24638 from the Director's decision. With their appeals, Mrs. Sandoz and Mr. Fuchs each made supplemental application for tracts which the adverse decision had offered to the Bosses. These additional applications will be considered in connection with these appeals. Moreover, the two appeals will be considered together herein, since the two applications, although in conflict as to a few tracts, really complement each other and are in competition not with each other but only with the Bosses and might well have been made by Mrs. Sandoz and Mr. Fuchs jointly.

THE SANDOZ CASE

The Director's decision offered Mrs. Sandoz a 1-year grazing lease of 482.48 acres out of the 842.48 acres described in her original application.¹ For convenience in discussion, these lands are described in three groups as follows:²

Group AS, 482.48 acres:

T. 6 N., R. 13 E., M. D. M., California,
sec. 13, NE $\frac{1}{4}$ SE $\frac{1}{4}$, S $\frac{1}{2}$ S $\frac{1}{2}$;

T. 6 N., R. 14 E.,

sec. 17, S $\frac{1}{2}$ SW $\frac{1}{4}$;

sec. 18, lot 4 (SW $\frac{1}{4}$ SW $\frac{1}{4}$, 42.48 acres), SE $\frac{1}{4}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$,
NE $\frac{1}{4}$ SE $\frac{1}{4}$.

Group BS, 160 acres:

T. 6 N., R. 14 E.,

sec. 20, N $\frac{1}{2}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$.

Group CS, 200 acres:

T. 6 N., R. 13 E.,

sec. 24, E $\frac{1}{2}$ NE $\frac{1}{4}$;

T. 6 N., R. 14 E.,

sec. 19, NE $\frac{1}{4}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ NE $\frac{1}{4}$.

The lands sought in her supplemental application were the five forties in N $\frac{1}{2}$ sec. 19, as follows:

Group DS, 200 acres:

sec. 19, NW $\frac{1}{4}$ NW $\frac{1}{4}$, S $\frac{1}{2}$ N $\frac{1}{2}$.

¹ By her supplemental application of April 23, 1947, Mrs. Sandoz asked for 200 acres additional which she said her lawyer had inadvertently omitted from her original application. This acreage was as follows: T. 6 N., R. 14 E., M. D. M., California, sec. 19, NW $\frac{1}{4}$ NW $\frac{1}{4}$, S $\frac{1}{2}$ N $\frac{1}{2}$.

² The groups of lands sought by Mrs. Sandoz are designated as AS, BS, etc.; those sought by Fuchs as AF, BF, etc.

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The group AS lands seemed not to be sought by others, and the decision of March 31, 1947, offered Mrs. Sandoz a 1-year lease of their 482.48 acres. Similarly, the group BS lands were not sought by others, but the decision rejected the Sandoz application for them and "in the interest of good range management" offered these four forties to Eugene Fuchs for 1 year, although his application, Sacramento 036468, had not asked for them. The group CS lands were in conflict with the Fuchs application, and also with Sacramento 036164 and its second supplemental of March 2, 1945, the Bosse and Bosse application. The Bureau of Land Management rejected the applications of both Sandoz and Fuchs for group CS and offered its five forties to the Bosses in a 5-year lease.

As to the group AS lands, it is to be noted that the Bureau's action overlooked a conflict between two of the sec. 18 forties therein with Sacramento 037560, a public-sale application by John W. Armstrong, of Los Angeles, owner of NW $\frac{1}{4}$ SE $\frac{1}{4}$ and lots 5 and 9 in sec. 18. The record shows that on December 9, 1946, Armstrong applied, under section 2455, Revised Statutes, as amended, for public sale of SE $\frac{1}{4}$ SW $\frac{1}{4}$ of sec. 18 as mountainous and too rough for cultivation, and on February 6, 1947, filed a supplemental application to include NE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 18, as well. However, pending adjudication of the Armstrong application, the Department sees no objection to a 1-year lease of these two tracts and extension of the lease in appropriate circumstances.

In her appeal Mrs. Sandoz states that for about 36 years she and her father before her have ranged and grazed cattle on all the lands sought, in common with cattle belonging to Eugene Fuchs and with cattle of the Taylor Estate; that she owns about 100 head of stock, and that in order to make a living she needs all the desired lands as supplemental to her own nearby land, comprising 640 acres, more or less. She asserts that to offer certain of these lands to Henry E. Bosse and Ernest W. Bosse is to show favoritism, stating that the Bosses have never ranged cattle on these lands and that they own and control thousands of acres of grazing land elsewhere. She especially resents the award to the Bosses of certain grassy hillsides south of the divide while to her are offered only the poor slopes on the north.

Appellant Sandoz does not object to the award of group BS to Eugene Fuchs, for she cooperates with him in range management and grazes her cattle with his. But for the reasons above stated, Mrs. Sandoz protests the award of group CS to the Bosses, being of opinion that her long-continued use of this range gives to her rights superior to any possessed by the Bosses.

In this opinion Mrs. Sandoz is mistaken. There are no superior, or preference, rights to a particular range based upon one's long prior

use thereof. Until approval of the Taylor Grazing Act, it was the Government's policy that public lands, when not under actual settlement, should be freely used by all persons desiring to graze stock thereon. But this use of unenclosed and unoccupied Government lands for pasturing livestock was permissive only; it created no title and no rights and could be terminated at any time by withdrawal of the Government's consent thereto. *State v. Bradshaw*, 161 Pac. 710 (1916); *McIlquham v. Anthony Wilkinson Live Stock Co.*, 104 Pac. 20 (1909); *Willis J. Lloyd and Oscar Jones*, 58 I. D. 779, 786 (1944). A general withdrawal of such governmental consent was effected by passage of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269; 43 U. S. C. sec. 315 *et seq.*). Since the enactment thereof, the grazing use of public lands is no longer unrestricted but is controlled by this statute, and the rights of applicants for grazing leases of lands outside of grazing districts are prescribed in section 15 thereof (43 U. S. C. sec. 315m).

Section 15 provides as follows:

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.

Here the proviso prescribes the basis of preference rights. Discussing this proviso in a recent decision,³ the Department said:

* * * It means, of course, that the degree of preference to be given to competing lawful occupants of contiguous lands must be commensurate with the degree of need which the contiguous base lands of the respective occupants have for the lease lands if the base lands are to be put to proper use for the grazing of livestock by such occupants. Not only must the base lands be contiguous to the lease lands, but the lease lands must be necessary to the base lands, complementing them and supplying their deficiencies in order to insure their proper use for the occupant's own grazing operations.

This provision means also that, in addition to these conditions of contiguity and necessity, a particular legal status is required of base lands as a third condition essential to the existence of the preference right in question. * * * The contiguous base lands * * * Either * * * are patented lands, owned by the grazing-lease applicants or leased by them from municipal or private owners, or, if the legal title to them continue to be in the United States,

³ *Claude G. Burson and Ellsworth E. Brown*, 59 I. D. 539 (1947).

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they are lands which, like those in homestead entries and certain other forms of possession * * * have been occupied, appropriated or reserved in accordance with law and therefore are nonpublic lands, not subject to disposal under the Taylor Grazing Act. * * *

* * * Of these three qualifications no single one is by itself sufficient to create a preference claim. The preference right springs only from the co-existence of all three conditions, and, if one of these be lacking, there is no preference right.

Under section 15, Mrs. Sandoz has no preference right to any of the lands above described. She owns about 640 acres in sections 21, 22, 27, and 28, of T. 6 N., R. 14 E., from 1 to 3 miles distant. But since no part of her acreage is contiguous to any of the tracts which she seeks to lease, Mrs. Sandoz does not meet the statute's preference-right requirement of contiguity as to base lands. This, however, does not mean that Mrs. Sandoz is ineligible for any lease under section 15. On the contrary, under the first part of section 15, she is privileged to obtain a lease of tracts for which there is no competition, if the Secretary in his discretion finds it suitable to lease them to her, and it is by virtue of the favorable exercise of this Secretarial discretion that Mrs. Sandoz has received the offer of the group AS lease above mentioned. Moreover, where there is competition but no preference right in any competing applicant, Mrs. Sandoz is on the same legal footing as such competitor, and it is for the Secretary to decide on the basis of range-management factors to which of the competitors the lands in conflict should be offered.

The record shows that the offer of the group CS lands to Henry E. and Ernest W. Bosse, father and son, was based on the assumption that the two Bosses were qualified for this lease by the "ownership and control" of certain lands by Henry E., the father, but that Mrs. Sandoz and Mr. Fuchs were not so qualified by either ownership or control. This assumption, however, the Department finds to have been erroneous. Scrutiny of the several records involved ⁴ shows that the *ownership* regarded as qualifying the Bosses for this lease was that of SE $\frac{1}{4}$ sec. 19, T. 6 N., R. 14 E. But this quarter, although nearer to the group CS lands than was any land owned by Mrs. Sandoz or Mr. Fuchs, is, nevertheless, not contiguous to any of the group CS tracts and hence does not give the Bosses any legal advantage over their competitors.

The "control" regarded as further qualifying the Bosses for this lease is not actual but is only a prospective control of S $\frac{1}{2}$ N $\frac{1}{2}$ sec. 19, R. 14 E., to be acquired by Henry Bosse through his expected grazing lease under 035844. The tier of four forties in the S $\frac{1}{2}$ N $\frac{1}{2}$ adjoins

⁴ 036475 by Sandoz; 036468 by Fuchs; 036164 by Bosse, H. E. and E. W.; and 035844 by Henry Bosse.

the first parcel of group CS on the east, and it adjoins the second parcel of group CS on the south. These forties therefore have contiguity to the lease lands sought, but they are United States public lands and even if they should be leased to Henry Bosse under his individual application for them, 035844, they would not give the Bosses any legal advantage over competitors for adjoining lands. For, as has been pointed out above, the statute requires that contiguous base be of non-public-land status, and the Department has consistently held that contiguous lands in one section 15 grazing lease are not valid contiguous base for a preference right to another such lease.⁵

It is apparent, therefore, that as regards the group CS lands the Bosses are on no better legal footing than Mrs. Sandoz and Mr. Fuchs. No one of the three competitors has a preference right to these lands, and the question as to which of the three should obtain a lease of them in whole or in part must be decided by the Secretary in accordance with the principles of good range management.

This phase of the matter the field reports do not consider as such. They show that the lands involved in the several applications here related are mountainous, with a general formation of slate and schist and a mantle of soil supporting a growth of timber, live oak, and brush. On the watershed of the south fork of the Mokelumne River, the tracts generally have fairly steep slopes and are well watered by the river and its tributaries. Springs and seeps are scattered throughout the area in the gulches. The forage consists of foxtail, June grass, mountain misery, and the annuals. The range is good in the spring, summer, and fall. All-year use is possible except in very severe winters. The carrying capacity is about 24 animal-units per section per year, and there is no overgrazing problem.

The field reports show that the Bosses contemplated a drift fence between their holdings and those of Mrs. Sandoz and Mr. Fuchs in secs. 20 and 19, R. 14 E. This fence, the field reports say, should be along subdivision lines in sec. 20 but in sec. 19 should follow the divide. The field reports show the approximate location of the divide in sec. 19, R. 14 E., and indicate that it passes through the $N\frac{1}{2}N\frac{1}{2}$ much closer to the northern boundary of that subdivision than to its southern line. The official plat, however, shows the divide as crossing sec. 19 more nearly along the southern line of $N\frac{1}{2}N\frac{1}{2}$. In that case, the $N\frac{1}{2}N\frac{1}{2}$ sec. 19 would be an integral part of a range unit on the north slope of the divide and should be awarded to Mrs. Sandoz in combination with the group AS lands in sec. 18 already offered to her. In such case also, it would seem advisable for consolidation purposes to award to Mrs. Sandoz both the $NE\frac{1}{4}NE\frac{1}{4}$ if not the whole $E\frac{1}{2}NE\frac{1}{4}$ of sec. 24 in the group CS lands and the

⁵ *Claude G. Burson and Ellsworth E. Brown*, 59 I. D. 539 (1947), and cases cited.

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NW $\frac{1}{4}$ NW $\frac{1}{4}$ of sec. 19, eliminating these tracts from the lease offered to the Bosses under 036164. It is, therefore, suggested that further field examination be had to determine the questions here raised as to the award of the group CS lands.

Further in connection with sec. 19, it will have been noted from footnote 1, *supra*, that in her supplemental application Mrs. Sandoz sought the S $\frac{1}{2}$ NW $\frac{1}{4}$ and the S $\frac{1}{2}$ NE $\frac{1}{4}$ sec. 19, both offered to Henry E. Bosse. As to the first parcel, Mrs. Sandoz is on all fours with Bosse, and the principles of good range management should govern on the basis of facts found in the new field report. As to the second parcel, S $\frac{1}{2}$ NE $\frac{1}{4}$, Bosse's ownership of contiguous land, SE $\frac{1}{4}$ sec. 19, gives him a technical preference right, but only to the degree *necessary* to permit proper use of the contiguous tract. Again, although his technical preference right gives Bosse an initial advantage, the new field report may show that the lease of S $\frac{1}{2}$ NE $\frac{1}{4}$ is not essential to the proper use of SE $\frac{1}{4}$ and that good range management will be better served by the award to Mrs. Sandoz of the east-west string of five forties, SE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 24, R. 13 E., and the S $\frac{1}{2}$ N $\frac{1}{2}$ sec. 19.

Except as regards the forties in conflict with the Armstrong public-sale application described above, any lease offered to Mrs. Sandoz should be for a 10-year term, no reason appearing for a limitation to 1 year.

The decision of the Director to offer the group AS lands to Mrs. Sandoz and the group BS lands to Eugene Fuchs is affirmed, and the case is remanded for further action in accordance with the instructions above given.

THE FUCHS CASE

In the case of Eugene Fuchs, the Director of the Bureau of Land Management offered Fuchs a 1-year grazing lease of only 320 acres of the 600 acres for which he had applied on January 27, 1945, in Sacramento 036468. On grounds similar to those urged by Mrs. Sandoz, Fuchs protests the offers to the Bosses. He says that he owns only 320 acres of patented land and needs additional range for his cattle in order to make a living; that for 40 years he has grazed his cattle on the tracts here sought, most of that time in cooperation with Mrs. Sandoz; that he has fought fire on this land and that he has cooperated with the Government in every way to make good range possible in this part of the country. Fuchs says further that Bosse owns considerable grazing land elsewhere and also has leases; that never before has Bosse ranged cattle in this particular area; that already, before even obtaining these particular leases, Bosse has begun to fence the lands in; and that the offers to Bosse announced by the decision of which Fuchs complains will seriously militate

against the chances of Fuchs to make a living on his base lands. Fuchs also points out that the leases offered to the Bosses were for 5 and 10 years, whereas the lease offered to Fuchs was for 1 year only. Fuchs urges revision of the Bosse awards.

With his appeal, Mr. Fuchs filed on April 23, 1947, a supplemental application under Sacramento 036468 for two additional forties. This supplemental application will be considered here in connection with this appeal, since the two tracts sought were embraced in the 10-year lease offered to Henry E. Bosse under Sacramento 035844 and announced in the decision from which Mr. Fuchs is appealing.

The lands sought by Mr. Fuchs in his original and supplemental applications all lie in T. 6 N., R. 14 E., M. D. M., California, and total about 680 acres. For convenience in discussion, they are described in four groups, as follows:

Group AF, 40 acres:

sec. 29, SW $\frac{1}{4}$ NW $\frac{1}{4}$.

Group BF, 200 acres:

sec. 19, S $\frac{1}{2}$ NE $\frac{1}{4}$ (sought by supplemental application of April 23, 1947);

sec. 29, NE $\frac{1}{4}$ SW $\frac{1}{4}$ (lot 2);

sec. 30, N $\frac{1}{2}$ NE $\frac{1}{4}$.

Group CF, 280 acres:

sec. 19, (a) NW $\frac{1}{4}$ NW $\frac{1}{4}$ (lot 1); (b) NE $\frac{1}{4}$ NW $\frac{1}{4}$; (c) NW $\frac{1}{4}$ NE $\frac{1}{4}$;

(d) NE $\frac{1}{4}$ NE $\frac{1}{4}$;

sec. 20, (a) SW $\frac{1}{4}$ SW $\frac{1}{4}$; (b) NW $\frac{1}{4}$ SW $\frac{1}{4}$; (c) SW $\frac{1}{4}$ NW $\frac{1}{4}$.

Group DF, 160 acres:

sec. 20, SE $\frac{1}{4}$.

Of the 17 subdivisions here sought by Fuchs, the group AF forty, SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 29, was patented land and, therefore, unavailable. The 16 tracts in groups BF, CF, and DF were all in conflict with applications by the Bosses, and three of them were also in conflict with the Sandoz application. On these conflicts the action of the Bureau of Land Management was as follows:

Group BF.—The five tracts here, comprising roughly 200 acres, conflicted with Sacramento 035844, the application of Henry E. Bosse, and by decision of March 31, 1947, were all offered to Bosse in a 10-year lease. That offer included other lands as well and covered altogether 455.22 acres.

Group CF.—The seven tracts here comprising roughly 280 acres all conflicted with Sacramento 036164, the application of Bosse and Bosse, and on the ground that they were necessary to the proper use of the Bosses' base lands were offered to them in a 5-year lease on March 31, 1947. The offer included other lands as well and covered altogether 639.73 acres. Among the seven tracts were the three which had been sought also by Jane Sandoz, namely (b), (c), and (d), sec. 19, group CF.

Group DF.—The four tracts in this quarter section of sec. 20 conflicted with Sacramento 036164, the joint Bosse application, but were offered to Fuchs in a 1-year lease on the ground that the Bosses did not own or control land contiguous thereto, whereas Fuchs did.

⁶ According to the tract books this quarter is not part of the Stanislaus Forest but merely adjoins it.

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Thus of the 16 available tracts sought by Fuchs, 12 were offered to the Bosses and only 4 to Fuchs, namely, SE $\frac{1}{4}$ sec. 20. However, the decision offered to Fuchs four additional tracts which he had not requested, namely, sec. 20, N $\frac{1}{2}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, and NE $\frac{1}{4}$ SW $\frac{1}{4}$. These had been sought by Jane Sandoz (see her group BS), but the award to Fuchs was agreeable to her in view of their close association. Hence, the land offered to Fuchs totaled eight tracts and was all in sec. 20.

Mr. Fuchs has not objected to this addition, but for the reasons stated above protests the offers to the Bosses. The Fuchs ranch lands comprise nine forties, as follows:

sec. 20, SE $\frac{1}{4}$ SW $\frac{1}{4}$;

sec. 28, N $\frac{1}{2}$ NW $\frac{1}{4}$;

sec. 29, N $\frac{1}{2}$ N $\frac{1}{2}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$.

These owned lands give Fuchs contiguity to all the tracts sought by him except the six in sec. 19, groups BF, CF, and CS. As to S $\frac{1}{2}$ NE $\frac{1}{4}$ and N $\frac{1}{2}$ N $\frac{1}{2}$ of sec. 19 in BF and CF, the offer to the Bosses under Sacramento 036164 has been discussed above in connection with the Sandoz application. Pending the further field examination which has been requested, no award of this portion of sec. 19 will be made.

As to the other group BF tracts, those in secs. 29 and 30, the Department approves the offer of these to the Bosses instead of to Fuchs. Both applicants own contiguous lands, but their preference rights cancel each other. Hence, the award of the tracts must depend on the pertinent factors of range management, and these favor the Bosses. In sec. 29 Fuchs owns six forties, all in a compact block in the N $\frac{1}{2}$. Bosse also owns six tracts but in separated tiers, three forties along the east boundary of sec. 29, and three along the west. It is desirable for Bosse to join these holdings in the S $\frac{1}{2}$, and to do so Bosse seeks to lease the tracts in the intervening tiers, namely, lots 2, 4, 5, and 6, in E $\frac{1}{2}$ SW $\frac{1}{4}$ and W $\frac{1}{2}$ SE $\frac{1}{4}$. Such a lease would be the logical step in range development in this area, for it would not only give Bosse control of the whole S $\frac{1}{2}$ of sec. 29 but would also consolidate for him an uninterrupted compact range of about 1,080 acres, embracing not only his sec. 29 lands but his block of 11 forties directly to the south in sec. 32 and his block of four forties directly to the west in sec. 30.⁷ It is evident that to lease to Fuchs the single forty here for which he has applied, namely, lot 2, or NE $\frac{1}{4}$ SW $\frac{1}{4}$, would only slightly advantage Fuchs but, on the other hand, would interfere with the Bosse consolidation described. Further, if fencing

⁷ These tracts are as follows:

sec. 32, N $\frac{1}{2}$ N $\frac{1}{2}$, S $\frac{1}{2}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ SW $\frac{1}{4}$, W $\frac{1}{2}$ SE $\frac{1}{4}$;

sec. 30, S $\frac{1}{2}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ SE $\frac{1}{4}$.

be contemplated, it would increase expenses by requiring fences on three sides of the intruding forty instead of on the north only.

An additional consideration concerns the $N\frac{1}{2}NE\frac{1}{4}$ of sec. 30. Bosse owns the contiguous land on both the south and the north—the four forties in sec. 30 and the $SE\frac{1}{4}$ of sec. 19. By leasing the $N\frac{1}{2}NE\frac{1}{4}$ of sec. 30, Bosse can close the gap between these two parcels of deeded land and increase his compact range from 1,080 acres to 1,240 acres. It is obvious that a lease of the two intervening forties to Fuchs would prevent this consolidation, and by placing in Fuchs the control of this 80-acre wedge between the Bosse holdings would create possibilities of friction without meeting any necessity on the part of Fuchs.

As regards the sec. 20 tracts in group CF, the Department disapproves their award to the Bosses. Here, too, the preference rights of Fuchs and the Bosses cancel each other and the question is one of range management. The tracts in question are three forties in the tier along the west boundary of sec. 20, namely, $SW\frac{1}{4}NW\frac{1}{4}$ and $W\frac{1}{2}SW\frac{1}{4}$. Both parties have adjoining lands, in part deeded lands, in part prospective section 15 leases. But if it be logical and desirable that the Bosses be permitted to extend their range on the south and west in secs. 29, 32, and 30, so here it is logical and desirable that Fuchs be permitted to expand his sec. 29 range toward the north in sec. 20 and insofar as possible to consolidate it with the holding of his associate, Mrs. Sandoz. The lease of 320 acres already offered Fuchs in sec. 20 effects a union with the Sandoz lease lands in secs. 17, 18, etc. The additional lease of the three tracts just described would give Fuchs control of all the public land remaining in sec. 20, and with his contiguous deeded land would give him a compact range of 840 acres on a terrain favorable to the development of the enlarged unit. Added to the Sandoz lease already offered, this would give the two associates a considerable portion of the range long used by them. The Department finds it desirable, therefore, that the three forties in question, namely, $SW\frac{1}{4}NW\frac{1}{4}$ and $W\frac{1}{2}SW\frac{1}{4}$ sec. 20 be eliminated from the lease offered to the Bosses under Sacramento 036164 and be offered to the Fuchs instead. Moreover, any lease offered to Fuchs should be for a term of 10 years, no reason appearing for the Director's limitation of the terms to 1 year.

Pending further field examination and report, the Director will make no offer of lands in sec. 19, T. 6 N., R. 14 E., M. D. M., California. As to other tracts in conflict, his decisions of March 31, 1947, in the four cases here involved are modified as above indicated, and the cases are remanded for action in accordance with the views above expressed.

C. GIRARD DAVIDSON,

Assistant Secretary.

OSCAR E. EVERETT ET AL.¹A-24716 to *Decided November 12, 1947*

A-24799, incl.

Private Exchange—Small-Tract Applications—Home Sites.

Protests of small-tract applicants against a pending private exchange, which would result in patenting the lands sought by such applicants, are dismissed where it appears that such lands are distant from any established community of substantial size, far from existing utility lines, lacking in water of known potable qualities, and situated at a substantial distance from schools, theaters, churches, banks, and opportunities for employment.

MOTION FOR REHEARING

Each of the persons named in the caption hereto¹ has filed a motion for rehearing of a decision of the Bureau of Land Management, approved by the Department on July 29, 1947, which rejected his application filed under the Small-Tract Act of June 1, 1938 (52 Stat. 609, as amended; 43 U. S. C. sec. 682a), for certain lands near the towns of Bouse and Vicksburg, in the State of Arizona, which had theretofore been selected by Chester W. Johns in proposed exchanges² under section 8 of the Taylor Grazing Act (48 Stat. 1269; 49 Stat. 1976; 43 U. S. C. sec. 315g).

The motions are mimeographed and, with minor exceptions, identical. Manford Ira Bale supplemented his motion with a letter which contends that the lands sought can be made into a fertile region. James Charles Ladas neglected to sign his motion; with the copy of the motion which he submitted he included a mimeographed letter which is set forth below.³ Whereas each of the motions refers to

¹ Eighty-four applicants filed motions for rehearing in this case. The names of the applicants have been omitted for purposes of brevity; they may be found by reference to the file of Phoenix 081820. [Editor.]

² Phoenix 081522, 081523, 082232, 081820.

³ PHOENIX, ARIZONA,
September 3, 1947.

DEAR FRIEND:

This form of protest to the recent letter to you from the U. S. Department of the Interior with reference to five acre tracts out on the Parker Highway area at Utting (near Bouse), or any other form you may desire in filing your particular motion for rehearing may be used.

There is a space at the bottom of the Motion for Rehearing for your signature and a stamped envelope enclosed for mailing same to the Land Office, should you so desire.

It is urgent that you do not delay. Mail the forms in immediately.

The following is a copy of a letter of testimony with reference to these lands, written by a former homesteader in the area, who lived there for many years:

"LONG BEACH, CAL.,
Aug. 26, 1947.

DEAR MR. RICHARDSON:

Many years ago, I took up a homestead land near Vicksburg, Ariz. to regain my health, not knowing then that I had acquired as rich a land as there was in the State of Arizona until the Government inspector informed me of its value. I asked him if it was as rich [as] the Imperial Valley. His answer was that the Imperial Valley land was not in it to my land. Then I asked if it was as rich as the Salt River Valley and he said equally as rich. Water is obtainable at 2.10 ft., for my son dug a well at

"giving away the said lands for the pecuniary profit of a few big Land Moguls," the motion of Charles B. Black contains the additional word "shot" between the words "big" and "Land"; likewise one word added to each of the other motions is not included in Black's copy.

The Bureau's decision stated that the lands involved are not irrigable from any known source of water supply and therefore are unadapted for agricultural purposes; that their present value is for grazing; and that consummation of the exchanges proposed by Johns will improve land patterns and the administration of grazing districts. It was also pointed out that the Small-Tract Act does not contemplate agricultural entries, which may be made under other land laws.

Each of the movants contends that if the Government consummates the Johns exchanges, it will be receiving land worth only 50 cents an acre in exchange for lands which can be disposed of under the Small-Tract Act to these applicants at \$5 per acre. They further assert that they seek these lands for home sites and other classifications enumerated in the Small-Tract Act; that there is an underground water supply; and that the interest of the United States will be better served by the granting of their applications rather than the exchange applications of Johns.

The lands involved have been the subject of extensive field investigations by the Department. Based upon these examinations the Department has concluded that the lands offered by Johns are equal in value to those selected by him. No factual matter is offered by the 5-acre-tract applicants to controvert this conclusion save the unsupported assertion that the selected lands are worth only 50 cents an acre, whereas they are agreeable to paying \$5 per acre for these lands. In the first place, the Department is placed under an obligation, by section 7 of the Taylor Grazing Act (48 Stat. 1269; 49 Stat. 1976; 43 U. S. C. sec. 315f), to refrain from the disposition of public lands where it appears that they will be devoted to purposes for

that depth, and got good domestic water, and when the Government Inspector came to see what improvements had been made and when my son said he had dug a well and obtained water this was the inspector's answer, "If I had this land with water on it, I would consider myself rich." I know the Valley has a future with power coming in and good prospects of water. What a blessing it will be to so many of our Service men who should like to have land and they above all others should have it. I learned more from time to time of the wonderful future of my Valley. One homesteader who had water, grew a forty pound watermelon. Anything would grow on his land. As for health, it is ahead of any place in Arizona, for I have seen patients who came to the Valley cured in a short time. What a wonderful location for a Sanitarium. Ex-Senator F. Colter had that in mind when he came on a visit.

Yours truly,

(Signed) O. M. KENNEDY.

Remaining, as ever,

Very truly yours,

(Signed) Charles B. Black,
CHARLES B. BLACK,
Box 3818, Phoenix, Arizona.

November 12, 1947

which they are not suited. Assuming that these applicants desire these lands for home sites, business sites, and similar purposes, it is noted that they are distant from any established community of substantial size, far from existing utility lines, and, as will be discussed later, lacking in water of known potable qualities. There are no public utilities on the lands or near them. Electricity, telephone, and natural or artificial gas are not available from any public or private source. The settlements of Vicksburg and Bouse in the vicinity are without such facilities, except for one telephone at Bouse connecting with the outside. There are small-grade schools at Bouse and Vicksburg, but no high school, no theater, and no church. The nearest bank is 35 miles away in Parker, which also has a railroad station and a telegraph and telephone office. Bouse has a small hotel, a small cafe, a garage and gasoline filling station, a grocery store, a post office, a few residences, and a population estimated at not in excess of 125 persons. Vicksburg contains a small store, bar, post office, and four or five houses. Neither Bouse nor Vicksburg could offer employment to persons proposing to settle upon these lands. The town of Parker was created by the construction of Parker Dam but has now diminished in size and commercial importance, and it is doubtful whether it could supply employment for these applicants who propose to establish home sites; Parker's population is about 500.

In the second place, the lands offered by Johns are of no poorer quality than the lands these applicants seek. Assuming that reasonable persons would be willing to pay \$5 per acre for the lands Johns has selected, there is no reason to believe that the lands offered by Johns would not bring the same return to the Government. In the third place, it is apparent from the form letter which solicited these motions that agricultural use of these lands is contemplated despite the fact that the applications fail to mention such use. Furthermore, it is noted that no applicant has denied that he proposes to use the lands for agricultural purposes, and all of them, save one, are content with the statement that thus far they have merely refrained from declaring in their formal applications that such is their purpose; the one exception is Ralph E. Frantz, who states in his application that he proposes to use the land for, among other purposes, a vegetable farm.

All of the applicants assert that they can obtain underground water, presumably in sufficient quantity and quality to maintain home sites and similar facilities. None of the applicants contends that the land will be irrigated and, as set forth in the Department's decision on *Charles B. Black's* motion for rehearing on his protest against the Johns exchanges (A. 24609, June 16, 1947), the Bureau of Reclamation does not contemplate supplying irrigation water for this land. Underground water, if it exists, is deep, expensive to obtain,

and of questionable quantity and quality. Certainly, it is inadequate for such agricultural purposes as these applicants may contemplate in conjunction with their home sites. This inadequacy is emphasized by the factors of seepage and evaporation which are unusually heavy due to the porous soil and the extreme heat. Whether it could be used for human consumption is open to question, in view of the fact that a well in Bouse supplies for railroad-locomotive purposes water which is extremely harmful to both animal and vegetable life.

Upon a complete review of all the circumstances and facts relating to this matter, the Department adheres to its conclusion that the public interest is better served by the consummation of the Johns exchanges than by the granting of the 5-acre-tract applications.

The motions for rehearing are denied.

C. GIRARD DAVIDSON,
Acting Secretary.

WEST COAST EXPLORATION CO.

A-24679

Decided November 18, 1947

Scrip—Mineral Lands.

Gerard scrip may not be located on mineral lands in California.

Scrip—Mineral Leasing Act.

Gerard scrip may not be located on lands bearing minerals, which are subject to leasing under the Mineral Leasing Act.

General Withdrawal Order—Mineral Leasing Act—Scrip Location—Taylor Grazing Act Classification.

Land under an outstanding mineral lease as of the time of the issuance of the General Withdrawal Order of November 26, 1934, is covered by that order, subject to the prior rights of such lessee, and, therefore, may not be disposed of on a subsequent scrip location until classified for such disposition.

MOTION FOR REHEARING

A sodium deposit of high-established value is situated on the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 24, T. 11 N., R. 8 W., S. B. M., California. To acquire this 10 acres, West Coast Exploration Co. filed Gerard scrip issued under the act of February 10, 1855 (10 Stat. 849).¹

¹ The statute provided as follows:

“* * * Reese A. P. Gerard, William Gerard, and Rachel Blue, (formerly Rachel Gerard), the only children and heirs of Joseph Gerard, a messenger of the United States to the Indians, who was killed in seventeen hundred and ninety-two, he, and they or their heirs are hereby permitted to enter, each one of them severally, or his or their heirs, one section of the public lands, without the payment of any consideration for said three sections, being in full payment for the patriotic services of said Joseph Gerard, and in accordance with the spirit of the inducements authorized by President Washington to be held out to such persons as would consent to carry a message from Fort Washington, now Cincinnati, in seventeen hundred and ninety-two, to the hostile Indians of the then Northwest Territory.”

November 18, 1947

In a decision approved by Assistant Secretary Gardner on June 2, 1947, the Bureau of Land Management rejected the application, and the Company has filed a motion for rehearing. The Bureau's decision was based upon the ground that Gerard scrip is not applicable to this tract because it is mineral land, and that disposition of the 10 acres to the applicant with a reservation of the mineral rights to the United States would be inconsistent with the provisions of the act of March 4, 1933 (47 Stat. 1570; 30 U. S. C. sec. 124). In view of this, the decision did not consider whether the land might otherwise be properly classified for disposition on scrip application.

West Coast contends that its Gerard scrip may be located on mineral lands and, consequently, that the act of March 4, 1933, is inapplicable to this situation.

Under the act of February 10, 1855, *supra*, Gerard scrip may be located on "the public lands." But as used in that act, the term "public lands" does not include mineral lands in California.² The Supreme Court has held that an act granting sections 16 and 36 of the public lands to the State of California without specific exclusion therefrom of mineral lands, passed only 2 years prior to the Gerard scrip act, was nevertheless intended to exclude from its operation mineral lands. *Ivanhoe Mining Co. v. Keystone Consolidated Mining Co.*, 102 U. S. 167 (1880). The Court discussed extensively the act there under consideration, as well as other statutes enacted during the same period, reviewed the history of the settlement of California, the discovery of mineral wealth in that area, and the statutes and practices relating to the survey of these lands. It was concluded that—

* * * Congress, after keeping this matter in abeyance about sixteen years, enacted in 1866 [14 Stat. 251] a complete system for the sale and other regulation of its mineral lands, so totally different from that which governs other public lands as to show that it could never have been intended to submit them to the ordinary laws for disposing of the territory of the United States. [102 U. S. 167, 174.]

The Court's reasoning and conclusions with respect to the statute there under consideration are equally applicable with respect to the question of whether Gerard scrip may be located upon mineral lands in California. And the administrative practice has conformed to this conclusion, as illustrated by the various precedents cited in the decision approved on June 2, 1947.

In its motion West Coast does not controvert the finding that the land it seeks is mineral. It does contend, however, that the act of March 4, 1933, is inapplicable because Gerard scrip may be located upon mineral land. It continues by assuming, *arguendo*, that even

² The extent, if any, to which Gerard scrip may be applicable to mineral lands outside the State of California is not here a matter of concern.

if the act does apply, the location of this scrip upon this particular tract would not interfere with operations under the Federal leasing laws. The act of March 4, 1933, permits selection of mineral lands with a reservation to the United States of the minerals which are subject, as are those on this tract, to the Mineral Leasing Act, provided that no land shall be subject to such selection "unless it shall be determined by the Secretary of the Interior that such disposal will not unreasonably interfere with operations" under the Mineral Leasing Act.

In *Caswell S. Neal*, A-24147, April 9, 1946 (unreported), scrip was filed on land already under mineral lease to a corporation which sought surface ownership, it appeared, to enable it to protect its mining operations and the necessary structures it had erected in connection with the mining activities. The Department there said:

While it may be advantageous to the corporation to secure a fee title to these lands, this advantage cannot hold sway over the interest of the public in assuring that future mining operations on this tract will not be impeded by adverse holders of the surface title. It is true that the buildings and structures of the corporation used in its mining operations at present occupy a substantial part of the lands sought * * *, but it must be remembered that the corporation pursues its business upon these lands only by reason of a lease. The granting of the application * * * would enable the passing to the corporation of a permanent interest in the lands which, so long as the corporation might hold the lease, would not be adverse to such rights as it may possess to the minerals on the land or interfere with its operations thereon. Should a situation arise, however, whereby the lease of the minerals on these lands were granted to others than this particular corporation or its successors in interest, the adverse situation referred to by the Geological Survey would be readily apparent. In the interest of protecting future mining operations on this land from interference by possible adverse holders of the surface title, the applications * * * should be denied.

The same reasons are applicable to the present situation, especially since West Coast at the present time has no rights whatever in the minerals here involved, and the probability of its being the successful bidder at a future offering of a lease of the land is purely speculative. *Utah Magnesium Corporation*, 59 I. D. 289 (1946).

West Coast also contends that the land is not subject to classification under section 7 of the Taylor Grazing Act (48 Stat. 1272; 49 Stat. 1976; 43 U. S. C. sec. 315f), because this 10 acres was under a mineral lease at the time of the issuance of General Withdrawal Order No. 6910 of November 26, 1934, and the withdrawal order by its own terms was "subject to existing valid rights."

Among other matters, section 7 provides that the lands withdrawn by Executive Order 6910 of November 26, 1934, may be classified by the Secretary as suitable for disposition under outstanding scrip rights and be opened, pursuant to such classification, to acquisition under the appropriate land laws. Because the withdrawal order was "subject to existing valid rights" and because at the time of the issu-

November 26, 1947

ance of the withdrawal order this 10 acres was under a mineral lease which has since been terminated, West Coast contends that the land was never withdrawn by Order 6910 and consequently is not subject to classification under section 7. In the first place, the mineral lease then outstanding was not held by West Coast so that the rights, if any, to be protected were not those of West Coast. In the second place, the Department has consistently held that the order does "cover all lands which might become vacant, unreserved, and unappropriated during the life of the order." Op. Sol., 55 I. D. 205, 207, 208 (1935). Consequently, upon the termination of the outstanding mineral lease, the order attached fully to this 10 acres and brought them into the orbit of section 7.

Since the land is rich in minerals subject to leasing under the Mineral Leasing Act, *supra*, and since the Mineral Leasing Act provides an orderly scheme for the extraction of minerals under procedures which safeguard the public interest in the fruitful exploitation of this natural wealth, it is not appropriate to classify this tract for disposal under any land law which would enable one not the mineral lessee to interfere with or impede the extraction of the minerals.

West Coast also states that it was entitled to a hearing before the Bureau of Land Management. But no statute or regulation requires that it have an oral hearing in connection with its application. Moreover, there is no substantial material issue of fact, for the assumption of the decision is that the surface owner would have the power to interfere with and impede the extraction of minerals and any lease issued hereafter. And this fact cannot reasonably be controverted. Moreover, on this motion, West Coast has fully exercised its privilege to present in writing all facts and arguments favorable to its position.

The motion for rehearing is denied.

OSCAR L. CHAPMAN,
Acting Secretary.

RECESS APPOINTMENT—NEXT SESSION OF THE SENATE

Appointment of Dr. James Boyd as Director of the Bureau of Mines.

A "Recess of the Senate," during which the President is authorized by the Constitution to make appointments to positions requiring Senate confirmation, means any substantial period of time when no meetings are held by the Senate and that body is not available to receive communications from the President and to give its advice and consent with respect to nominations. The Constitutional phrase "Vacancies that may happen during the Recess of the Senate" means "vacancies that may happen *to exist* during the recess of the Senate" and not "vacancies that may happen *to occur* during the recess of the Senate."

The "next Session" of the Senate after a recess appointment has been made by the President is the next occasion when the Senate reassembles for the transaction of business.

M-35011

NOVEMBER 26, 1947.

TO THE SECRETARY.

This responds to your oral request of this morning for an opinion upon the question of when the present appointment of Dr. James Boyd as Director of the Bureau of Mines is scheduled to expire, and upon the related question of when a new nomination for the filling of this position must be submitted by the President to the Senate.

The circumstances surrounding the appointment of Dr. Boyd as Director of the Bureau of Mines, a position which is filled through the process of a nomination by the President and confirmation by the Senate (30 U. S. C. sec. 1), may be summarized as follows: The First Session of the Eightieth Congress convened on January 3, 1947, and regular meetings of the Senate were held thereafter until July 27, 1947. On March 7, 1947, the President submitted to the Senate the nomination of Dr. Boyd to succeed Dr. R. R. Sayers as Director of the Bureau of Mines (93 Cong. Rec. 1807). Dr. Sayers' resignation was subsequently effective on July 13, 1947, and the position of Director of the Bureau of Mines thereupon became vacant. No action upon Dr. Boyd's nomination was taken by the Senate prior to its adjournment on July 27 in accordance with a resolution which provided that the Congress should "stand adjourned until 12 o'clock meridian on Friday, January 2, 1948," or until such earlier date as might be jointly determined by the President pro tempore of the Senate, the Speaker of the House of Representatives, the majority leader of the Senate, and the majority leader of the House of Representatives (93 Cong. Rec. 10400, 10407). On August 26, 1947, the President, exercising his power to make recess appointments, appointed Dr. Boyd to be Director of the Bureau of Mines "until the end of the next session of the Senate of the United States and no longer." On November 17, 1947, the Senate reassembled pursuant to the President's proclamation of October 23, 1947, declaring that "an extraordinary occasion requires the Congress of the United States to convene at the Capitol in the city of Washington on Monday, the 17th day of November 1947 * * *." (93 Cong. Rec. 10564.)

In connection with this case, consideration must be given to the third clause of Section 2 of Article II of the Constitution of the United States, and also to Section 56 of Title 5 of the United States Code.

The provision of the Constitution mentioned in the preceding paragraph states that—

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 56 of Title 5 of the United States Code provides that—

No money shall be paid from the Treasury, as salary, to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, if the

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vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until such appointee has been confirmed by the Senate. The provisions of this section shall not apply * * * if, at the time of the termination of the session of the Senate, a nomination for such office, other than the nomination of a person appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent * * *: *Provided*, That a nomination to fill such vacancy * * * shall be submitted to the Senate not later than forty days after the commencement of the next succeeding session of the Senate.

It will be noted that the Congress did not adjourn sine die on July 27, 1947, but instead adjourned to a day certain, unless the principal officers of the two Houses (or the President) should notify the members to reassemble at an earlier date. Consequently, from the standpoint of the congressional system of numbering sessions, the First Session of the Eightieth Congress did not end on July 27, and the proceedings which began on November 17 are regarded as a continuation of the First Session of that Congress.

It is necessary to decide, therefore, whether the period between the adjournment of the Senate on July 27 and its reassembling on November 17 constituted a "Recess of the Senate," within the meaning of that phrase as used in the third clause of Section 2 of Article II of the Constitution. In 1901, the Attorney General expressed the opinion that the word "Recess," as used in the Constitutional provision under consideration, means the period between the final adjournment sine die of Congress at the end of one numbered session and the beginning of the next numbered session, and he accordingly held that a recess appointment could not properly be made under this provision of the Constitution during an adjournment of the Senate from December 19, 1901, until January 6, 1902, for the holiday season (23 Op. Atty. Gen. 599). In a subsequent opinion, however, the Attorney General held that an adjournment of the Senate from August 24, 1921, until September 21, 1921, in the course of a numbered session of Congress constituted a "Recess of the Senate" during which the President might make recess appointments to vacant positions requiring Senate confirmation. The Attorney General in this instance expressed the view that any absence of the Senate for a substantial period of time "so that it cannot receive communications from the President or participate as a body in making appointments" constitutes a recess from the standpoint of the President's power under the Constitution to make recess appointments. He went on to say that "the President is necessarily vested with a large, although not unlimited, discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate." (33 Op. Atty. Gen. 20, 25.)

The later view of the Attorney General appears to be the proper one, because otherwise the Congress, by carefully wording an adjourn-

ment resolution so as virtually to eliminate any lapse of time between the official end of one numbered session of Congress and the official beginning of the next numbered session in a situation where it is expected that the two Houses actually will not hold any meetings over a period of several months, could prevent the effective exercise by the President of his Constitutional power to make recess appointments. I conclude, therefore, that the absence of the Senate from July 27 until November 17, 1947, constituted a "Recess of the Senate," within the meaning of this phrase as used in the third clause of Section 2, Article II, of the Constitution.

Another problem that arises is whether the vacancy in the position of Director of the Bureau of Mines, which occurred on July 13, 1947, and prior to the adjournment of the Senate for the extended period previously mentioned, falls within the category of "Vacancies that may happen during the Recess of the Senate." This Constitutional phrase has been construed to mean "vacancies that may happen *to exist* during the recess of the Senate" and not "vacancies that may happen *to occur* during the recess of the Senate." (1 Op. Atty. Gen. 631.) Consequently, the vacancy in the position of Director of the Bureau of Mines is one that "happened" during the recess of the Senate, in the Constitutional sense, although it occurred prior to the beginning of the recess.

We turn now to a consideration of the meaning of the word "Session," as used in the Constitutional provision which indicates that recess appointments expire at the end of the "next Session" of the Senate, and as used in the statutory provision which requires that a nomination for a position theretofore filled by a recess appointment must be submitted to the Senate not later than 40 days after the commencement of the "next succeeding session of the Senate." If, as we have previously concluded, a recess of the Senate is any substantial period of time during which the Senate holds no meetings and, consequently, is not available to receive communications from the President and to give advice and consent with respect to nominations, it follows, I believe, that the "next Session" or the "next succeeding session of the Senate" following a recess is the next occasion when the Senate has reassembled for the transaction of business and is available to receive communications from the President and to give its advice and consent with respect to nominations. In other words, if the word "recess," as used in the Constitutional and statutory provisions under consideration, does not necessarily mean the period that intervenes between numbered sessions of Congress, then the phrases "next Session" and "next succeeding session of the Senate," as used in such provisions, do not necessarily refer to the next numbered session of Congress. (But see *Gould v. United States*, 19 Ct. Cl. 593 (1884).)

It is my opinion, therefore, that the proceedings of the Senate which

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began on November 17 constitute, with respect to Dr. Boyd's recess appointment as Director of the Bureau of Mines, the next session of the Senate within the meaning of the third clause of Section 2, Article II, of the Constitution, and within the meaning of Section 56 of Title 5, United States Code. Accordingly, I believe that Dr. Boyd's present appointment as Director of the Bureau of Mines will expire at the time when the regular meetings of the Senate which began on November 17 come to an end and the next recess of the Senate begins; and that the President must submit a nomination regarding this position to the Senate not later than 40 days after November 17.

MASTIN G. WHITE,
Solicitor.

JACK A. MEDD

A-23951

Decided December 26, 1947

Private Exchange—Public Water Reserve—Grazing Leases—Unlawful Enclosure—Ownership of Water on Public Domain.

An application for a private exchange under section 8 (b) of the Taylor Grazing Act is properly rejected as not being in the public interest where the selected land is in a public water reserve and contains a spring which is valuable to the public and is necessary for proper use of the adjoining Federal range.

Under section 10 of the Stock-Raising Homestead Act, a public water reserve must be kept open to public use. Any enclosure of a public water reserve is a violation of the Unlawful Inclosures Act and, if accomplished by the holder of a grazing lease on the surrounding Federal range by an enclosure of the leased land, is also a violation of the terms of the grazing lease.

A grazing lease will not be granted for land in a public water reserve where the land in the reserve is rocky and of little use for grazing and it is obvious that the lease is sought solely for the purpose of gaining control over the water in the reserve.

Section 10 of the Stock-Raising Homestead Act authorizes the reservation not only of public land containing water holes and springs but of the unappropriated water in the springs and water holes. Consequently, where a water reserve has been created, the nonnavigable water thereon which was unappropriated at the time when the reserve was created is not subject to appropriation under State water laws, and any permit issued by a State for the appropriation of such waters is ineffective.

The Department of the Interior adheres to the position taken by the executive branch of the Government in the case of *Nebraska v. Wyoming* concerning the question of the ownership and control of the unappropriated non-navigable waters on the public domain.

APPEAL FROM THE GENERAL LAND OFFICE¹

Jack Medd, of Skull Valley, Yavapai County, Arizona, has appealed from a decision by the Commissioner of the General Land Office made

¹ Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

on May 5, 1944, in Phoenix 080448, an application by Zack and Pearl Kelley of Congress, Arizona, for an exchange of certain Arizona lands. The Commissioner granted Medd's petition that he be substituted for the Kelleys as the party in interest but held the application for rejection and denied the petition for restoration of the selected lands from Public Water Reserve No. 107 as being an attempt to secure control of the water and exclude the public from the use of it.

The case record is involved. Pertinent facts are as follows: The Kelleys on January 8, 1942, filed a private exchange application under section 8 (b) of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269), as amended by the act of June 26, 1936 (49 Stat. 1976; 43 U. S. C. sec. 315g), offering as base NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 20, T. 27 N., R. 20 W., G. & S. R. M., Arizona, in Arizona Grazing District No. 2. In exchange therefor they selected land outside a grazing district, a 40-acre tract described as T. 10 N., R. 5 W., G. & S. R. M., Arizona, sec. 24, NE $\frac{1}{4}$ SE $\frac{1}{4}$. This selected land is in Yavapai County, Arizona, about 6 miles east of Congress Junction and 3 miles north of the mining town of Stanton, in a district in the Weaver Mountains which has been the scene of considerable placer mining and in which miners and prospectors are still active. The tract is traversed from northeast to southwest by Antelope Creek, an intermittent stream tributary to the Hassayampa, which flows into the Gila about 50 miles southwest of Phoenix and by way of the Gila joins the Colorado at Yuma. The tract contains a spring known as Walnut Spring, and is part of Public Water Reserve No. 107.²

The record also shows that 2 years after the Kelleys made this appli-

² Interpretation No. 160 of April 8, 1932, defined the SE $\frac{1}{4}$ of sec. 24 as withdrawn from entry by the Executive order of April 17, 1926, and as reserved for public use as part of Public Water Reserve No. 107. Later in 1932, this quarter section was reinvestigated. The field report of November 7, 1932, stated that one of the forties, namely, the NW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 24, was "devoid of water, its southeast corner merely touching the bank of Antelope Creek." Accordingly, upon the advice of the Geological Survey, Interpretation No. 180 of March 16, 1933, revoked that part of Interpretation No. 160 which affected the NW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 24.

In consequence of Interpretation No. 180, the public water reserve in sec. 24 has from March 16, 1933, to date comprised only 120 acres, the NE $\frac{1}{4}$ SE $\frac{1}{4}$, the SE $\frac{1}{4}$ SE $\frac{1}{4}$, and the SW $\frac{1}{4}$ SE $\frac{1}{4}$, instead of the 160 acres originally withdrawn. It was the exclusion of the fourth forty, NW $\frac{1}{4}$ SE $\frac{1}{4}$, from the reserve because it contained no water which made it possible for that subdivision 2 years later, on June 6, 1935, to be included in the homestead entry of Manuel Van Cleve, Phoenix 069420, later sold by Van Cleve to Pearl Kelley and by her to Jack A. Medd, appellant herein.

For additional details as to both the water and the mineral claims on SE $\frac{1}{4}$ sec. 24, see Phoenix 069420, the Manuel Van Cleve stock-raising application (January 3, 1931). This was in conflict with the mining claims of W. H. Spangle and G. R. Neil, namely, the Antelope and Rich Gulch placer, and two lode claims, the Evening Star and the Ironclad. A third lode claim, the Laura Ella, was located on the SW $\frac{1}{4}$ SE $\frac{1}{4}$ subsequently to Van Cleve's application (January 3, 1931).

See field report of June 27, 1942, in the Kelley-Medd file, Phoenix 080448, for statement that on June 10, 1940, G. S. Neill located a lode claim, The Cardinal, on the NE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 24.

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cation, Jack A. Medd, on January 6, 1944, filed with the United States land office in Phoenix a petition for substitution of himself for the Kelleys as party applicant in 080448 and with it a formal consent by the Kelleys to such substitution. As reasons, Medd set forth that the Kelleys had sold him their ranch property of 200 acres (NE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 24) adjacent to the forty here selected (NE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 24), and that by special warranty deed, executed on November 30, 1943, and recorded on December 22, 1943, they had also conveyed to him the base land offered herein.

Medd also filed a general warranty deed and relinquishment of the base to the United States and a continuation of the abstract of title thereof not to the date of Medd's application but only to February 26, 1943. Further, on January 14, 1944, Medd filed with the General Land Office a copy of the State's assignment to him of Water Appropriation Permit No. A-1667 granted in pursuance of application A-2501 by Zack Kelley. This copy bore a typewritten endorsement reading "All rights under this permit are assigned to Jack A. Medd. Approved December 22, 1943. (s) O. C. Williams, State Land Commissioner." Attached was the Commissioner's certificate under seal that the copy of the permit was correct.

The record further shows that besides these properties Medd had also acquired all the other Kelley interests in the immediate neighborhood of the public water reserve in sec. 24. These holdings consisted of certain grazing leases and the stock-raising homestead of Zack Kelley in sec. 20 in the range to the east.³ They were all mentioned in the Kelley papers and afforded the basis for the Kelley petition. The Kelley statements concerning them, having been allowed to stand without alteration upon Medd's substitution, make an integral part of this case.

Among the papers filed with the Kelleys' exchange application was an affidavit of December 27, 1941, petitioning for restoration to the public domain not merely of the selected tract but of all three forties in sec. 24 then remaining within Public Water Reserve No. 107 under Interpretation No. 160.⁴ The Kelleys stated that at their request the State of Arizona had, on September 3, 1941, included SE $\frac{1}{4}$ SE $\frac{1}{4}$ and SW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 24 in a State exchange application, Phoenix 080231, in order that the Kelleys might eventually lease this land from

³ T. 10 N., R. 4 W., G. & S. R. M., Arizona. Phoenix 070747, first stock-raising homestead entry, allowed September 29, 1931, was relinquished May 19, 1932. Phoenix 076302, second stock-raising homestead on unsurveyed land, claimed to have been settled on May 20, 1932; application filed August 3, 1940; entry allowed October 28, 1940; final certificate January 2, 1941; Patent No. 1111360 issued May 19, 1941.

⁴ See footnote 2, *supra*.

the State for grazing.⁵ The record attests the State's cooperation in this matter. On January 8, 1942, the day when the Kelleys filed their private exchange application; the Arizona Land Commissioner advised the register at Phoenix that the Kelleys' petition for restoration of the lands in the water reserve was being filed *for the State* as well as for the Kelleys personally; that the State, having found that its 80-acre selection in sec. 24 was within the water reserve, desired its restoration; that it was, therefore, transmitting a certified copy of the Kelley request for restoration of the whole reserve and was asking that said petition have due consideration in connection with the State's application, as well as with that of the Kelleys.

This petition, seeking as it does the restoration of the whole reserve, gives considerable information concerning the Kelleys' holdings in the area and the relation of these to the reserve. According to its statements, the Kelley control, now that of Medd, extends to about 8,200 acres which completely surround the public water reserve. This block comprises 840 acres of owned land, 7,200 acres of United States land in grazing leases under section 15 of the Taylor Grazing Act, and 160 acres of State-owned land under lease from the State. Further, this block of 8,200 acres is completely enclosed. On the north and east there is a high rim rock, forming a natural fence, and on the south and west there are fences of 4 and 7 wires which tie to the rim rock. Hence, the Kelley-Medd papers say, "this entire block is now in the[ir] exclusive use and occupancy." Further, the entire water reserve "has now become isolated as to use by any other livestock operator in this locality," its waters being "available to them [the Kelleys] only."

With further reference to the water reserve, which thus seems to have been made an enclave within the Kelley-Medd domain, petitioners declare that its three forties are rough and rocky, with little vegetation, and are therefore of little value as a grazing unit. They also say that the tracts are traversed by a "dry wash" and about this wash that—

Cutting through at approximately right angles to the bed of the wash are intrusive rocks or dykes which form natural dams to the underground waters of the wash, bringing the waters to surface at two points, one on the NE $\frac{1}{4}$ SE $\frac{1}{4}$ and the other on the SW $\frac{1}{4}$ SE $\frac{1}{4}$ said Section 24, and forming surface springs, the seep from which flows on down the bed of the wash and eventually sinks into

⁵ Departmental records show that these exchange applications by the Kelleys and the State had been preceded by an unsuccessful effort by the Kelleys to gain control of all the lands in the water reserve by means of a grazing lease from the United States. In Phoenix 078931, filed October 5, 1938, Pearl Kelley had applied to lease an area of 1,720 acres which included this reserve. On February 7, 1939, the General Land Office rejected the application as to the 120 acres in sec. 24 on the ground that they were in Public Water Reserve No. 107 and therefore were not subject to lease. Mrs. Kelley took no appeal but later adopted a different method for acquiring the desired control, namely, the making of the two exchange applications, the one by the State, the other by her husband and herself.

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the sands, and in wet times this water flows onto lands leased by your petitioners under Section 15 of the Taylor Act.

These waters, petitioners say—

* * * are soft and good for domestic use, and it is for this particular reason that the title to the NE $\frac{1}{4}$ SE $\frac{1}{4}$ and the water is desired by your petitioners. * * *

Water otherwise available to them for domestic use, they say, comes from a highly alkaline well on the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of sec. 24, where since 1937 they have maintained their ranch headquarters.⁶

The record further shows that on August 21, 1941, Zack Kelley filed with the Arizona Water Commissioner two applications (A-2500 and A-2501) for permits to appropriate water from Antelope Creek in the water reserve. Both applications were approved on October 10, 1941. Permit A-1666 allowed Kelley to appropriate 2,000 gallons per day for stock-watering purposes from Bluff Spring in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of sec. 24, the water to be used on that same tract in the reserve. Permit A-1667 allowed him to appropriate 2,500 gallons per day for domestic use and 50 gallons per day for stock watering from Walnut Spring in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of sec. 24, both those uses to be at the ranch headquarters in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of sec. 24.

The permits provided that the construction of the diversion and other works should be begun before October 10, 1942. It appears, however, that the works were not only begun but were practically completed in about 2 months after issuance of the permits and before December 27, 1941, for the petition for restoration sworn to on December 27, 1941, states that the diversion works under both permits had already been installed. About permit A-1666 for Bluff Spring located on land selected by the State in its exchange application, the petition said:

* * * Under this permit a concrete box 3 feet by 3 feet by 2 feet *has been installed* and the water *pipcd* from this diversion box to a concrete trough 18 feet by 2 feet by 1 foot, at a cost of \$150. [Italics supplied.]

About permit A-1667 for Walnut Spring in the Kelley selection, the petition said:

* * * Under this permit a cement dam *has been constructed* on top of the dyke 40 feet long, 4 feet high and 18 inches thick and is dug out on the north end to a depth of 4 feet to bed rock at a cost of approximately \$450. At this time [December 27, 1941] the pipe connection has not yet been made to convey the water to the house for domestic use as it is very difficult under present conditions to secure the pipe but just as soon as it can be purchased this installation will be made. [Italics supplied.]

⁶ This forty is that which was excluded from the public water reserve and later became part of the 200-acre homestead patented to Manuel Van Cleve on June 6, 1935, Phoenix 069420, and sold to Mrs. Kelley in 1937. See footnote 2, *supra*.

Mr. Medd's papers show that long before the Kelleys sold their interests to Medd the difficulties of obtaining materials had been overcome and the water had been piped to the Kelley ranch houses.

Having made these showings concerning their water rights, the Kelleys then prayed that Interpretation No. 160 of Public Water Reserve No. 107 be revoked and that NE $\frac{1}{4}$ SE $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 24, T. 10 N., R. 5 W., G. & S. R. M., Arizona, be restored therefrom. They asserted that they and their predecessors in interest had used this tract of 120 acres and utilized the waters thereon for 15 years or more; that they were the only ones who could possibly use the slight quantity of water flowing thereon or who would keep these watering places in usable condition since *there were no other parties who could use the waters or who could have ingress or egress to or from said tracts* or an interest in maintaining the watering places. For this reason, they urged, these tracts should be restored from the reserve "so that title may pass from the United States and your *petitioners be protected in their investment.*" Especially should the restoration be made since petitioners have for several years either leased or owned all the surrounding lands, and *the purpose for which said tracts were set aside no longer exists.* [Italics supplied.]

On these several papers the Commissioner of the General Land Office acted adversely. In his decision of May 5, 1944, he stated that the "dry wash" referred to is the bed of Antelope Creek, which contains water along its course for 9 months or more during the year. Further, he observed that in the vicinity there are many miners and prospectors who with their horses, burros, or other animals, have a right to use the water in this public water reserve, and that the exchange application appeared to be an attempt to secure control of the water and exclude the public from the use of it. Accordingly, he denied the petition for restoration of the NE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 24 and held the Kelley-Medd exchange application for rejection.

As to the State's interest in the Kelley petition and its prayer for restoration of the tracts sought by the State for the ultimate benefit of the Kelleys, the Commissioner appears to have found it unnecessary to comment. For on June 15, 1942, the State had withdrawn its selection of these tracts from its exchange application, Phoenix 080231. However, certain facts connected with the State's action are not without bearing on the instant case.

It appears that on January 5, 1942, the Commissioner had found the State's application defective and had called for affidavits as to springs and water holes and as to possible claims under the mining laws. A water affidavit was then made on January 22, 1942, by Zack Kelley and J. D. Taylor. This stated that the land contained—

* * * a spring the waters of which have been duly appropriated under the laws of the State of Arizona, and permit No. A-2500 issued therefor to one

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of your affiants, Zack Kelley, and the said spring is not used by the public. [Italics supplied.]

This affidavit was accepted by the Commissioner.

A mineral affidavit, also made on January 22, 1942, but by Zack Kelley alone, was in chief part as follows:

Zack Kelley * * * says that * * * part of said land is claimed under the mining laws but the land in itself is non-mineral in character and the mining claim,⁷ in the opinion of affiant, was located thereon purely to cover the spring thereon, the waters of which have been duly appropriated by your affiant under the laws of the State of Arizona, and permit No. A-2500, to appropriate the waters of said spring has been issued to your affiant.

This affidavit the Commissioner found defective since it did not state whether the land was being occupied or worked under the United States mining laws. He therefore called upon the State to supply this information in accordance with 43 CFR 147.7, stating that if the tract was actually occupied or worked for minerals when the selection was filed on September 3, 1941, it was not subject to selection. *Roos v. Altman et al.*, 54 I. D. 47 (1932); *Ainsworth Copper Co. v. Beas*, 53 I. D. 382 (1931).

The State asked for time to make further examination of the land and received an extension until July 1, 1942. However, it submitted no additional evidence. Instead, on June 15, 1942, it asked leave to withdraw the selection from its application. The leave was granted and the State's application for the 80 acres in the reserve was finally rejected on July 16, 1942. There is nothing in the record to indicate why the State pursued this course, but it is not to be overlooked that it may have found the lode claim being worked and may have concluded for this or other reasons that it was vain to press its choice.

On July 24, 1944, Medd filed an appeal from the Commissioner's decision in his case, asking for its reversal and for issuance of patent to the selected tract. He says that the decision correctly stated the facts in the case, but his specifications of error, 11 in all, in effect deny most of what he acknowledges to have been correctly stated. His points, although not very systematically or clearly presented, are perhaps meant to be as follows:

The Commissioner should have held—

1. That the selected tract is not within the purview of the Executive order of April 17, 1926, and is not included in Public Water Reserve No. 107 but is unreserved public domain subject to patent.
2. That this application does not attempt to gain control of the water and exclude the public from its use, for the land and the water

⁷ Presumably this was "The Cardinal," a lode claim located June 10, 1940, by G. S. Neill, according to field report in this case, Phoenix 080448. Cf. G. R. Neill, mineral claimant, footnote 2.

are not so situated as to serve a public purpose, being within the exclusive range of appellant.

3. That although throughout Arizona as in other Western States there are roving miners, prospectors, and itinerants, and also animals such as wild burros and horses roaming at large, there are no miners or prospectors in this vicinity with burros or other animals, and that the Government cannot find any such persons with their animals traversing any part of appellant's small range and attempting to interfere with his water and water rights.

4. That by refusing to patent the lands on which these waters are situate the United States indirectly and unlawfully interferes with the State's unlimited right to dispose of these nonnavigable waters and also prevents appellant from protecting against contamination and pollution the waters which the State has given him the legal right to apply to the domestic purposes of 10 persons on his adjacent ranch and to the watering there of some stock.

In his argument on these points, Medd, first, repeats the facts set out in the petition for restoration. He describes the extent of the Kelley-Medd holdings in this area; their "complete" enclosure of the reserve; Medd's water rights in the "dry wash" of Antelope Creek; his need for the soft waters of Walnut Spring for domestic use by 10 members of two families at his adjacent ranch headquarters; and his need for title to the land (1) to enable him to protect his investment in the diversion works, and (2), in the interest of the health of his family and employees, to safeguard the spring waters from contamination and pollution.

Second, appellant says that the NW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 24 was restored from the water reserve in order that it might be included in the entry of Manuel Van Cleve,⁸ the Department specifically holding that the Executive order of April 17, 1926, did not apply to it. He asserts that the circumstances in this case are no different, and that the Department should not show discrimination by refusing to restore and patent this tract as it did the other.

Third, appellant contends that the water in question is owned by the State of Arizona; that appellant and his predecessor in interest had a right to appropriate it; that under Revised Statutes, secs. 2339 and 2340, their right vested and is fully protected; but that by refusing to patent to appellant the land containing the water the United States is illegally, arbitrarily, and unjustifiably preventing appellant from doing the very thing which State law entitles him to do, namely, enjoy the beneficial use of this water and protect it from pollution.

Fourth, in the Commissioner's point that Medd seems to be seeking "to secure control of the water and exclude the public from use

⁸ Footnote 2, *supra*.

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of it," appellant finds a claim by the United States that it owns waters which belong to Arizona and that it can prevent the use of waters legally appropriated by refusing to patent the land containing them. This appellant finds capricious and ridiculous, opposed to the decisions of the Department, the Supreme Court and the State courts alike.

He says that a State permit and water-right certificate giving appellant exclusive use, occupancy, and possession of *this water*⁹ necessarily excludes the public from the use of it and that that is the purpose of the appropriation. He adds that his appropriation does not cover all the waters of the creek and that the public may therefore appropriate and use the water for miles up and down the creek; further, that if appellant fails to apply his whole appropriation to a beneficial use, the public may use the unapplied portion. All these matters, he says, are governed by the laws of Arizona and with them the United States has no concern. According to *Edwards et al. v. Sawyer*, 54 I. D. 144 (1933), "The Department has repeatedly decided that it is without jurisdiction to determine the question as to the right to water, that being a matter solely within the province of the State courts." On this ground alone, he says, this arbitrary decision should be set aside.

Fifth, appellant quotes from decisions and statutes numerous passages to which he refers as sustaining his contentions. Some of these extracts correctly state several elements of the appropriation doctrine and require no comment here. The rest are irrelevant, being drawn from cases with distinguishing features the significance of which appellant has overlooked. Hence, the brief in all its parts not only affords appellant no support for his position but misconceives the basic principles governing State and Federal rights to water on lands of the United States and therefore misinterprets the determining facts.

Concerning the specifications of error assigned, there is no ground for the first point, namely, that the selected tract is not in the public water reserve and is therefore unreserved land, subject to patent. Nor does any reason appear why if this contention were valid appellant should have filed a petition for the restoration of the tract from the public water reserve or why facts admitted and used in the petition should be denied in any part of the appeal.

The facts are that on April 17, 1926, the President created Public Water Reserve No. 107 by an order of withdrawal worded as follows:

Under and pursuant to the provisions of the act of Congress approved June 25, 1910 (36 Stat. 847), entitled "An act to authorize the President of the

⁹ Other parts of a rather confused argument indicate that appellant here means a permit for the exclusive use not "of this water" but of a *certain amount* of this water.

United States to make withdrawals of public lands in certain cases," as amended by act of Congress approved August 24, 1912 (37 Stat., 497), it is hereby ordered that every smallest legal subdivision of the public land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land be, and the same is hereby, withdrawn from settlement, location, sale, or entry, and reserved for public use in accordance with the provisions of Sec. 10 of the act of December 29, 1916 (39 Stat., 862), and in aid of pending legislation.

The applicable part of section 10 of the act of December 29, 1916 (39 Stat. 862, 865; 43 U. S. C. sec. 300), provides:

That lands containing water holes or other bodies of water needed or used by the public for watering purposes shall not be designated under this Act but may be reserved under the provisions of the Act of June twenty-fifth, nineteen hundred and ten, and such lands heretofore or hereafter reserved shall, while so reserved, be kept and held open to the public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe: * * *

Subsequently, by Interpretation No. 160 of April 8, 1932, the withdrawal was ordered to be construed as in part describing the *whole* of SE $\frac{1}{4}$ of sec. 24, this being traversed from northeast to southwest by Antelope Creek and containing two springs, Walnut Spring in NE $\frac{1}{4}$ SE $\frac{1}{4}$ and Bluff Spring in SW $\frac{1}{4}$ SE $\frac{1}{4}$. A later Interpretation, No. 180, of March 16, 1933, ordered the withdrawal modified by elimination from it of NW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 24, that forty having been found to be "devoid of water, its southeast corner merely touching the bank of Antelope Creek."¹⁰

At no other time has there been any change in the withdrawal affecting the SE $\frac{1}{4}$ of sec. 24. Accordingly, the three other forties of this quarter section, namely, NE $\frac{1}{4}$ SE $\frac{1}{4}$ containing Walnut Spring, SW $\frac{1}{4}$ SE $\frac{1}{4}$ containing Bluff Spring, and SE $\frac{1}{4}$ SE $\frac{1}{4}$, not containing a spring but crossed by the creek bed, all continue to be part of Public Water Reserve No. 107 and are deemed in law to have been withdrawn on April 17, 1926, the date of the Executive withdrawal order. All three tracts therefore are reserved lands. None of them is public and none is open to disposal.

Nor in refusing to restore this tract from the reserve and to patent it to appellant was the Commissioner "discriminating" against him, as his argument implies.¹¹ Appellant asserts that the circumstances here are no different from those obtaining in the Manuel Van Cleve case where, *in order that the NW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 24 might be patented to Van Cleve*, the Department specifically held that that tract was not affected by the Executive order of April 17, 1926, and was not in the reserve.

¹⁰ *Supra*, footnote 2.

¹¹ *Supra*, p. 90.

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This assertion is far from correct and further seems not to distinguish between purpose and result. It was scarcely *for the purpose* of patenting the tract to Van Cleve but rather *in consequence* of finding it devoid of water that the Department held the NW $\frac{1}{4}$ SE $\frac{1}{4}$ to be unsuitable for inclusion in a water reserve and therefore to be unaffected by the withdrawal order. It was also as a *result* of finding the tract to be unwatered, unwithdrawn, and unreserved that the Department found it to be *public* and subject to entry by any qualified applicant, such as Van Cleve.

There are no like circumstances in the Medd case. The tract which Medd wishes to patent is not devoid of water. It has a spring which departmental records show to have been used by the public for watering purposes for many years and which Medd, according to all his papers and arguments, now particularly desires to have.¹² It is because of this spring that the tract was suitable for inclusion in Public Water Reserve No. 107 and was withdrawn therefor in 1926; and it is because of this spring that this forty cannot be restored from the reserve as was the waterless forty ultimately patented to Van Cleve and now owned by Medd. The two tracts can be contrasted but not compared. The facts in the two cases are entirely different. Patently, the implied charge of Government "discrimination" against Medd is baseless.

The second specification of error¹³ is specious in arguing, first, that because the tract and the spring are "within the exclusive range of appellant," they are not so situated as to serve a public purpose, and, second, that because their situation within his "exclusive" range makes it impossible for them to serve a public purpose, the application for restoration and patent is not an attempt to control the water and exclude the public.

In the first place, it is not the situation of the tract and the spring which prevents their serving a public purpose. For the reserve is not "within the exclusive range of appellant," and there is no such legal barrier to public access to its waters as appellant's phraseology suggests. It is true that only appellant may graze cattle on the block of 8,200 acres of range which he says completely encloses and isolates the reserve. But it is also true that on 7,200 acres of this range appellant, instead of having any such authority to prevent entrance by outsiders as his use of the term "exclusive" would seem to import, has on the contrary a specific duty to admit and give passage to a varied public. For these 7,200 acres in fact belong not to Medd but to the United States and are at present under Medd's control only by virtue of short-term Federal grazing leases which are subject to existing

¹² *Supra*, pp. 86, 87, 88, 90.

¹³ *Supra*, pp. 89-90.

valid rights and which expressly stipulate not only for the admission of various types of outsiders to the leasehold for lawful purposes but also for no hindrance of travelers on commonly used public roads and trails.

The grazing-lease contract specifies as persons entitled to access not only authorized representatives of the Department and other Federal agents, including game wardens, but also all persons having rights-of-way or holding other Government permits, such as permits to use and dispose of timber on the premises, or to prospect, locate, develop, mine, enter, lease or patent the mineral resources of the leased area. The grazing-lease contract also expressly provides as to roads or trails commonly used for public travel that the lessee shall not enclose them in such a manner as to interfere with the traveling of persons who do not molest grazing animals. Moreover, although the contract permits the lessee to fence the land or any part thereof, it requires that any fence constructed be such as to permit ingress and egress for miners, prospectors for minerals, and other persons entitled to enter the leasehold for lawful purposes.

As a grazing lessee Medd, therefore, is under an express obligation to admit to his 7,200-acre leasehold a considerable potential public. Further, this obligation does not depend upon or vary with the number of the persons who may assert the rights described. Nor does it cease in the event that few or none assert or attempt to assert such rights. Instead, it continues throughout the life of the lease, and nonobservance of it may result in Government action under the cancellation clause of the lease.

Further in this connection, it is to be remembered that only on the north boundary and on the north half of the west line does patented land¹⁴ adjoin the reserve and bar access thereto. On its east and south sides and on the south half of its west line the reserve is immediately adjoined by the Government's own lands, the 7,200 acres in Medd's Federal grazing leases. These United States lands, therefore, afford direct physical access to the reserved springs from all points in the miles of range which they comprise.

Moreover, the fact of their leasing interposes no legal obstacle to passage over them by such of the public as may need to water at the reserve, not merely the special permittees specified in the lease but whatever general public may be moving along the roads and trails commonly used for public travel, some of which may still lead to the reserve. For the grazing-lease stipulations described above¹⁵ themselves expressly ensure to that public free movement over the leasehold, together with ingress and egress.

¹⁴ The Manuel Van Cleve homestead, now owned by Medd.

¹⁵ *Supra*, pp. 93-94.

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In addition, there is no question as to the availability of the reserved springs for public use for they are still reserved, and the Stock-Raising Homestead Act requires that water reserves *while so reserved be held and kept open to the public use* for watering purposes. It is clear, therefore, that there is no validity in Medd's assertion that the situation of the reserve makes it impossible for it to serve a public purpose. There may not be much public in the surrounding area, but whatever public there is or may be has an undoubted right to water in this reserve and to reach the reserve by way of the lands leased to Medd.

Appellant's second argument is in effect that, because of the situation of the springs within his exclusive range and the resultant fact that there is now no public to use them, his application to patent the reserve is not an attempt to control the water and exclude the public. The argument is specious. This application for patent is by its very nature an attempt to acquire *de jure* control of the Walnut Spring tract and legal authority to exclude the general public from it, and if it is not an attempt at *de facto* control and exclusion that is only because such control and exclusion are being effectuated by other means.

That such is the case, appellant's papers, both the petition for restoration and the brief on appeal, are at some pains to establish. They state (1) that the entire block of land surrounding the reserve is completely enclosed and is in the exclusive use and occupancy of appellant; (2) that the reserve is isolated as to use by any other livestock operator in this locality; (3) that the waters of the reserve are available to appellant only; (4) that appellant is the only party that can possibly use the waters thereon; (5) that there are no other parties to use the waters; (6) that there are no other parties who *could* have "ingress or egress to said tracts"; (7) that the purpose for which the reserve was created no longer exists; and (8) that all this results not merely because the reserve is completely surrounded by appellant's exclusive range of 8,200 acres but because that entire range has itself been "completely enclosed" by the high rim rock which forms a natural fence on certain sides of the block and by complementing barbed-wire fences which tie to that rim rock.¹⁶

As to the enclosure here described, if the representations are true and if Medd's methods of fencing have accomplished such "complete" enclosure of the range as he alleges with resultant exclusion of the public, it can only follow that he has violated the stipulations of his grazing lease set forth above¹⁷ and made the lease subject to cancellation; secondly, if by his acts in "completely enclosing" his range appellant has likewise enclosed the lands in the reserve, preventing or

¹⁶ *Supra*, p. 86.

¹⁷ *Supra*, p. 94.

obstructing public access thereto or free passage thereover, he would seem to have made an unlawful enclosure of the lands in the reserve without color of title thereto and to have rendered himself liable to proceedings, civil or criminal, under the Unlawful Inclosures Act of February 25, 1885 (23 Stat. 321), as amended by the act of March 10, 1908 (35 Stat. 40; 43 U. S. C. secs. 1061-1066). Whether this is so depends on the answers to questions of fact and requires careful investigation by the Commissioner to determine what proceedings, if any, should be taken.

Thirdly, if appellant has so effectually enclosed his range that only he and his ranch family can possibly use the reserved waters and no other parties *could* have ingress to the tract containing them, there would seem to be no basis for appellant's concern about contamination of the waters and for his claim that only by possessing title to the tract can he prevent pollution of the spring, safeguard the health of his family, and protect his investment in the diversion works.¹⁸ Obviously, if there is no public to have ingress to the spring, there is no public to pollute or do damage.

Appellant urges that since there is no one but himself, his family and his ranch set-up to use this public water reserve, the purpose for which it was created no longer exists. This argument overlooks several important considerations. The legislative history of section 10 of the Stock-Raising Homestead Act.¹⁹ shows that the purpose of the Congress in authorizing these reserves was—

* * * to withdraw from entry and hold open for the general use of the public, important water holes, springs, and other bodies of water *that are necessary for large surrounding tracts of country; so that a person can not monopolize or control a large territory by locating as a homestead the only available water supply for stock in that vicinity.* * * * [Italics supplied.]²⁰

Bluff and Walnut Springs are waters of the character here contemplated by the Congress. Among the few living waters in a vast region, they have been of vital necessity to the immediately surrounding great stretches of grazing and mineral lands which for decades have afforded range to many stockmen and homesteaders and been the scene of great prospecting and mining activity. As the Congress wisely foresaw and stated in the report quoted, any homesteader patenting the tracts containing such springs before any appropriation of their waters would have monopolistic control of living water necessary to users of the surrounding area and thus control of the area itself. It is to prevent such monopoly and such injury to the public interest and to insure the continuing availability of this water to

¹⁸ *Supra*, p. 90.

¹⁹ *Supra*, p. 92.

²⁰ H. Rept. No. 35 of the House Committee on Public Lands, January 11, 1916, 64th Cong., 1st sess., p. 18.

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these lands and their users that these springs and the tracts containing them have been withdrawn from entry and reserved for use by the general public on those lands.

Appellant, in saying that there is no such public and no purpose in continuing the reservation, overlooks the fact that whoever uses the surrounding lands, whether today or tomorrow, whether as owner or as lessee, or as one otherwise lawfully upon them, is the public for whose benefit the springs have been reserved. He overlooks the fact that yesterday the Kelleys, today he himself, his family and his ranch set-up, and tomorrow his successors, whether many or few, all as users of lands to which these waters are necessary, are a vital part of the public for whose benefit the waters have been reserved.

It is apparent, therefore, that the purpose of the reserve has not ceased to exist and that to suspend the reservation and patent these spring lands to Medd or any other would defeat that purpose and work the very injury to the public interest which the Congress desired to prevent. Obviously, to insure for the benefit of the public the proper control and management of the considerable adjoining Federal range lands it is essential that possession and control of the strategic land and water in this reserve continue in the Government and not pass to any individual.

Efforts at such individual control, however, have been almost continuous during the past 15 years, the instant exchange application being only one of the series. In 1931, Van Cleve applied for stock-raising homestead entry of the whole of sec. 24, including, of course, both springs. Because of the reserve and several mining locations on the section, the application was contested, with the result that in 1935 Van Cleve obtained patent to only 200 of the 640 acres. After Pearl Kelley bought this homestead, she tried, as indicated above,²¹ to have the 120-acre reserve included in Phoenix 078931, a grazing-lease application of October 5, 1938. This failed in 1939 because of the reserve. Mrs. Kelley then induced the State to make its exchange application of 1941 for part of the reserve, and she and her husband a few months later filed the instant exchange application for the rest of the reserve.

The next attempt was made by Medd. Despite his disavowal of any attempt to gain control of the water, Medd not only took the instant appeal from the Commissioner's adverse decision on the Kelley application but he made a still further attempt to get the water in the event the appeal should fail. On October 19, 1944, he, like Pearl Kelley, filed an application, now pending, for a grazing lease of the whole reserve. This application, which was supplemental to Phoenix 075771, a Kelley grazing lease which Medd as assignee was seeking to

²¹ *Supra*, p. 86, footnote 5.

renew,²² differed from Mrs. Kelley's in that it was filed under a circular then only newly issued, Circ. No. 1160a of August 9, 1944 (43 CFR 295 7 (c)). This stated that although withdrawn water-hole lands are not subject to entry or disposition, consideration will be given to applications to lease or use such lands under an appropriate public-land law *until the lands are needed for the purpose of the withdrawal if the proposed use will not interfere with such purpose.* [Italics supplied.]

In filing this grazing application for the whole reserve, Medd stated in regard to the Walnut Spring forty—

* * * This application for NE $\frac{1}{4}$ SE $\frac{1}{4}$ is not to be construed in any manner as prejudicing Private Exchange Phoenix 080448 [the application under consideration in the instant appeal], nor in any way a withdrawal of said exchange application, and for the reason that applicant controls all the land surrounding it and there is no use thereof by the general public.

In this connection it is particularly to be remembered that in his petition for restoration Medd stated that the three forties of the reserve are so rough and rocky that they have little vegetation and are therefore of little value as a grazing unit.²³ It is clear, therefore, that the real object of this grazing-lease application for the reserve is not at all its forage but its water and the control thereof.

Indeed, from the successive efforts by the successive owners of the adjacent Van Cleve homestead to obtain one type or another of *de jure* control over the reserve lands, it is perfectly obvious that the waters of this reserve are strategic waters, essential to the occupants of that homestead not merely for their use thereon for both domestic and stock purposes but also for their use of the adjoining Federal range for whatever stock they graze thereon and therefore desirable to be controlled by them in any manner possible. Moreover, it is clear that these persons have chosen to own this homestead and live in this neighborhood because of the Federal range and the water its users can have. It is equally obvious in all the circumstances described that either to patent the reserve or to lease it under Circ. 1160a to these homestead owners would frustrate the purpose of the Congress in enacting section 10 of the Stock-Raising Homestead Act, interfere with administration of the Federal range, and be contrary to the public interest.

The appellant's contention in his fourth specification of error and in the third, fourth, and fifth points of his argument dealing with this specification,²⁴ to the effect that, under permits issued by the State of Arizona to his predecessor, Kelley, and by the State assigned to

²² Phoenix 075771 was a 5-year grazing lease of November 30, 1940, issued to Zack Kelley and assigned to Medd.

²³ *Supra*, p. 86.

²⁴ *Supra*, pp. 90-91.

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Medd, he has the right to use the waters in the lands involved in this appeal, is untenable for the reason that such waters had already been reserved by the President for public use long before Kelley applied to the State of Arizona for the permits.

As previously noted,²⁵ the order creating Public Water Reserve No. 107 reserved for public use—

* * * every smallest legal subdivision of the public land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole * * *.

The order was issued pursuant to section 10 of the act of December 29, 1916,²⁶ which authorized the reservation of—

* * * lands containing water holes or other bodies of water needed or used by the public for watering purposes * * *.

The term "land" is frequently used in the law of real property to connote and include all the incidents of the land, among which is the water on the land. That the Congress used the word "lands" in this comprehensive sense in section 10 of the act of December 29, 1916, and intended to authorize the reservation of waters as well as terra firma is indicated by the legislative history of the section. In its report,²⁷ the House Committee on Public Lands stated with respect to section 10 (then designated as section 11 of the bill) that it authorized the withdrawal from entry, and the holding open for the general use of the public, of—

* * * important water holes, springs, and other bodies of water that are necessary for large surrounding tracts of country * * *.

Therefore, when the President, in the order creating Public Water Reserve No. 107, withdrew "every smallest legal subdivision of the public land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole," he withdrew the waters in the springs and water holes, as well as the other elements of the lands affected by the order.

Accordingly, the nonnavigable waters of Antelope Creek and of Bluff and Walnut Springs, as found in the 120 acres of section 24 here in question, were not subject to appropriation under State laws when the appellant's predecessor, Kelley, applied on August 21, 1941, to the Arizona Water Commissioner for permission to appropriate such waters; because these waters, being wholly unappropriated as of April 17, 1926, and therefore free from any rights previously vesting, had been reserved in their entirety on April 17, 1926, by the President of the United States. It necessarily follows that the permits issued to Kelley under the authority of the State of Arizona were ineffective and

²⁵ *Supra*, pp. 91-92.

²⁶ *Supra*, p. 92.

²⁷ *Supra*, footnote 20, p. 96.

that neither he nor the appellant acquired any rights to these waters. Instead, they have made unauthorized use of the Government's waters and are liable in trespass because of such use. Also, in entering these reserved lands of the United States and in constructing upon them the diversion works and the pipe line previously mentioned, without obtaining permission for such entry and a right-of-way in accordance with the regulations of this Department,²⁸ both Kelley and Medd have made unauthorized use of the surface of the Government's lands as well as its waters and are liable in trespass by virtue of such action.

Arguments against the power of Congress to authorize the reservation of unappropriated nonnavigable waters on the public domain in Arizona or against the validity of a Presidential order effecting such a reservation, based upon the asserted ownership of these waters by the State of Arizona, cannot be accepted by the Department of the Interior. To this Department, all statutes of the United States and all official actions of the President are valid unless the contrary has been established by judicial proceedings. With regard to the question of the ownership of the unappropriated nonnavigable waters on the public domain, this Department adheres to the position that was taken by the executive branch of the Government in the case of *Nebraska v. Wyoming*, 325 U. S. 589, 611-616 (1945).

For all the foregoing considerations, the petition for the revocation of Interpretation No. 160 of April 8, 1932, as amended by Interpretation No. 180 of March 16, 1933, affecting sec. 24 in T. 10 N., R. 5 W., G. & S. R. M., Arizona, is denied as against the public interest. Likewise denied, for the same reason, is the petition for the restoration of the 120 acres in said sec. 24, namely, NE $\frac{1}{4}$ SE $\frac{1}{4}$ and S $\frac{1}{2}$ SE $\frac{1}{4}$, from Public Water Reserve No. 107. These lands will be retained in the reserve. They will not be patented nor will they be leased for grazing.²⁹

Further, field investigation should be had in order to determine (1) whether appellant has violated the stipulations of his grazing leases by preventing, obstructing, or discouraging free movement over his leasehold by the public entitled to access thereto,³⁰ and (2) whether he has made an unlawful enclosure of the lands in the public water reserve on sec. 24 under the act of February 25, 1885,³¹ and (3) what proceedings, if any, should be taken in the circumstances found.

The decision of the Commissioner of the General Land Office is affirmed.

MASTIN G. WHITE,
Solicitor.

²⁸ 43 CFR, Cum. Supp., 244.1-244.13, 244.22-244.30.

²⁹ *Supra*, pp. 97-98, Phoenix 075771.

³⁰ *Supra*, pp. 93 and 94.

³¹ *Supra*, pp. 95 and 96.

LULA T. PRESSEY

A-24591

*Decided December 26, 1947***Mineral Leasing Act—Oil and Gas Leases—Entries—Public Land.**

An entry of public land under the laws of the United States segregates the land from the public domain, appropriates it to private use, and withdraws it from subsequent entry or acquisition until the prior entry is officially canceled and removed.

The same rule applies to applications filed under the Mineral Leasing Act of February 25, 1920 (41 Stat. 437), as amended (30 U. S. C. sec. 181 *et seq.*).

Unless and until an outstanding oil and gas lease under the Mineral Leasing Act is relinquished by the lessee or canceled by the Government and notation of that fact entered on land records of the Department, the land under lease is not subject to disposition to others for oil and gas purposes under the terms of the Mineral Leasing Act.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Lula T. Pressey has appealed from the rejection by the Bureau of Land Management of her application, B. L. M. (G. L. O.) 010884, for a noncompetitive oil and gas lease under the Mineral Leasing Act of February 25, 1920 (41 Stat. 437), as amended (30 U. S. C. sec. 181 *et seq.*). The application was rejected because the land applied for was already under a noncompetitive lease, approved on August 28, 1943, to the British-American Oil Producing Company (G. L. O. 09223). Pressey contends that the Company is not qualified, under section 1 of the Mineral Leasing Act and the regulations of the Department, to hold a lease under that act because it is not an American company, and because its stockholders are not citizens of the United States.

Section 1 of the Mineral Leasing Act provides, in part:

That deposits of * * * oil, oil shale, or gas, and lands containing such deposits owned by the United States, * * * shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to associations of such citizens, or to any corporation organized under the laws of the United States, or of any State or Territory thereof * * *. Citizens of another country, the laws, customs, or regulations of which deny similar or like privileges to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this Act.¹

¹The regulations of the Department in effect when the lease to the British-American Oil Producing Company was approved, provided: "American corporations, some of whose stock is owned by aliens, may make application for lease with a full disclosure of the residence and citizenship of its stockholders, and the Department will then determine whether a lease may be granted." 43 CFR 191.2. The regulations relating to oil and gas leases required a corporation applicant for a noncompetitive lease to file a certified copy of its articles of incorporation and a showing as to the residence and citizenship of its stockholders. 43 CFR 192.23.

The records of the Department show that the British-American Oil Producing Company was incorporated under the laws of the State of Delaware. Prior to the issuance of the lease here in question, the Company submitted information relating to the residence and citizenship of its stockholders. On the basis of the information submitted and of other information contained in the files of the Department, the present lease to the Company was approved.

However, it is not necessary to the disposition of the present appeal to determine whether the British-American Oil Producing Company is or is not qualified to hold the lease which has been issued to it.

It was well settled long prior to the passage of the Mineral Leasing Act that an entry of public land under the laws of the United States segregates it from the public domain, appropriates it to private use, and withdraws it from subsequent entry or acquisition until the prior entry is officially canceled and removed. *Neff v. United States*, 165 Fed. 273, 281 (1908); *Bunker Hill & Sullivan Mining and Concentrating Co. v. United States*, 226 U. S. 548 (1913); *Hiram M. Hamilton*, 38 L. D. 597 (1910); *California and Oregon Land Co. v. Hulen and Hunnicutt*, 46 L. D. 55 (1917).

Shortly after the passage of the Mineral Leasing Act, the same rule was held to apply to applications filed under that act. *Sullivan et al. v. Tendolle*, 48 L. D. 337 (1921). And in the case of *Martin Judge*, 49 L. D. 171 (1922), the Department, in following the rule, said:

It is recognized that a permit does not constitute a technical segregation or entry, as those terms are ordinarily used in connection with the public land laws, as it is not an appropriation with a view to the acquisition of title, but that does not prevent the application of the principle of the general administrative rule, and until an outstanding permit is canceled by the Commissioner and the notation of the cancellation made in the local 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 therefor, or by the posting of notice of intention to apply for such a permit.

This rule has been followed repeatedly by the Department, both with respect to applications for permits and for leases. *Stahl v. Stiffler*, 49 L. D. 406 (1923); *State of New Mexico v. Weed*, 49 L. D. 580 (1923); *Fred L. Alger*, 50 L. D. 201 (1923); *Harvey V. Craig*, 50 L. D. 202 (1923); *Hill v. Williams and Liddell*, 59 I. D. 370 (1947), motion for rehearing denied April 30, 1947, A-24248, A-24255.

It follows that unless and until the lease to the Company is relinquished by it or is canceled by the Government in the manner provided by law, and the notation of that fact entered on the land records of the Department, the land applied for is not subject to disposition to others under the terms of the Mineral Leasing Act.

Appellant further contends that the Bureau erred in rejecting her application for the reason that the records of the "Land Department

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did not disclose that any prior filing was upon the said land, and the Department is now estopped to set up earlier filing as a basis for rejection." Appellant's second contention is clearly without merit. The fact that the records of the Bureau indicated that the land applied for was already under lease was the basis for the rejection of her application.

The decision of the Bureau is accordingly affirmed.

C. GIRARD DAVIDSON,
Assistant Secretary.

ALLOCATION OF HOT WATER ORIGINATING IN HOT SPRINGS NATIONAL PARK

Secretarial Discretion—Statutory Construction.

The allocation of the hot water originating in the Hot Springs National Park is discretionary with the Secretary of the Interior. However, the Secretary, in exercising his discretion, should give consideration to applicants in the order or priority prescribed by Congress and should apply the standards provided by Congress in passing upon applications.

M-35020

JANUARY 6, 1948.

TO THE UNDER SECRETARY.

In accordance with your oral request, I have reviewed the file pertaining to the report dated October 23, 1947, of the Committee on Allocation of Hot Water at Hot Springs National Park.

The committee in its report recommended, among other things, that permission for the installation of 40 additional bathtubs in order to utilize more fully the water presently impounded in the collection system at the Hot Springs National Park should be granted by the Secretary; that the water to supply 10 of these additional bathtubs should be reserved for and allocated to a second Negro bathhouse;¹ and that the water to supply 30 of the additional bathtubs should be made available to hotels outside the park area which do not now have bathhouses,² in order that they may establish bathhouses for the use of their guests. The committee's recommendations in this respect are opposed by several bathhouse companies, hospitals, and hotels which are presently utilizing hot water from the park. Each of these objectors wishes an additional allocation of hot water for its own use,

¹ One of the existing bathhouses outside the park, namely, the Knights of Pythias bathhouse, with 20 bathtubs already installed and an authorization for the installation of 7 additional bathtubs, caters exclusively to Negroes. The second Negro bathhouse, as contemplated in the committee's report, presumably would be operated outside the park also.

² Applications for water have been received from the Park Hotel, the De Soto Hotel, the Jack Tar Court Hotel, and the Hotel Goddard, all of which are within this category.

and asserts that its needs should be satisfied before any water is made available to "newcomers."

The legal issues in connection with this controversy are governed by sections 361 and 362 of Title 16, United States Code. Section 361 provides that—

The Secretary of the Interior is authorized to grant to hotels having bathhouses attached, and to bathhouses situated in the Hot Springs National Park, as well as in the city of Hot Springs, Arkansas, the right to install, maintain, and use, either in said bathhouses or in connection with the rooms of said hotels or the bathhouses attached to said hotels, as many bathtubs as in his discretion he may deem proper and necessary for the public service and the amount of hot water will justify. * * *

Section 362 states that—

* * * After the Army and Navy hospital bathhouse, the public bathhouse, the bathhouses which are authorized in the said park, the Arlington Hotel, and the bathhouses outside said park authorized on or before March 3, 1891, to be supplied with hot water, in the order herein named, if there shall still be a surplus of hot water 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. * * *

It will be noted that the determination concerning the number of bathtubs for the utilization of the hot water originating in the Hot Springs National Park which the various applicants for such water shall be permitted to install is entrusted by Congress to the discretion of the Secretary of the Interior. However, Congress has provided two standards to guide the Secretary in the exercise of his discretion, i. e., the Secretary must determine (1) whether the allocation desired by a particular applicant is "proper and necessary for the public service," and (2) whether "the amount of hot water will justify" the allocation for which application has been made. Moreover, although the grammatical construction of the portion of section 362 quoted above causes some doubt to arise concerning its effect, it appears that Congress has established six different categories into which those who wish to utilize the water originating in the Hot Springs National Park shall be placed, and has prescribed the order in which water from the park is to be furnished to the several categories of applicants. The categories and the order of priority among them are as follows: (a) The Army and Navy hospital bathhouse; (b) the public bathhouse; (c) the bathhouses which are authorized to operate in the park (including such new bathhouses as the Secretary from time to time may permit to be constructed in the park); (d) the Arlington Hotel; (e) the bathhouses located outside the park which received permits on or before March 3, 1891, for the utilization of hot water from the park; and (f) other bathhouses and hotels located outside the park and families residing outside the park.

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It apparently was intended by Congress that the Secretary should proceed somewhat as follows in allocating the water originating in the park: In the first place, the Secretary allocates to the Army and Navy hospital bathhouse as much hot water (i. e., he permits the installation in that bathhouse of as many bathtubs for the utilization of such water) as may be applied for by the hospital *if* the Secretary, in his discretion, determines that the desired amount of water is available and that its use by the Army and Navy hospital bathhouse is "proper and necessary for the public service"; next, the Secretary, having made to the Army and Navy hospital bathhouse an allocation deemed by him to be appropriate under the statutory standards, allocates to the public bathhouse as much hot water as may be applied for by this bathhouse *if* the Secretary, in his discretion, determines that the amount of water desired by the public bathhouse is available and that its utilization by the public bathhouse is "proper and necessary for the public service"; then the Secretary, having made appropriate allocations to the Army and Navy hospital bathhouse and to the public bathhouse, allocates to the bathhouses which are authorized to operate in the park (including any new bathhouses to which such authorizations may be granted by the Secretary from time to time) as much hot water as may be applied for by these bathhouses *if* the Secretary, in his discretion, determines that the amount of water desired by them is available and that its utilization by these bathhouses is "proper and necessary for the public service"; and so on, giving consideration in the statutory order to each category of applicants so long as water remains available for allocation after the needs of applicants in higher categories have been met through the application of the standards prescribed by Congress. In passing upon any application, the allocation of water may represent the full amount desired by the applicant or such smaller amount as the Secretary, in his discretion, may deem to be appropriate in the light of the pertinent statutory provisions; or the Secretary may disallow an application in its entirety when such action seems to be proper upon an application of the pertinent statutory provisions. Also, in passing upon a particular application, the Secretary will necessarily consider it in relation to all other pending applications submitted by persons of the same category and of lower categories. The application will, of course, be entitled to favorable action in relation to the requests submitted by persons of lower categories whenever the "public service" factors seem to be in balance or to be weighted in favor of the higher-priority applicant.

In other words, although the allocation of the water originating in the Hot Springs National Park is discretionary with the Secretary, he should, in exercising his discretion, give consideration to applicants in the order of priority prescribed by Congress, and he should

apply the standards provided by Congress in passing upon the various applications.

Among those who have objected to the report of the Committee on Allocation of Hot Water at Hot Springs National Park are several bathhouse companies which operate in the park and which have a higher priority rating (category (c)) than that of the concerns which would be permitted to install the 40 additional bathtubs under the committee's recommendations (the hotels would be in category (f), as would the second bathhouse for Negroes if it were to be operated outside the park). The desire of high-priority users of hot water for additional allocations of water was not considered by the committee, presumably because applications from such users were not pending before the Department at the time when the committee held its hearing at Hot Springs. The failure of high-priority users of hot water to apply before the hearing for additional allocations of water for which they now assert a desire and a need was apparently due to their belief that no additional water was available for allocation.

In this state of the record, I believe that all interested persons should be afforded an opportunity to apply for the additional hot water which the committee finds to be available for allocation, and should also be permitted to support their applications with written data pertaining to the "public service" factor which the Secretary will consider in passing upon the applications.

* * * * *

MASTIN G. WHITE,
Solicitor.

ANTHONY S. ENOS

A-24646

Decided January 21, 1948

Color of Title Act—Appraised Valuation.

Under Color of Title Act, establishment of sale price at current market value of land as of the date of appraisal, exclusive of values resulting from development or improvement of the land by the applicant or his predecessors, is not erroneous where the land is business property intended to be devoted to business use.

Color of Title Act—Good Faith of Applicant.

Applicant who knew title to land was in the United States at the time when he purported to acquire it from his predecessor in interest does not hold color of title in good faith.

January 21, 1948

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Anthony S. Enos filed an application under the Color of Title Act (45 Stat. 1069; 43 U. S. C. secs. 1068, 1068a) to purchase lot 106, containing .24 acre in sec. 30, T. 4 S., R. 1 W., M. D. M., California. The Bureau of Land Management held that Enos had established a preference right to purchase the land upon his compliance with various conditions, including payment of the appraised price of \$2,000.

From this decision Enos has appealed on the ground that the appraisal of \$2,000 is excessive.

From the record it appears that the land involved in the application is business property with a frontage of approximately 50 feet on the main street of Centerville, California, and a depth of about 208 feet. Enos states that the lot "is fifty (50) feet of a One Hundred (100) foot frontage" which he purchased in 1944 for a total price of \$9,500. He estimates that buildings and improvements on the land at that time had a value of \$5,000. On this basis, the land in the entire tract was then worth \$4,500, or \$45 per front foot, according to Enos, "and not more than Fifty Dollars (\$50) per foot." Based upon these figures supplied by Enos, the Bureau's appraisal of \$2,000 for the lot with its 50-foot frontage appears to be conservative.

Enos argues, however, that a much more valuable piece of property in the center of the town of Centerville was conveyed under the Color of Title Act to the Ladies' Town Hall Association of Centerville for 96 cents. It was in reliance upon that conveyance, he states in his appeal, that he paid to his predecessor in interest the full consideration for the land for which he now seeks to acquire title in this proceeding.

The Color of Title Act provides, among other things, that—

* * * the Secretary of the Interior shall cause the lands * * * to be appraised, said appraisal to be on the basis of the value of such lands at the date of appraisal, exclusive of any increased value resulting from the development or improvement of the lands by the applicant or his predecessors in interest, and in such appraisal the Secretary shall consider and give full effect to the equities of any such applicant. [43 U. S. C. sec. 1068a.]

In any event, however, payment is to be made at not less than \$1.25 per acre. (43 U. S. C. sec. 1068.)

With respect to the sale of land under the act to the Ladies' Town Hall Association of Centerville, the record (Sacramento 032859) indicates that the price of 96 cents was computed upon the basis of the sale of 0.77 acre at the rate of \$1.25 per acre. In arriving at this appraised price, the General Land Office (now the Bureau of Land Management), as required by the statute, considered and gave full

effect to the equities of the Association. In this connection, it may be noted that the Association was a nonprofit corporation which, for approximately 50 years, had maintained a town hall in the town of Centerville, the use of which was available, subject to the rules of the corporation, to all persons irrespective "of their situation in life or their political or religious belief." The income which the Association derived was used solely for the maintenance and improvement of the property. In addition to maintaining the hall, the Association from time to time leased small portions of the land to the municipality of Centerville at nominal rentals for use as a site for the town's fire department and a jail. The equities of the Ladies' Town Hall Association dictated a conveyance at the minimum price.

No such equities are apparent in the case of Enos. It appears that he purchased the property for business use and intends to devote it to such purposes. His statement that the consideration which he paid for the land in 1944 was influenced by the price at which the General Land Office had sold a tract to the Ladies' Town Hall Association is not helpful to his appeal. If he knew at the time of his apparent purchase of this lot that the title was actually in the United States, and if, as indicated in his appeal, he expected ultimately to rely on the Color of Title Act in order to acquire good title under terms similar to those granted by the Department to the Ladies' Town Hall Association, he cannot be said to have acquired the land, and to hold it at the present time, "in good faith," within the meaning of the Color of Title Act. As stated by the Supreme Court, "there can be no such thing as good faith in an adverse holding, where the party knows that he has no title * * *." *Deffeback v. Hawke*, 115 U. S. 392, 407 (1885). Also see *Henshaw v. Ellmaker*, 56 I. D. 241, 245 (1937). Indeed, Enos' assertion casts such doubt on his eligibility to acquire this land under the Color of Title Act as to merit reconsideration by the Bureau of Land Management of its finding that Enos has established a preference right to purchase this lot. In any event, Enos cannot advance his lack of good faith in initially acquiring the land as justification for a reduction of the value placed upon the land in the appraisal. Cf. *Harry J. Schultz*, A-24441 (October 4, 1946); *W. D. Clack*, A-24517 (December 12, 1947).

Therefore, by virtue of the authority delegated to me by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the decision of the Bureau of Land Management with respect to the appraisal of lot 106 is affirmed, and the case is remanded for further proceedings in accordance with this decision.

MASTIN G. WHITE,
Solicitor.

NICK G. KRITSAS

A-24708

*Decided January 22, 1948***Oil and Gas Leases—Preference Right Under Section 20 of Mineral Leasing Act.**

Where land had been withdrawn as mineral land before it was patented and the United States retained the mineral rights in patenting the land, the owner of the surface has no preference right to a mineral lease under section 20 of the Mineral Leasing Act.

Where land was patented under the Stock-Raising Homestead Act, which reserved the minerals to the United States, the owner of the surface has no preference right to a mineral lease under section 20 of the Mineral Leasing Act.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On May 10, 1946, Mr. Nick G. Kritsas filed two applications, Denver 054035 and 054036, for oil and gas leases on certain lands in Tps. 1 and 2 N., Rs. 101 and 102 W., 6th P. M., Colorado. His applications were rejected by the Bureau of Land Management, and Kritsas has appealed.

It appears that the appellant is the owner of the surface of the lands involved in the applications; that the Government, in disposing of the surface of these lands, retained the mineral rights; and that, with respect to the several tracts covered by the Kritsas applications, the Department, prior to the receipt of these applications, either had issued oil and gas leases to other persons or had received from other persons oil and gas lease applications which were awaiting consideration.

In his appeal, Kritsas contends that, as he owns the surface of the lands, he is entitled to preference-right leases under section 20 of the act of February 25, 1920 (41 Stat. 437, 445; 30 U. S. C. sec. 229), and that the outstanding oil and gas leases on these lands are invalid because the lessees, in making their applications for leases, failed to serve on him notices of such applications, as required under 43 CFR 192.44 (1940 ed.).¹

The provision of law relied upon by the appellant declares that—

In the case of lands bona fide entered as agricultural, *and not withdrawn or classified as mineral at the time of entry*, * * * the entryman or patentee, or assigns, * * * if the entry has been patented with the mineral right reserved, shall be entitled to a preference right to a permit and to a lease, * * * in case of discovery * * *. [30 U. S. C. sec. 229; italics supplied.]

¹43 CFR 192.44 (1940 ed.) has been superseded by Circ. 1624 of October 28, 1946, 43 CFR 192.70.

With respect to the tracts involved in the appellant's application, Denver 054035, it appears that these lands had been included within Petroleum Reserve No. 3 by an Executive order of July 2, 1910, prior to the original homestead entry on September 14, 1914, of John A. Stroud (Glenwood Springs 08505), through whom the appellant's title to the surface is derived; and that the lands were patented on December 17, 1920, with the oil and gas deposits reserved to the United States. The language quoted above from section 20 of the Mineral Leasing Act plainly states that no preference right to an oil and gas lease exists in favor of the surface owner where the patented lands had been "withdrawn or classified as mineral at the time of entry." The tracts involved in application, Denver 054035, are within this category.²

The appellant's title to the surface of the tracts involved in his application, Denver 054036, is derived from a patent that was issued pursuant to a stock-raising homestead entry (Glenwood Springs 016881) under the act of December 29, 1916 (39 Stat. 862, 864; 43 U. S. C. sec. 291 *et seq.*). This statute provides that "All entries made and patents issued * * * shall be subject to and contain a reservation to the United States of all the * * * minerals in the lands so entered and patented * * *." (43 U. S. C. sec. 299.) Because of the statutory reservation of the minerals in these lands, the Department has consistently taken the position that such lands are to be regarded as having been "withdrawn or classified as mineral at the time of entry," and has held that an entryman or patentee of land under the Stock-Raising Homestead Act does not have a preference to an oil or gas lease under section 20 of the Mineral Leasing Act.³

As the appellant, with respect to the tracts involved in these applications, has no preference right to leases under section 20 of the Mineral Leasing Act, it is unnecessary to consider his contention that the existing leases are invalid because of the failure of the lessees to serve on him, as the owner of the surface, the notices required under the regulations.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the decisions dated July 22, 1947, and August 22, 1947, of the Bureau of Land Management are affirmed.

MARTIN G. WHITE,
Solicitor.

² *T. A. Wann*, 52 L. D. 63 (1927); *Schneider v. Forster*, 49 L. D. 610 (1923).

³ Digest of Decisions and Opinions in Connection with the Administration of the Act of February 25, 1920, as Applied to Oil and Gas, 47 L. D. 463, 465, 468-469 (1920); *Charles R. Haupt*, 47 L. D. 588, 589 (1920); *Tieck v. McNeil*, 48 L. D. 158, 159 (1921).

PROGRAM STAFF—OFFICE OF THE SECRETARY

Authority of the Secretary—Organizational Action—Appropriation Laws.

The Secretary has the statutory authority to appoint, within the limitation of available funds, such employees as he deems necessary, and to organize these employees into such groups (denominated as "bureaus," "divisions," etc.) as he deems to be appropriate.

It is not necessary that a group or agency within a department be created by statute. Such groups or agencies may validly be created by administrative action of the head of the department for the purpose of performing, under his supervision, or assisting him to perform any function vested in him by law.

An appropriation for salaries and other expenses of subdivisions of a department which has been created by the valid exercise of the executive power vested in the head of such department is an appropriation for purposes authorized by law.

M-35024

JANUARY 23, 1948.

TO THE DIRECTOR, PROGRAM STAFF.

This is in reply to your memorandum dated January 14, 1948, requesting a statement concerning the legal authority for the establishment of the Program Staff in the Office of the Secretary.

The Program Staff was established in the Office of the Secretary by Order No. 2394, dated December 16, 1947, "in order to enable the Secretary more effectively to discharge his responsibility for formulating, recommending and executing policies and programs within the jurisdiction of the Department." The Program Staff was "authorized to examine all policies and programs of the Department with the objective of ascertaining that (a) they are integrated and internally consistent; (b) they constitute a full utilization of the Department's powers for carrying out the responsibilities of the Department; (c) they are appropriately related to the programs and policies of other agencies of government; and (d) they are in proper context with the current and prospective needs of the national economy." Based upon the results of these examinations, the Staff "will make such recommendations to the Secretary as will assist him in the performance of his responsibility."

The scope of the powers and responsibilities of the Secretary of the Interior is indicated by section 485 of Title 5, United States Code, which enumerates 13 Government agencies and major fields of governmental activity as being subject to the Secretary's supervision.

It is well settled that public officers not only have the powers that are expressly conferred on them by law, but they also possess, by necessary implication, such additional powers as are requisite to enable them to discharge the duties placed upon them. (27 Op. Atty. Gen. 432, 436.)

Moreover, section 161 of the Revised Statutes (5 U. S. C. sec. 22) expressly authorizes the head of each department to make provision for "the distribution and performance of its business * * *."

Within the limitation of the funds made available for the employment of personnel, the head of a department is authorized to establish such positions and appoint such employees as may be necessary to perform, under his supervision, or to assist him in performing the functions that are vested in him or in the department by law. (Revised Statutes, sec. 169; 5 U. S. C. sec. 43.) In the language of the Attorney General (39 Op. Atty. Gen. 541, 546), "The theory underlying the vesting in an executive officer of numerous duties, varying in importance, is not that he will personally perform all of them, but rather that he will see to it that they are performed, the responsibility being his and he being chargeable with the result."

It is not necessary that a group of employees to whom the head of a department desires to assign the duty of performing or of assisting him in the performance of functions vested in him or in the department shall have a formal organized status created by a statute. The head of the department can organize the group and designate it as a "bureau" or as a "division" or by some other organizational name (e. g., "Program Staff"). There are numerous examples throughout the Government of such groups established by administrative rather than legislative action. A striking example along this line in the Department of the Interior is the Bureau of Reclamation, which had its origin in administrative action by the Secretary of the Interior. In support of this principle that the head of a department may establish bureaus and other organizational units to perform under his supervision or to assist him in performing functions vested in the head of the department or in the department, see 27 Op. Atty. Gen. 300; 1 Lawrence Comp. Dec. 1, 8.

Under the legal authorities discussed above, it is clear that the Secretary of the Interior was authorized to establish a Program Staff to assist him in performing the supervisory functions vested in him by law. Hence, an appropriation by the Congress to defray the expenses of the Program Staff in the conduct of the work assigned to it by the Secretary would be an appropriation for purposes authorized by law.

MASTIN G. WHITE,
Solicitor.

LEGAL QUESTIONS ARISING OUT OF STOPPAGE OF WORK ON FRIANT-KERN CANAL

Contracts—Exhaustion of Funds—Termination—Adjustments—Extension of Time.

Contracts for construction work made by the Bureau of Reclamation were not automatically terminated by the exhaustion of funds appropriated for the work covered by the contracts.

When the Government announced that funds would be exhausted and that any work performed thereafter would be done at the contractors' risk, the contractors had a power to rescind their contracts. The power to rescind ceased to exist when the contractors failed to exercise it before they were notified by the Bureau of Reclamation that funds had again become available for earnings under the contracts.

Since the stoppage of work under the contracts did not result from "changes in the drawings and/or specifications," but, rather, resulted from the exhaustion of funds appropriated by Congress for the making of payments under the contracts, no equitable adjustment for the cost resulting from the stoppage may be made by the Department under article 3 (Standard Form No. 23) of the respective contracts.

The purpose of article 4 (Standard Form No. 23) of the respective contracts is to provide a procedure under which the Government may alter the contracts in order to meet unanticipated physical conditions. Since no such conditions were involved here, article 4 does not permit the Department to grant any administrative relief to the contractors.

The delays caused by the exhaustion of funds resulted from "unforeseeable * * * acts of the Government" within the meaning of article 9 (Standard Form No. 23) of the respective contracts, and the contractors, therefore, are entitled to extensions of time under that article.

CA-22

JANUARY 28, 1948.

TO THE COMMISSIONER, BUREAU OF RECLAMATION.

There are before me requests for my views on several basic questions that have arisen because the funds appropriated for the construction of the Friant-Kern Canal, Bureau of Reclamation, Central Valley project, California, became exhausted on November 30, 1947, and no additional funds were made available for this project until the enactment of the Third Supplemental Appropriation Act, 1948 (61 Stat. 941), on December 23, 1947. The requests are in the form of purported "appeals" by contractors under five contracts covering construction of the canal from "decisions" by the contracting officer with respect to matters connected with the stoppages of work that resulted from the exhaustion of funds previously mentioned. A conference, at which representatives of the contractors concerned presented their views, was held in my office on January 13, 1948. As the questions presented concern matters of law, I shall state my views in an opinion to you, rather than in a decision upon the so-called appeals.

The contracts concerned were all made by the Bureau of Reclamation prior to the fiscal year 1948. They are Contract No. I2r-16144, with Arizona-Nevada Constructors, Dinuba, California, dated June 6, 1946; Contract No. I2r-16141, with Morrison-Knudsen Company, Inc., and M. H. Hasler, Fresno, California, dated June 6, 1946; Contract No. I2r-15788, with Peter Kiewit Sons' Co., Omaha, Nebraska, dated March 9, 1946; Contract No. I2r-15878, also with Peter Kiewit Sons' Co., dated April 8, 1946; and Contract No. I2r-15803, with Bechtel Corporation, San Francisco, California, dated March 6, 1946. All these contracts are on Standard Form No. 23.

Paragraph 11 of the specifications attached to each contract (the specifications are expressly made a part of the contract) states:

Failure of Congress to appropriate funds. If the operations of this contract extend beyond the current fiscal year, it is understood that the contract is made contingent upon Congress making the necessary appropriation for expenditures thereunder after such current year has expired. In case such appropriation as may be necessary to carry out this contract is not made, the contractor hereby releases the Government from all liability due to the failure of Congress to make such appropriation.

This provision was inserted under the authority of section 12 of the Reclamation Project Act of 1939 (43 U. S. C. sec. 388), which reads as follows:

When appropriations have been made for the commencement or continuation of construction or operation and maintenance of any project, the Secretary may, in connection with such construction or operation and maintenance, enter into contracts for miscellaneous services, for materials and supplies, as well as for construction, which may cover such periods of time as the Secretary may consider necessary but in which the liability of the United States shall be contingent upon appropriations being made therefor.

On November 26, 1947, the Construction Engineer and Authorized Representative of the Contracting Officer, in a letter to each contractor, called attention to the fact that the contracts were "made contingent on the necessary appropriations being made for expenditures thereunder," and then stated:

These contracts make the Government's liability thereunder contingent on there being made the necessary appropriations for expenditures thereunder. Unless the status of funds available for this fiscal year shall hereafter change, it is our best estimate in the light of the information available to us at this time that funds available for payments under your contract will be exhausted by about November 30, 1947. Work performed under these contracts involving earnings beyond the funds available for payment thereof necessarily will be at the contractor's risk. You will, of course, be advised promptly in the event of there being made available funds in addition to those now available for contract payments in this fiscal year.

Subsequent developments in connection with the several contractors are indicated below.

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ARIZONA-NEVADA CONSTRUCTORS

The Arizona-Nevada Constructors, on December 5, 1947, wrote that it was in disagreement with the Bureau's position as to the contingent nature of the Government's obligation; that the limited amount of work which it had performed since receiving the notice of November 26 had been carried on at the suggestion of the Government for the preservation of the existing work; and that—

* * * In no case, should our action be construed as a waiver to the Government's conduct nor an election to exercise any particular remedy to which we are entitled.

The contractor then stated that, if it were "obligated to again resume work under our contract," it requested "an equitable adjustment in prices for the increased costs occasioned and an extension of time for the additional time required by the Government's action."

On December 16, the Bureau made the following statement of its position in a letter to the contractor:

* * * It is the view of the Bureau that your contract does not automatically terminate upon exhaustion of funds but that the parties are not obliged to proceed under the contract until additional funds are made available by Congress for the resumption of work. Upon that event you will be expected to resume work under your contract. Any decision as to how you will proceed at the present time must of necessity be made by you in the light of the Bureau's position.

In a letter dated December 20, 1947, the contractor outlined its position at length.* The contractor stated that it protested and "appealed" to the Secretary of the Interior from the "decision" of the contracting officer contained in the Bureau's letter of December 16. It then wrote, in part:

* * * We are now standing by with plant, machinery, equipment and inventories of a value of approximately \$1,800,000. The contract contemplates continuous performance of work. There is no provision in the contract permitting a stoppage of work. * * * If it had been contemplated that the contractor should stand-by awaiting appropriations, the contract would have so provided with the term of duration for such stand-by and the contractor would have made his bid price accordingly. The contract does not say that performance of the work is contingent—it says the contract is *made* contingent. * * *

The contingency occurred whether Congress failed for one day, one month, one year, or forever. We have been told that the funds were exhausted, that further performance of work would be at our own risk, and that no voucher would be honored for work performed subsequent to November 30, 1947. * * *

It is therefore very clear that the contract intent of the parties was that the obligation to perform work would only continue until such time as the con-

*As Arizona-Nevada Constructors, Morrison-Knudsen Company, Inc., and Peter Klewit Sons' Co., were all represented by the same counsel, who advanced virtually the same theories in behalf of his three clients, the contents of this letter will be noted in some detail.

ticiency occurred, namely, the exhaustion of funds. This interpretation is confirmed by the provision that the contractor releases the Government from all liability for failure of Congress to appropriate funds.

The contractor requested—

an immediate decision by the Contracting Officer and the head of the Department of the following questions:

1. Are we entitled to an immediate acceptance of and full payment for all work performed?
2. Are we obligated to resume work and complete the uncompleted portion thereof in the event of funds becoming available?
3. Was the exhaustion of funds in this manner foreseen, or was it one of the unforeseen contingencies contemplated by Article 4 of the contract?
4. Are we entitled, in the event we are required to resume and complete the uncompleted portion of said work, to an equitable adjustment in contract prices and an extension of time to cover the increased cost and additional time required by reason of the stoppage of work?

The contractor also requested an opportunity to present its views to the Secretary or his authorized representative at an informal conference.

On December 26, 1947, the Bureau wrote as follows to all the contractors:

In previous correspondence concerning the availability of funds for the payment of contract earnings during the fiscal year 1948 under your above numbered contract, we advised that should there be any change in the status of such funds, as then indicated, we would notify you promptly. I am glad to be able to advise you that additional funds are now available for that purpose as provided by the Third Supplemental Appropriation Act, 1948.

On December 30, 1947, Arizona-Nevada Constructors wrote a letter to the Contracting Officer and requested that it be treated as a supplemental "appeal" to the prior "appeal" of December 20. In this letter, the contractor stated, in part:

If it be your intention to require that we now proceed with the work, we request the immediate issuance of a change order, bearing the written approval of the Head of the Department and making an equitable adjustment in price and time in conformity with Article 3 and Article 4 of our contract.

* * * * *

We stand ready to comply with any order that may be properly authorized and issued under the terms of our original contract for this work. We protest and appeal to the Secretary of the Interior from any order, either direct or by implication to the effect that we are obligated to stand the expense of the present shut-down and are required to resume work without the immediate issuance of a proper change order making an equitable adjustment in our contract price and time for the completion of the work.

The contractor also requested answers from the Department to the two following additional questions:

1. What assurance have you to offer that necessary funds are now available?
2. Are we still to proceed at our own risk as instructed by your letter of November 26, 1947?

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MORRISON-KNUDSEN COMPANY, INC., AND M. H. HASLER

The first communication to the Bureau from this contractor, after the receipt of the Bureau's letter of November 26, was dated December 5, 1947. It stated, in part, as follows:

Without waiving our rights for recovery of damages sustained due to suspension of the work, we hereby notify the government that we will consider the contract terminated, if funds are not made available for continuance of the work within a reasonable period of time subsequent to November 30, 1947.

On December 23, after Morrison-Knudsen had received the Bureau's letter of December 16 stating that the Bureau did not consider the contract to have been terminated automatically because funds had become exhausted, this contractor stated its position in detail. This letter used language almost identical with that dated December 20, 1947, from Arizona-Nevada Constructors, and it requested the decision of the Department on the same four questions.

On December 30, 1947, Morrison-Knudsen replied to the Bureau's letter of December 26 stating that funds were again available for the payment of earnings under the contract for the fiscal year 1948. This communication of December 30 from Morrison-Knudsen was identical with that written to the Bureau on the same date by Arizona-Nevada Constructors. Accordingly, it will be unnecessary to describe the letter further than to quote a single sentence—

We stand ready to comply with any order that may be properly authorized and issued under the terms of our original contract for this work.

PETER KIEWIT SONS' Co.

On December 5, 1947, this contractor protested "the instructions of the Contracting Officer as contained in his letter to us of the 26th," and then wrote: .

We believe the above-described action of the Contracting Officer, and our resulting stoppage of work, is not within the provisions of our contract and specifications for this contract, and that our contract has been terminated.

In the event that at some later date it is legally determined that our contract has not been terminated, we request this protest be considered our request for an equitable adjustment of our contract to provide for extension of time and adjustment in contract price to cover our increased costs and time for performance made necessary by the action of the Contracting Officer.

On December 8, 1947, the contractor inquired of the Bureau whether it should hold the "Company-owned plant, equipment, materials, supplies, crews and supervisory personnel * * * at the site on the possibility that we may at a later date be required and directed to resume work under this contract," or whether it should "attempt to mitigate incurred costs and losses to be incurred by immediately removing said plant, equipment, materials, supplies, crews, and supervisory personnel, for use elsewhere."

On December 17, the Bureau responded by stating its legal position in the same language as that employed in its letters to Arizona-Nevada Constructors and Morrison-Knudsen, namely, that the contract had not automatically terminated, but that the parties were not obliged to proceed under it until additional funds should be made available by Congress for the resumption of work.

On December 20, 1947, this contractor also stated its position in a letter to the Bureau which was almost identical in language with those written by Arizona-Nevada Constructors and Morrison-Knudsen Company and which requested the decision of the Department on the same four questions. The only other letter from Kiewit in the file is the contractor's formal acknowledgment to the Bureau of the latter's communication of December 26 concerning the availability of additional funds.

BECHTEL CORPORATION

This contractor on December 4, 1947, acknowledged the Bureau's letter of November 26 concerning the exhaustion of funds by stating that it considered the measures that it was compelled to take in order to protect its property during the shut-down as extra work, for which it expected additional compensation. It then wrote:

* * * we consider your stated failure or refusal to continue to pay for the performance of work under our contract as unwarranted and a breach by the Government of the contract. It is our thought that the extent of the damages resulting from the action of the Government can best be minimized by an immediate conference to effectuate the termination of our contract, and an amicable adjustment of the damages and additional costs thereby occasioned to us * * *

On December 23, in response to the statement of the legal position of the Bureau contained in its letter of December 16, the contractor requested an answer from the Department to the two following questions:

1. Is it the Government's position that the above-numbered contract was not terminated by the exhaustion of funds?
2. Will the contractor be required to return to work upon notification that additional funds are available?

On December 30, 1947, after the contractor had received the Bureau's letter of December 26 informing it that "additional funds are now available," Bechtel requested instructions from the Bureau as to whether the letter of December 26 was "intended as an order that we proceed with the work under the * * * contract?" If so, the contractor requested "that a proper change order * * * be issued and that such change order include proper and equitable adjustments in prices and time for completion * * *." The contractor requested also "a definite assurance and commitment from

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you of the amount of money now available for payment for work performed by us in the event we are required to recommence operations, such commitment to demonstrate that we will be paid in full for all work required to be performed under the above contract during the fiscal year 1948."

1. The first legal question is whether the Bureau's identical letters of November 26 served to put the several contractors on notice that the respective contracts would terminate under their own terms on November 30, when funds for payments to the contractors would become exhausted.

It will be noted in connection with this point that paragraph 11 of the specifications, previously quoted, is addressed solely to the liability of the Government in the event that Congress should fail to appropriate funds for the continuation of operations under the respective contracts after the first year. It does not provide that the contract shall terminate upon a failure by the Congress to appropriate sufficient funds.

In *Dineen v. United States*, 71 F. Supp. 742 (Ct. Cl., 1947), where the Government had informed a contractor who was engaged in highway construction for the National Park Service that further monthly progress payments could not be made because of the exhaustion of funds, had subsequently authorized the contractor to suspend work, and had thereafter called on the contractor to complete the work under the contract after funds for that purpose were made available by Congress, it was held that neither the exhaustion of funds nor the suspension order which followed automatically terminated the contract.

The decision of the Comptroller General (B-72020) dated January 9, 1948, and addressed to the Secretary of the Interior, with respect to the consequences of the exhaustion on November 30, 1947, of appropriated funds for earnings under Bureau of Reclamation contracts, indicates clearly that, in the opinion of the Comptroller General, these contracts did not necessarily come to an end on the date mentioned. In the view of the Comptroller General, a hiatus existed, "at least in the liability of the United States," from the time when the appropriated funds became exhausted until the enactment of a supplemental appropriation statute providing funds for further payments on work covered by the Bureau of Reclamation contracts. This hiatus ended when the supplemental funds became available and the contractors were informed of that fact.

The following decisions of the Court of Claims support the view taken in the *Dineen* case and in the Comptroller General's decision of January 9, 1948, with regard to the point now under considera-

tion: *Schuler & McDonald, Inc. v. United States*, 85 Ct. Cl. 631 (1937); *William T. Joplin v. United States*, 89 Ct. Cl. 345 (1939).

In the light of these authorities, it seems clear that the Bureau of Reclamation contracts which are the subjects of this memorandum did not terminate automatically on November 30, 1947, as a result of the exhaustion of the funds appropriated for the work covered by such contracts.

2. As it has been concluded that the several contracts did not terminate automatically on November 30, 1947, the next question to be considered concerns the nature of the legal relations which existed between the parties subsequent to that date.

Decisions of the Court of Claims indicate that the inability of the Government to make further payments under contracts such as those involved here places it in a vulnerable legal position with respect to the other contracting parties. Thus in *Schuler & McDonald, Inc. v. United States*, *supra*, where the Government caused work to be suspended under a contract because of the exhaustion of the applicable appropriation, the court held squarely that the Government had breached its contract. This idea of breach by the Government was carried over into the first opinion in *William T. Joplin v. United States*, *supra*, wherein the Government "about October 8, 1928, in effect, directed the plaintiffs to cease operations until further notice * * * unless they were willing to finance the work themselves." In a supplemental opinion, however, the Court of Claims stated (89 Ct. Cl. at pp. 362-363) that—

* * * In the opinion heretofore filed it was stated that this [action by the Government] constituted a breach of the contract on the part of the defendant. This statement was too broad for the reason that the action of the defendant violated none of the express provisions of the contract. * * * When the defendant announced that it would stop making payments in accordance with the terms of the contract, the plaintiffs could have abandoned the project and sued on a *quantum meruit* for the work done and for damages. * * *

This second statement by the Court of Claims in the *Joplin* case seems to describe accurately the legal relations existing between the Government and the several Bureau of Reclamation contractors subsequent to November 30, 1947, and prior to the receipt by the contractors of the identical letters of December 26, 1947, from the Bureau stating that funds for further earnings under the contracts had become available. After the Government announced that funds would be exhausted on November 30 and that any work performed thereafter would be done at the contractor's risk insofar as compensation was concerned, it would be unreasonable either to require a contractor to continue with performance after November 30 or to require that the contractor stand by in readiness for an indefinite period because of the possibility that at some future time funds might once more

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become available. On the contrary, it seems that during the period in question each of the contractors possessed a power of rescission which, if it had been exercised, would have terminated the contract and would have enabled the contractor to recover for the work previously performed and for the damages suffered as a result of the action of the Government.

There is nothing in the record before me to indicate that any of the four contractors exercised this power of rescission.

In its letter of December 5, 1947, to the Bureau of Reclamation, Arizona-Nevada Constructors stated that its communication should not be construed as "an election to exercise any particular remedy to which we are entitled." This same contractor's lengthy letter of December 20, 1947, consisted principally of an argument that the contract terminated under its own terms when funds were no longer available to finance the work covered by the contract, and of the request for the views of the Department on the legal position of the contractor.

In its letter of December 5, 1947, Morrison-Knudsen Company, Inc., and M. H. Hasler stated that "we will consider the contract terminated, if funds are not made available for continuance of the work within a reasonable period of time subsequent to November 30, 1947." The Morrison-Knudsen letter of December 23 to the Bureau was virtually identical with the letter of December 20 from Arizona-Nevada Constructors.

On December 5, 1947, Peter Kiewit Sons' Co. informed the Bureau that while it believed "that our contract has been terminated," nevertheless, "in the event that at some later date it is legally determined that our contract has not been terminated, we request this protest be considered our request for an equitable adjustment." Three days later, this contractor asked the Bureau whether it should hold its equipment and personnel at the site "on the possibility that we may at a later date be required and directed to resume work under this contract." Finally, the Kiewit letter, dated December 20, 1947, was virtually identical in language with the letter of the same date from Arizona-Nevada Constructors.

The Bechtel Corporation, on December 4, stated to the Bureau that it considered the Government's "failure or refusal to continue to pay for the performance of work under our contract as unwarranted and a breach by the Government of the contract," and the contractor requested a conference at which it might discuss the termination of its contract. While this statement by Bechtel at first glance might indicate an intention to rescind, on December 23 this same contractor asked the Bureau whether it would "be required to return to work upon notification that additional funds are available?"

There is no evidence that any of the contractors made any statement or took any action which clearly gave the Government notice of an intention permanently to abandon work on the Friant-Kern project. Therefore, it is my conclusion that none of the four contractors took the positive unilateral action necessary to constitute a valid exercise of the power of rescission.

When the contractors were notified by the Bureau's identical letters of December 26 that funds had become available for the payment of contract earnings, the power of rescission which the contractors had possessed since November 30 ceased to exist. There are two reasons for this conclusion.

In the first place, even if one of the parties to a contract has repudiated it (an act of greater significance legally than that of the Government in the instant case), the repudiation may be withdrawn unless the other party has, before the withdrawal, either manifested an election to rescind the contract or has in some other manner changed his legal position in reliance on the repudiation. See *Nilson v. Morse*, 52 Wis. 240, 9 N. W. 1 (1881); *Rayburn v. Comstock*, 80 Mich. 448, 45 N. W. 378 (1890); *Johnson v. Wright*, 175 Minn. 236, 220 N. W. 946 (1928). *A fortiori*, it is clear that the Bureau of Reclamation, by sending its letters of December 26, cut off the possibility of any change in the legal relations of the parties which might have followed its letter of November 26 and the exhaustion of appropriations on November 30 if any of the contractors had acted in a timely manner to effect such a change.

In the second place, the contractors failed to exercise their power of rescission within a reasonable time after learning of the condition of the appropriations and, accordingly, they forfeited the power. Williston, *Contracts* (Revised ed.) 1937, sec. 1469. The contractors had almost a month (from November 30 until the receipt of the letters of December 26) during which they might have exercised their power of rescission. This period constituted a reasonable time within which to make an election to rescind. The Government thereafter was in a position to perform its obligations, and the contractors were informed of that fact and of the Government's expectation that they would resume work under the contracts.

Therefore, it is my opinion that each of the contractors became obligated, upon receiving the Bureau's communication of December 26, to resume work under its contract.

3. The next question that arises is whether the Department can properly grant to each of the contractors an equitable adjustment under article 3 of the contract or a modification of the contract under article 4 to cover the additional expenses occasioned because of the suspension of the work as a result of the Government's failure to provide the funds necessary for continuous operations.

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Article 3 of each contract authorizes the contracting officer to "make changes in the drawings and/or specifications of this contract," and provides that "If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly * * *." The language of this article plainly indicates that it does not provide a means whereby relief may be granted administratively to the Bureau of Reclamation contractors with respect to the additional expenses occasioned by the work stoppages. This is because the work stoppages did not result from "changes in the drawings and/or specifications," but, rather, resulted from the exhaustion of the funds appropriated by Congress for the making of payments under these and other contracts of the Bureau of Reclamation. Hence, article 3 of the respective contracts is irrelevant to the situation with which we are dealing in this memorandum. See *Diamond v. United States*, 98 Ct. Cl. 543, 551 (1943).

Article 4 of each contract also fails to provide a means whereby relief may be granted administratively by this Department to the contractors in connection with the added expenses resulting from the work stoppages due to exhaustion of funds. This article provides that if, during the progress of the work, the contractor encounters or the Government discovers "subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications," the contract may be "modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions." The purpose of article 4 is to provide a procedure under which the Government may alter the contract in order to meet unanticipated physical conditions. *United States v. Rice*, 317 U. S. 61, 66 (1942); *The Arundel Corporation v. United States*, 103 Ct. Cl. 688 (1945), *certiorari denied* 326 U. S. 752 (1945); *Breyman v. United States*, 106 Ct. Cl. 367 (1946); *Ottinger Bros. Construction Co.*, 3 CCF 489, 491 (War Department BCA No. 977, 1945); *Trapp-Carroll Company*, 1 CCF 328, 330, 331 (War Department BCA No. 142, 1943). The problem before us did not arise because unanticipated physical conditions were encountered or discovered in connection with the work under any of the contracts. Instead, as previously indicated, the situation developed solely because of the inability of the Bureau of Reclamation to make progress payments to the contractors over a period of approximately 1 month.

Therefore, article 4 is of no assistance in considering the matter of administrative relief to the contractors.

4. Another pertinent question is whether the contractors may be granted by administrative action extensions of the time prescribed in the respective contracts for the completion of the work under such contracts.

It is clear, in my opinion, that each contractor is entitled to an appropriate extension of time, and that the extension may be granted by administrative action. Article 9 of each contract provides, among other things, that the contractor shall not be chargeable with "any delays in the completion of the work due to unforeseeable causes * * * including * * * acts of the Government * * *"; and that the time for completing the work under the contract may be extended by administrative action when such delays occur. As this language was drafted by representatives of the Government, its scope should be liberally construed for the benefit of the other party to the contract. Accordingly, I conclude that the phrase "acts of the Government" should be broadly construed to include any exercise of power or "determination of will, producing an effect in the sensible world," by an agency, officer, or employee representing the Government. (See the definition of the noun "act" in Webster's New International Dictionary, 2d ed., Unabridged.) When viewed from this standpoint, the action of the Government in providing for the fiscal year 1948 funds inadequate in amount to finance the operations contemplated for that year under the contracts between the Bureau of Reclamation and the contractors whose situations are under consideration in this memorandum, and the notifications which were given to the contractors by the Bureau of Reclamation in the identical letters dated November 26, 1947, were "acts of the Government" causing delays in the completion of the work under the several contracts, within the meaning of article 9 of each contract.

It is also my view that such "acts of the Government" were "unforeseeable," in the legal sense. That is to say, enforced work stoppages under long-term Bureau of Reclamation contracts due to exhaustion of funds are not of such frequent occurrence as to be a part of the common experience of persons who deal with the Bureau and, hence, to be reasonably anticipated as a likely contingency. In fact, I am informed that the work stoppages in the autumn of 1947 were the first that ever became necessary on account of exhaustion of funds in the entire history of the Bureau of Reclamation. The inclusion in these contracts of a provision relating to the liability of the Government for damages in the event that Congress might fail to provide funds for the completion of the work does not mean that such a contingency was reasonably expected by the persons who signed the contract as likely to occur.

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Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (43 CFR 4.24; 12 F. R. 8424), I direct the contracting officer to notify each of these contractors that the contractor is granted a period of 10 days from the date of the receipt of such notification within which to submit a formal application for an extension of time under article 9 of the applicable contract with respect to the delay caused by the acts of the Government discussed in this memorandum.

5. Apart from the extension of time referred to above in part 4 of this memorandum, it appears that no relief can be granted to these contractors by administrative officials of the Government. Whatever claims the contractors may have against the Government by virtue of increases in costs occasioned by the exhaustion of funds and the necessary stoppages of work are in the nature of claims for unliquidated damages. It is the general rule that officers and employees of the executive branch of the Government are without authority to entertain and settle claims against the United States for unliquidated damages arising in connection with Government contracts. *Wm. Cramp & Sons v. United States*, 216 U. S. 494, 500 (1910); *Arthur W. Langevin v. United States*, 100 Ct. Cl. 15, 31 (1943).

Hence, the possibility of making these contractors whole with respect to their added costs resulting from the exhaustion of funds and the work stoppages would seem to depend upon congressional action in their behalf, or perhaps upon the successful outcome of proceedings instituted by them in the Court of Claims. If the contractors and the Bureau of Reclamation could agree regarding the amounts of the increased costs which were incurred by the contractors as a consequence of the exhaustion of funds and the resulting work stoppages, it would not be inappropriate, in my judgment, to join the contractors in a request that Congress relieve the contractors with respect to such amounts.

MASTIN G. WHITE,
Solicitor.

**ESTATE OF LUCY THOMPSON, DECEASED YUROK OR LOWER
KLAMATH RIVER INDIAN**

A-24696

Decided February 9, 1948

Indian Laws—Descent and Distribution—Act of June 25, 1910 (36 Stat. 855)—Secretary of the Interior—State Court Judgments—Evidence.

The determination and settlement of all questions or controversies concerning the heirship to restricted allotted lands is vested solely in the Secretary of the Interior by the act of June 25, 1910 (36 Stat. 855), and the Secretary's jurisdiction over those matters accordingly is regarded as exclusive and universal.

As a necessary part of the Secretary's complete jurisdiction in matters of this kind, he has the power to ascertain and determine the status of persons who are claiming as heirs, and in making that determination he is not controlled or bound by decrees or orders entered by the State courts.

An adjudication of birth by a State court is not conclusive, but constitutes a part of the evidentiary material to be considered in determining the status of an individual who claims to be an heir to restricted Indian land.

APPEAL FROM THE BUREAU OF INDIAN AFFAIRS

On June 16, 1942, Edgar Warren Wolford submitted his petition, together with supporting papers, to reopen the heirship case of Lucy Thompson, a deceased member of the Yurok or Lower Klamath River Tribe of Indians, under the jurisdiction of the Hoopa Valley Agency in California. The Department had determined, on October 28, 1935, that Loleta Thompson, an adopted daughter of the decedent, was entitled to inherit her restricted estate.¹ The decedent also owned unrestricted property which was probated in the Superior Court of Humboldt County, California.²

The petitioner's request for a reopening was predicated upon an adjudication of his birth as it was established in the Superior Court of Humboldt County, California, during the year 1941.³ On June 26, 1942, the Department reopened the heirship proceeding and directed that further hearings be had to ascertain whether the petitioner was entitled to share in the estate as the decedent's son. Notice of the taking of further testimony was given by the Examiner of Inheritance, and further hearings were held in September 1945. The petitioner and a number of other witnesses testified at those hearings. On July 16, 1947, the original decision of the Department, finding Loleta Thompson to be the sole heir of the decedent, was affirmed by the Acting Commissioner of Indian Affairs. The present appeal followed that determination.

Petitioner relies primarily upon the order of the Superior Court of Humboldt County as constituting a conclusive determination of his birth and parentage. The examiner reports that no written record apparently was made of the evidence adduced at that proceeding.⁴ One of the papers presented by the petitioner is a document certified by the State registrar to be a true copy of the "original certificate of

¹ The decedent was unallotted, but her restricted estate consists of inherited interests in lands which were allotted to Indians on the Hoopa Valley Reservation in California. Those lands are still held in trust and are subject to the administrative control of the Department.

² A copy of the probate decree covering the unrestricted estate was not furnished, but the record indicates that Loleta Thompson, the adopted daughter of the decedent, was also found to be the beneficiary of the unrestricted property.

³ A copy of the certificate of birth established by the State court refers to the mother of the petitioner as Che-Na-Wa-Weitch-Ah-Wah; the alleged Indian name of Lucy Thompson.

⁴ It is reported that the substance of the proof upon which the decree was entered may be found in the affidavits and papers submitted by the petitioner in support of his claim.

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birth as established in the Superior Court of Humboldt County." Such a judicial proceeding appears to be authorized by the California law.⁵ The State statute contains a requirement⁶ that the court's order shall be made in the form and upon the blank prescribed and furnished by the State registrar.⁷ While full compliance with the statute necessarily includes the naming of the child's parents, nevertheless, it seems that the primary purpose of the judicial proceeding in question is to establish a record of the fact and the time and place of the birth of an individual, and that the exact identity of the parents is incidental to the basic objective sought.

Aside from any force or effect which the order of the State court and the local vital statistics records may have in this matter, this Department is free, nevertheless, to conduct an independent investigation of all of the facts to ascertain the heirs of a deceased Indian owning restricted property. The Secretary of the Interior is directed, under such rules as he may prescribe, to ascertain the legal heirs of Indians owning interests in restricted allotments, "and his decision thereon shall be final and conclusive."⁸ The determination and settlement of all questions or controversies concerning the heirship to such restricted lands is vested solely in the Secretary of the Interior, and his jurisdiction over these matters accordingly has been regarded as exclusive and universal.⁹ As a necessary part of the Secretary's exercise of complete jurisdiction in matters of this kind, he has the power to ascertain and determine the status of persons who are claiming as heirs, and in making that determination he is not controlled or bound by decrees or orders entered by the State courts.¹⁰

While it appears, therefore, that an investigation of all of the available facts can be made to determine the status of an individual who is claiming to be an heir to an Indian's restricted estate, nevertheless, the Acting Commissioner of Indian Affairs and the Examiner of Inheritance properly considered the State court proceeding as a part of the evidentiary material produced in support of the petitioner's claim. The function of the Secretary at this time is to ascertain whether the decisions of those officials, that the petitioner failed to establish a right to share in the estate, are supported by the entire record.

⁵ California Codes (Deering, 1939), sec. 10600 *et seq.*, as amended, California Code (Deering, Supp., 1941).

⁶ California Code (Deering, 1939), sec. 10606.

⁷ See sec. 10200 of the California Code.

⁸ Section 1, act of June 25, 1910 (36 Stat. 855; 25 U. S. C. sec. 372).

⁹ *First Moon v. White Tail and United States*, 270 U. S. 243 (1926); *Hallowell v. Commons*, 239 U. S. 506 (1916); *Bertrand v. Doyle*, 36 F. (2d) 351 (1929); *Bond v. United States*, 181 Fed. 613 (1910); *Spicer v. Coon*, 110 Okla. 233, 238 Pac. 833 (1925).

¹⁰ *Lane v. United States ex rel. Mickadiet*, 241 U. S. 201 (1916); *Cf. Mickadiet v. Payne*, 269 Fed. 194 (1920); See departmental rulings dated April 12, 1930 (53 I. D. 78, 83, 89), and September 26, 1913 (42 L. D. 493).

It would seem that the action to establish the birth of the petitioner in the State court was not strictly an adversary proceeding, particularly after Victor Zampatti, an attorney and the administrator of the unrestricted estate of Lucy Thompson, had withdrawn his original objection to the establishment of the petitioner's birth. It will be noted that the condition upon which the administrator withdrew his objection was that the petitioner relinquish all claim to the estate of Lucy Thompson. The superior court apparently had determined prior to the agreement or stipulation between the parties that the petitioner was not the son of Lucy Thompson.¹¹ It would appear, therefore, that the proof apparently available to the administrator in support of his initial objection to the adjudication of birth would have defeated the petitioner's claim had the stipulation in question, including the withdrawal of the objection by the administrator, not been executed.¹²

The affidavits submitted by petitioner are not convincing insofar as they attempt to show that the Indian servant employed in the Wolford home, who is alleged to have given birth to a child while so employed, was actually Lucy Thompson, the present decedent. The assertion that the Indian servant in question had tribal tattoo marks on her chin is not persuasive, in view of the examiner's statement that chin tattooing is a common custom and is widely practiced among the Indian women of the community in which Lucy Thompson lived. Furthermore, the statement that Lucy Thompson was employed or "worked out" as a servant girl is refuted by the testimony of elderly Indians who were well acquainted with the decedent over a period of many years. Those witnesses, including Victor Zampatti, who had also assisted Lucy Thompson in various business dealings during her lifetime, testified to the effect that Lucy had no children.¹³ Finally, it should be noted that the testimony taken at the original hearing on the estate likewise fails to disclose any indica-

¹¹ See the testimony of Victor Zampatti, "I appeared and objected to the proceedings and * * * after the court rendered its decision against Mr. Wolford at the time, then Mr. Wolford and Mr. Dorman [petitioner's attorney] came to me and asked me that if I withdrew my objections they would sign a stipulation, or rather Mr. Wolford would sign a stipulation that he would release and relinquish any right, title or interest in the estate of Lucy Thompson and to any Indian claims, and so with that promise we prepared the stipulation and signed." (P. 10.) "The consideration was that I would withdraw my objection so that he [Edgar W. Wolford] could establish his birth, and until that time the court had rendered the opinion that he was not the son of Lucy Thompson" and the court would have held that opinion if I had not withdrawn my objection, and when there was no one there to present any objection why I understand the court signed an order that he was the son of Lucy Thompson." (P. 14.)

¹² See Victor Zampatti's testimony (p. 11) where he stated that he had proved to his "own satisfaction that he [petitioner] was not the son of Lucy Thompson."

¹³ See the testimony of Victor Zampatti (p. 13), Dora Thompson (pp. 17, 18), Charley Stevens (p. 19).

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tion that Lucy Thompson may have had a child; in fact, the witnesses at that hearing stated that she never had issue.¹⁴

An examination and analysis of all of the facts and circumstances impels this Department to conclude that the decisions of the Acting Commissioner of Indian Affairs and the Examiner of Inheritance are fully supported by the proof in the entire record on the present case. The Acting Commissioner's decision of July 16, 1947, denying the claim of the petitioner, is accordingly affirmed.

WILLIAM E. WARNE,
Assistant Secretary.

STATE OF LOUISIANA

A-24618 *Decided February 18, 1948*

Swampland Selection—Validity of Previous Survey.

A swampland-selection application filed by the State of Louisiana for a long and relatively narrow strip of land purportedly existing between the record meander line and the existing shore line of Moss Lake and Calcasieu River was correctly rejected where the land bounded by the meander line, as shown on the plat of a previous survey, had been patented to the State under the swampland laws some 95 years ago, since the State had not made a sufficient showing that the survey was fraudulent or so grossly in error as to constitute a fraudulent survey.

Secretary of the Interior—Determination Whether Lands Are Vacant Public Lands.

The Secretary of the Interior is under a duty to determine whether lands applied for are vacant public lands and subject to disposal, or whether they have been previously reserved, granted, or sold. Pursuant to such determination, he may order a resurvey of lands believed to be public lands. But the record in this case does not indicate an adequate basis upon which the Secretary could properly determine that the lands applied for were public lands which should be resurveyed and disposed of as public lands.

Survey—Boundary Lines of Watercourses—Meander Lines.

Generally, a meander line of a watercourse is designed only to show the sinuosity of a stream or body of water; the water line itself, not the meander line, constitutes the boundary line. Although the meander line may constitute the boundary where there has been fraud or such gross error as amounts to fraud, such fraud or gross negligence is not proven by merely showing the omission of some land from a survey. The burden of proving the survey to be fraudulent or so grossly erroneous as to amount to a fraud is upon the person who seeks so to categorize the survey.

¹⁴ See, particularly, the statement of Allen Thompson, the stepson of the decedent, who lived with Lucy Thompson for 21 years from the time he was 4 years old, and who appears to have been taken into the home of Lucy Thompson and her husband about the year 1834.

Cases Followed.

United States v. Lane, 260 U. S. 662 (1923).

Cases Distinguished.

Jeems Bayou Club v. United States, 260 U. S. 561 (1923); *Security Land & Exploration Co. v. Burns*, 193 U. S. 167 (1904); *French-Glenn Live Stock Co. v. Springer*, 185 U. S. 47 (1902); *Niles v. Cedar Point Club*, 175 U. S. 300 (1899); *Horne v. Smith*, 159 U. S. 40 (1895).

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On November 18, 1946, the State of Louisiana filed a swampland-selection list (B. L. M. 011778) under the acts of March 2, 1849 (9 Stat. 352), and September 28, 1850 (9 Stat. 519).¹ The lands which the State seeks to obtain were described as follows in the selection list:

That part of Section 6 lying between the traverse shown on survey by John P. Parsons and Calcasieu River and Moss Lake, containing an estimated area of 104 acres;

That part of Section 7 lying between the traverse shown on survey by John P. Parsons and Moss Lake, containing an estimated area of 227 acres;

That part of Section 18 lying between the traverse shown by John P. Parsons and the Calcasieu River, containing an estimated area of 16 acres;

All in Township 11 South, Range 9 West, Louisiana Meridian, in accordance with plat of survey by F. Shutts' Sons, C. E., November 6, 1946.

The area of the above lands calculated by planimeter.

Accompanying the selection list were a report and a map of the area prepared for the State land office by F. Shutts' Sons, Civil Engineers, of Lake Charles, Louisiana, concerning the survey and area in T. 11 S., R. 9 W., Louisiana Meridian. That map purports to show a long, narrow strip of land lying within secs. 6, 7, and 18, between the record meander line and the existing shore line of Moss Lake and Calcasieu River, on the east side of the lake and river but west of the east meander line shown on the 1883 Parsons survey of these sections in this township. The tabulation on the Shutts map shows the acreage of this strip of land as 350.75 acres² in relation to the meander line of the Parsons survey plat of 1883 and as 172.76 acres in relation to the meander line of the Williams survey plat of 1884. The Shutts report (p. 9) describes the present character of the land as follows:

All of the lands within Section 7 (excepting a small point of high land on the East line), Section 18, and the area between the front of Sections 6, 7, and 18, and the shore line of Moss Lake and Calcasieu River (excepting a small point of high land near the South line of Section 6 and a small area of high land at the North end of this area), are tidal marsh land subject to overflow and unfit for cultivation, having an average elevation of about one foot above sea level.

¹ The general provisions of these acts were carried into Rev. Stat. sec. 2479; 43 U. S. C. sec. 932 *et seq.* See, also, *Work v. Louisiana*, 269 U. S. 250, 252 (1925). Compare act of February 19, 1925 (43 Stat. 951; 43 U. S. C. sec. 993).

² Although the Shutts map tabulated 350.75 acres as the amount of land allegedly unsurveyed, the State's application was for a total of 347 acres.

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The township in which the lands here involved are situated was first surveyed in 1833 by Deputy Surveyor H. T. Williams, and the plat of his survey was approved on September 3, 1834.

On December 7, 1850, the State of Louisiana filed a swampland-selection list for the following lands in secs. 6, 7, and 18, among other lands:

Section	Subdivision	Total acreage
6-----	Lots 7, 8, 9, 10, 11, and 12-----	257. 31
7-----	All-----	412. 92
18-----	All-----	541. 22

On May 5, 1852, this Department approved the State's selection of all these lands except lot 8 in sec. 6, and lots 10 and 11 in sec. 18. Thus, the State received, among other lands, all of the following lands which it had selected:

Section	Subdivision	Total acreage
6-----	Lots 7, 9, 10, 11, and 12-----	212. 78
7-----	All-----	412. 92
18-----	Lots 1 to 9, and 12 to 14, inclusive---	480. 68

In 1883, the entire township was resurveyed by Surveyor John P. Parsons, and the plat of his survey was approved on June 23, 1883.

In its decision of February 13, 1947, the Bureau of Land Management rejected the State's present swampland selection, holding that the land for which the State now seeks a patent is not public land because it passed to the State of Louisiana some 95 years ago under the State's swampland selection approved by this Department on May 5, 1852. The Bureau stated that although the Shutts map "shows that the Parsons resurvey of the meander lines is located some 10 chains to the east of the original Williams meanders of the Calcasieu River and Moss Lake," the Parsons field notes show that Parsons, identifying certain corners, closely approximated the record of the Williams survey. Hence, the Bureau concluded that the Williams and Parsons surveys of the section lines were identical in position. On this basis, and on the basis of the representations in the Shutts map and report, the Bureau also concluded that the strip of land now sought by the State (excluding about 20 acres of lake bed filled with spoil) contains about 190 acres lying in front of secs. 6, 7, and 18, is about 155 chains (10,230 feet, or nearly 2 miles) long, and

has a maximum depth of 24 chains (1,584 feet) and an average depth of 15 chains (990 feet). The Bureau pointed out that Williams had meandered the river and lake in this area without establishing intermediate meander corners, and that (with the exception of the eastern part of the line between sections 18 and 19) he had run only the outer boundaries of the various sections through which the meanders ran, without running the section lines in the field. It was the Bureau's view that Williams, in effect, had surveyed these sections as one tract containing approximately 3,000 acres, with respect to which the 190 acres of alleged omitted land represented an error of only about 6 $\frac{1}{2}$ percent of the entire tract. The Bureau then applied the rule of *United States v. Lane*, 260 U. S. 662 (1923), that—

Lots patented under the public land laws according to a plat showing them bordering on a lake, extend to the water as a boundary and embrace pieces of land found between it and the meander line of the survey, where the failure to include such pieces within the meander was not due to fraud or mistake but was consistent with a reasonably accurate survey, considering the areas included and excluded, the difficulty of surveying them when the survey was made and their value at that time.

The State has appealed (A-24618) and, pursuant to the Department's requirements, has served copies of its appeal and brief on the Louisiana Farm and Live Stock Company, which the records of Calcasieu Parish show to be the owner of the lots to which the alleged excess lands are attached (lots 7, 10, and 11 of sec. 6, lots 2, 3, 7, and 8 of sec. 7, and lot 3 of sec. 18, T. 11 S., R. 9 W., Louisiana M.). Photostat copies of the record were furnished to attorneys who stated that they represented parties interested in this case and who, after reviewing the record, wrote to the Department that they would rely on the Bureau's decision without filing an answer or brief.

In its appeal, the State urges that the 1852 swamp-land-selection approval did not pass to the State the title to the lands now selected by the State. The State contends, first, that the correct acreage of the excess area is not 190 acres, as stated by the Bureau, but 237.15 acres, as shown by exhibits prepared by F. Shutts' Sons which place the Williams meander line of the east shore of Calcasieu River and Moss Lake in red ink on the map some 10 chains to the east of where the Williams meander line was previously marked on the Shutts map, so as to conform the Williams meander with the section lines and corners established by the Parsons survey. The State further contends that the Bureau should not have calculated the proportion of the excess acreage on the basis of the approximately 3,000 acres in the entire area whose outer boundaries only had been run by Williams in his 1833 survey, but should instead have calculated the proportion of the excess acreage on the basis of the total acreage of only the particular lots to which the excess would be added, or, in the alternative, on the

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basis only of the particular sections (6, 7, and 18) in which the alleged excess occurs. The first method, says the State, would show an excess of 68 percent; the second method an excess of 56 percent. With this amount of excess, says the State, the Bureau should have held that the original survey³ was fraudulent or so grossly erroneous as to constitute, in effect, a fraud on the Government and, therefore, that the meander line, not the water line, should be considered as the boundary to the land which passed to the State in 1852; and thus the land to the west of the meander line would constitute unsurveyed land which was never selected by or patented to the State and may be selected now. The State cites, in support of its contentions, the following decisions:

Jeems Bayou Club v. United States, 260 U. S. 561 (1923); *Security Land & Exploration Co. v. Burns*, 193 U. S. 167 (1904); *French-Glenn Live Stock Co. v. Springer*, 185 U. S. 47 (1902); *Niles v. Cedar Point Club*, 175 U. S. 300 (1899); *Horne v. Smith*, 159 U. S. 40 (1895).

Implicit in the State's application and appeal, and in the Bureau's decision, is the assumption that the lands alleged to be excess acreage, i. e., lying to the west of the east traverse line of Calcasieu River and Moss Lake, were in existence in 1833 and 1883 when the Williams and Parsons surveys were made. The Shutts report, in fact, alleges that the shore line in 1911, when Frank Shutts surveyed the east shore of Moss Lake, was the same as it is now, except the south half mile of the lake which was in 1923 and 1924 extended westward some 200 feet by the deposit of spoil; and that several trees along the shore line indicated, by their tree rings, that they were in existence in 1833. The Shutts report appears to be inconsistent in these matters. The trees were allegedly found along the shore at traverse points 22 to 26, inclusive; yet these points are along the shore of the south half mile of the lake the shore of which was extended by the deposit of spoil in 1923 and 1924.

The Bureau's decision made no findings as to the age of the land. And for the purpose of this appeal, we shall assume, as did the Bureau, (a) that the present shore line of the land now claimed by the State was in existence in 1833 and 1883; (b) that the different lines represented by the Williams meander line, the Parsons meander line, and the present shore line were not due to any accretion to, or erosion

³ The State's contentions also necessarily impugn the validity, not of the Williams survey alone, but of both the Williams and Parsons surveys along the east meander lines of Lake Moss and Calcasieu River. The Parsons survey had shown the meander slightly to the east of the Williams meanders of the river and lake. The State contends, in effect, that both of these surveys of this low-lying marshland were fraudulent along the meander lines in not showing the existence of more than 230 acres of land to the west. Yet the State finds no fault with the Parsons survey, and practically no fault with the Williams survey, with respect to the entire township and section lines.

of, the shore line; and (c) that the land, as stated in the Shutts report, is "tidal marshland subject to overflow and unfit for cultivation, having an average elevation of about one foot above sea level."

The State is erroneous in assuming that the Parsons survey of 1883 has any bearing on the question as to what land the State received in 1852. The Parsons survey was not in existence when the State's selection list was approved in 1852. Only the 1833 Williams survey has any relevancy to the 1852 selection approval. No resurvey by the United States could alter the title which the State received under the 1852 approval, based on the Williams survey. The title received by the State must be judged on the basis of the facts as they were in 1849, the effective date of the swampland act, including the 1833 survey, not on the basis of the facts or survey of 1883 or at present.⁴

Nor does the State show a proper basis for asserting that the Bureau was wrong in computing the excess acreage, on the basis of the Shutts map and report, as 190 acres, and that the correct acreage is 237.15. First, the State's figure of 237.15 includes, whereas the Bureau excluded, the approximately 20 acres said to be added to the shore by deposit of spoil; second, the State furnishes no basis for the precision of the red line drawn on exhibit A of its appeal, the second map drawn by Shutts, which demarcates the supposed position of the Williams meander in relation to the present shore line. That line must necessarily be based on an estimate only, since the east-west section lines, on the basis of which the supposed red meander line was drawn, were protracted lines. And if that meander line were to be shifted westward, obviously the acreage of the alleged excess strip of land lying to the west would be diminished. Certainly, there does not appear any basis for the exactitude of acreage, in terms of hundredths of an acre, as is shown on the Shutts map. The Bureau's figure of 190 acres was itself an estimate based on the facts supplied in the Shutts map and report. That figure might actually be less or greater. But the State has not demonstrated that the Bureau was wrong, or that the excess land contains exactly 237.15 acres.

The State also contends that the Bureau should have calculated the proportion of the excess acreage not on the basis of the 3,000 acres within the section lines surveyed by Williams in this area, but on the basis of the acreage of the lots to which the excess would be added, or on the basis of the acreage of the sections in which the excess acreage lies. Such computations, on the basis of 190 acres rather than

⁴ *Lindsey v. Hawes*, 2 Black (67 U. S.) 554 (1862); *Gleason v. White*, 199 U. S. 54 (1905); *Gazzam v. Lessee of Elam Phillips*, 20 How. (61 U. S.) 372 (1857), overruling *Brown's Lessee v. Clements*, 3 How. (44 U. S.) 650 (1845); *Frank P. Ryan*, 13 L. D. 219 (1891); *Carlos C. Burr*, 15 L. D. 395 (1892); *Hiram Brown*, 13 L. D. 392 (1891); *Edward N. Marsh*, 5 L. D. 96 (1886); *D. J. Shlenker* (F-510, 1911-115331), August 7, 1911 (unreported); *Cragin v. Powell*, 128 U. S. 691 (1888); Secretary's Instructions of June 20, 1946 (M-33711).

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the figure of 237.15 acres used by the State, would result in percentages of excess less than those mentioned in the State's appeal. It is, however, unnecessary to pass upon the propriety of the Bureau's calculation of percentage in this instance. Even if the State's suggested methods of calculation were adopted, the resulting percentages would not alone be determinative of the basic issue whether the surveys of Williams and Parsons were fraudulent or so grossly in error, with regard to the running of the meander lines of Lake Moss and Calcasieu River, as to constitute their surveys in that area a fraud upon the Government and require the Government to treat the meander line, rather than the water line, as a line of boundary.

The Secretary of the Interior is authorized, and is under a duty, to determine whether lands applied for are vacant public lands and subject to disposal, or whether they have been previously reserved, granted, or sold.⁵ Pursuant to such determination, the Secretary may order a resurvey of lands believed to be public lands.⁶ But the facts now in the record as to the land here involved and the Williams survey, in the light of the decisions of the Supreme Court in other somewhat similar cases, do not indicate an adequate basis upon which the Secretary could properly determine that the lands applied for are public lands which should be resurveyed and disposed of as public lands.⁷

The general rule is that a meander line of a watercourse is designed only to measure the sinuosity of the stream or body of water; the water line itself, not the meander line, constitutes the boundary line.⁸ This rule is subject to the exception that where there has been fraud, or such gross error as amounts to fraud, in the survey, the meander line may constitute the boundary.⁹ The surveys of the United States are presumed correct, and he who seeks to categorize a survey as fraudulent or so grossly erroneous as to amount to fraud has the burden of

⁵ *Litchfield v. Register and Receiver*, 9 Wall. (76 U. S.) 575, 577 (1869); *Knight v. United States Land Association*, 142 U. S. 161, 177-178 (1891); *Kirwan v. Murphy*, 189 U. S. 35, 53 (1903); *Carrick v. Lamar*, 116 U. S. 423 (1886).

⁶ *New Orleans v. Paine*, 147 U. S. 261 (1893); *Gardner v. Bonestell*, 180 U. S. 362 (1901); *Cragin v. Powell*, 128 U. S. 691, 698-699 (1888); *Scott v. Lattig*, 227 U. S. 229 (1913); *Moss v. Ramey*, 239 U. S. 538 (1916); *Otto F. Henneke*, A-24240, June 11, 1946 (unreported); *O. O. Cooper*, A-24208, October 28, 1946 (unreported); *Kirwan v. Murphy*, 189 U. S. 35, 53, 54 (1903).

⁷ *Cragin v. Powell*, 128 U. S. 691 (1888).

⁸ *Railroad Company v. Schurmeir*, 7 Wall. (74 U. S.) 272, 286-287 (1868); *Hardin v. Jordan*, 140 U. S. 371, 380 (1891); *Mitchell v. Smale*, 140 U. S. 406, 412-413 (1891); *Jefferis v. East Omaha Land Co.*, 134 U. S. 178, 194 (1890); *United States v. Lane*, 260 U. S. 662 (1923); *Whitaker v. McBride*, 197 U. S. 510, 512 (1905); *Horne v. Smith*, 159 U. S. 40, 42 (1895); *Producers Oil Co. v. Hanzen*, 238 U. S. 325, 339 (1915); *Kean v. Calumet Canal and Improvement Co.*, 190 U. S. 452, 459 (1903).

⁹ *Jeems Bayou Club v. United States*, 260 U. S. 561 (1923); *Security Land & Exploration Co. v. Burns*, 193 U. S. 167 (1904); *French-Glenn Live Stock Co. v. Springer*, 185 U. S. 47 (1902); *Niles v. Cedar Point Club*, 175 U. S. 300 (1899); *Horne v. Smith*, 159 U. S. 40 (1895).

proving the validity of such charges. But fraud or gross negligence is not proven merely by showing the omission of some land from a survey, or by showing the existence of land beyond the meander line of a watercourse. From *Newsom v. Pryor's Lessee*,¹⁰ through *Mitchell v. Smale*,¹¹ to *United States v. Lane*,¹² the Supreme Court has recognized that in the early days much land was not considered to be worth the trouble of a minutely exact survey. The degree of precise particularity required in the survey must necessarily be evaluated in the light of the character and value of the lands, the difficulties and time of survey, the remoteness of the lands, the intention manifested in the survey, and the general degree of accuracy attained.¹³ It may be noted that the earliest official printed Manual of Instructions to the surveyors of the public lands, issued in 1855, about 22 years after the Williams survey, allowed for errors of up to 3 chains and 50 links (231 feet) in the closing of township lines, and of up to 1 chain and 50 links (99 feet) in closing meanders *within each fractional section*.¹⁴

The land here involved, which we assume has never shifted, is said to be only 1 foot above sea level, marshy, unfit for cultivation. Certainly, in 1833 its value was negligible. The marshy character of the land, if land it was, precluded the precision, under the circumstances, of a perfect survey. The alleged excess acreage does not consist of markedly distinct bodies of land with unusual configuration, but is merely a crescent-shaped apparent excess of land beyond the surveyed meander line, similar to that involved in *United States v. Lane*, 260 U. S. 662 (1923). In fact, the crescent-shaped alleged excess here is even narrower, proportionately, than the crescent-shaped excess in the *Lane* case, which the Supreme Court described as having a "length of * * * nearly 4,000 feet and * * * extreme width about 1,200 feet."¹⁵ As in the *Lane* case, the excess acreage here does not extend beyond the sections of land to which the alleged excess is attached. The plat of survey, and the field notes, quite plainly indicate that the intention was to run the meander so as to indicate the shore line, not to constitute the meander as a boundary line separate from the shore line. Both in the *Lane* case and here, the meander line throughout its length approximately conformed to the sinuosities of the shore.

¹⁰ 7 Wheat. (20 U. S.) 7 (1822).

¹¹ 140 U. S. 406 (1891).

¹² 260 U. S. 662 (1923).

¹³ *United States v. Lane*, 260 U. S. 662 (1923).

¹⁴ Manual of Instructions to the Surveyors General of Public Lands (1855), pages 21, 24. The present Manual of Instructions for the Survey of the Public Lands of the United States (1947), page 238, permits much smaller maximum errors of closure—as low as 8 links for valuable lands and 25 links (16½ feet) for extremely rough, mountainous lands. Errors of closure on the type of land here involved would not be permitted in excess of 16 links (about 10½ feet). The greater precision of modern instruments permits much more accurate surveying than was possible 114 years ago.

¹⁵ 260 U. S. 662, 666. The official plats actually show that tract to be about 4,800 feet in length, with an area of 97.64 acres.

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The combination of these various considerations indicates that a fully adequate basis has not yet been shown for reversing the Bureau's decision in refusing to depart from the general rule that the water line of a meandered watercourse, not the meander line, is the boundary line of the land adjoining the watercourse. This case, like the *Lane* case, is one where "the lands were of such little value, the locality so wild and remote, and the attendant difficulties so great that the expenditure of energy and money necessary to run the lines with minute regard to the sinuosities of the lake would have been quite out of proportion to the gain." (260 U. S. 662, 665.) And there it was held "that the waters of the lake and not the traverse line constitute the boundary." (260 U. S. 662, 667.) See also *Mitchell v. Smale*, 140 U. S. 406, 413 (1891).

The present case is quite different from the five cases cited by the State. In *Jeems Bayou Club v. United States*, 260 U. S. 561 (1923), more than 500 acres of compact and well-timbered upland were omitted between a supposititious peninsula and a lake shore line. The omitted land extended into four sections, whereas the claimants to the omitted land claimed under a patent to a tract in one section. The actual shore line was from several hundred feet to three-quarters of a mile from the outside boundary of the land so patented. The Supreme Court pointed out that the peninsular-shaped tract was described "not by lines purporting to meander the margin of any body of water but by courses and distances. There is nothing in the field notes to indicate a water boundary * * * the facts conclusively show that no body of water existed or exists at or near the place indicated on the plat * * * there never was, in fact, an attempt to survey the land in controversy." (At pages 563-564.)

In *Security Land & Exploration Co. v. Burns*, 193 U. S. 167 (1904), the surveyor had run only the exterior township lines, not the inner section lines; yet he showed over 1,000 acres of high tillable land as being under a lake. His field notes were plainly fictitious, and no lake existed within half a mile to a mile from the fictitious meanders. The patentee of only 140.87 acres was claiming 571 acres, and the omitted land was almost entirely in other sections than described in the patent of the claimant. The Supreme Court pointed out, "in truth the survey as a whole was a fraud." (At p. 180.)

In *French-Glenn Live Stock Co. v. Springer*, 185 U. S. 47 (1902), the jury had found "that there never was a lake in front of the said lots." (At pp. 50-51.) The Supreme Court held that the defendant in the case was not precluded from submitting evidence "to show that there was not, at the time of the survey nor since, any such lake, and to contend that, in such a state of facts, there could be no intervening

land and no accretion by reliction" under the law of the State of Oregon. (At p. 54.)

In *Niles v. Cedar Point Club*, 175 U. S. 300 (1899), the surveyor stopped his surveys at "flag marsh," which intervened between the meander line and Lake Erie, and the intention not to include this intervening land in the survey clearly appeared from the field notes and plat of the survey. The meander line was thus treated as a line of boundary limiting the amount of land, which passed under a patent, to the amount specified in the patent and within the meander line.

Similarly, in *Horne v. Smith*, 159 U. S. 40 (1895), the surveyor obviously stopped his survey at a bayou, leaving the tract between the bayou and a river unsurveyed. The plaintiff was claiming over 700 acres under his patent calling for only 170 acres; there was from three-quarters of a mile to a mile and a quarter between the meander and the actual margin of the river; the bayou conformed substantially to the meander line of the Government survey; and the claimed land and river line were in sections other than the patented lots and the meander line.

So far as the present record is concerned, there has been insufficient basis shown for treating the Williams survey as fraudulent or so grossly in error as to constitute a fraud. In the absence of such a showing, this case is governed by the general rule that the water line, not the meander line, is the boundary of a surveyed watercourse. The decision of the Bureau is affirmed.

C. GIRARD DAVIDSON,
Assistant Secretary.

LEASING OF LAND IN SHENANDOAH NATIONAL PARK TO BOY SCOUTS OF AMERICA

National Parks—Leases—Accommodation of Visitors.

The statutory authority of the Secretary to lease park lands for the accommodation of visitors is not restricted to the issuance of leases to persons who propose to provide accommodations for the general public.

If the Secretary concludes, from the policy standpoint, that such action would be advisable, he can legally lease the President's Camp on the Rapidan in the Shenandoah National Park to the Boy Scouts of America for the use of members of that organization.

M-35026

MARCH 1, 1948.

TO ASSISTANT SECRETARY DAVIDSON.

You have referred to me the question whether the Department has the statutory authority to lease to the Boy Scouts of America, presumably for the use of members of that organization, the President's Camp on the Rapidan in the Shenandoah National Park.

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The pertinent statutory provision is section 3 of the act of August 25, 1916 (39 Stat. 535), as amended (16 U. S. C. sec. 3). This section authorizes the Secretary of the Interior to "grant privileges, leases, and permits for the use of land for the accommodation of visitors in the various parks, monuments, or other reservations herein provided for * * *"

The Department, in administering the statutory provision quoted above, has heretofore adopted a restrictive view concerning the scope of the phrase "for the accommodation of visitors," and has regarded this language as limiting the Secretary's authority to the issuance of leases, etc., to those persons who propose to furnish accommodations for the general public.¹

When the matter is viewed wholly from a legal standpoint, I do not regard it as necessary or wise for the Department to read into a statute which confers authority upon the Secretary of the Interior a limitation which the Congress has not imposed upon the exercise of the Secretary's discretion. If Congress had thought it advisable to restrict the issuance of leases, etc., under the language quoted above from section 3 to those persons who will commit themselves to provide accommodations for the general public, language to achieve this purpose could easily have been used. For example, the words "the general public" might have been substituted for the word "visitors." Although the Congress, in the enactment of the portion of section 3 quoted above, was undoubtedly concerned principally with the issuance of leases, etc., to concessioners desiring to serve the general public,² Congress did not use language evidencing any intention to restrict the Secretary's authority in this respect.

As Boy Scouts who go to the Shenandoah National Park are "visitors" to the park, the issuance of a lease "for the use of land for the accommodation of" such visitors would be within the statutory power of the Secretary, in my opinion, even though the lessee proposed to limit the clientele to members of the Boy Scouts of America. Accordingly, I conclude that the Secretary, if he believes that such action would be advisable from the standpoint of policy, can legally lease the President's Camp on the Rapidan in the Shenandoah National Park to the Boy Scouts of America under the provisions of section 3.

From the policy standpoint, however, serious consideration should be given to the problem of whether a lease of park property should be granted to any organization which proposes to provide accommodations only for its own members. Once a precedent of this sort has

¹ Letters: Secretary Work to Senator Nye (January 25, 1928); Secretary Wilbur to S. W. Cramer (November 16, 1929); Director of National Park Service to W. S. Wilson (December 16, 1929); to C. E. Clifford (March 3, 1931); to Victor H. Boyden (October 16, 1931); to O. H. Gunkler (October 9, 1946), and to George A. Creasey (February 3, 1947).

² H. Rept. 700, 64th Cong., 1st sess., p. 5, on H. R. 15522 (1916).

been established, it will be difficult to resist the importunities of other groups and individuals seeking to obtain park lands for their exclusive use. Yielding to such pressure might, in the end, convert the national parks into a congeries of private enclaves.

MASTIN G. WHITE,
Solicitor.

FOREST E. LEVERS

A-25203

Decided March 1, 1948

Oil and Gas Leases—Application—Airport Lease.

Where lands involved were included in an airport lease as of the time of filing of a rejected oil and gas lease application, petition for reinstatement of the application is denied since the airport lease did not constitute a "withdrawal," a portion of the lands involved is still covered by the airport lease, and the petition for reinstatement was not filed before the portion of lands no longer under the airport lease became open to filing by the general public (43 CFR 191.15).

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On March 2, 1944, Forest E. Levers filed an application for a non-competitive oil and gas lease (41 Stat. 443, as amended; 30 U. S. C. sec. 226), embracing, among other lands, the S $\frac{1}{2}$ sec. 3, the N $\frac{1}{2}$ NW $\frac{1}{4}$ and W $\frac{1}{2}$ NE $\frac{1}{4}$ sec. 10, and all of sec. 17, T. 17 S., R. 25 E., N. M. P. M., New Mexico. The register rejected the application as to these lands because the acreage was included in outstanding public airport leases (45 Stat. 728, as amended; 49 U. S. C. secs. 211-214) issued to the City of Artesia, New Mexico (Las Cruces 056921, 062743). The register allowed 30 days for an appeal to be taken from this rejection.

More than 3 years later, and after other persons had filed intervening applications for these lands, Mr. Levers appealed to the Director of the Bureau of Land Management, asserting that his application should have been merely suspended instead of rejected, and that the use of the lands for airport purposes had, in the meantime, been abandoned. The Director affirmed the decision of the register on the ground that one who fails to take a timely appeal must be held to have acquiesced in the decision and, therefore, is not entitled to assert any right to the prejudice of an intervening applicant. *Cummings, Jr. v. Johnson-Fenner and Mundi*, 52 L. D. 529, 531 (1928).

Mr. Levers has appealed from this decision of the Director of the Bureau of Land Management. He abandons the contention that the application originally should have been suspended rather than re-

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jected, and he now seeks to have his application reinstated on the basis of 43 CFR 191.15, which provides:

§ 191.15 *Reinstatement of rejected applications for lands restored from withdrawal or use for war purposes.* Hereafter, upon publication of a revocation of a withdrawal or of a use permit made or granted in connection with the prosecution of World War II, a mineral permit or lease applicant whose application was rejected solely because of the subsequent withdrawal of the land for use in connection with the prosecution of the war or because, either before or after the application was filed, a permit was granted to use the land for war purposes, may apply for and obtain a reinstatement of his application. If the application for reinstatement is for lands restored from a withdrawal it must be filed prior to the date fixed for the filing of applications by the general public; if for land affected by the revocation of permits, within 60 days from the date of publication of such revocation. No application for reinstatement will be considered unless it is timely filed and accompanied by the proper filing fee and the full amount of the first year's rental.

In the first place, the lands involved here were not the subject "of a withdrawal or of a use permit made or granted in connection with the prosecution of World War II." On the contrary, as of the time when Mr. Levers filed his application, these lands were under lease to a municipality for use as a public airport. The records do not indicate, nor does the appellant assert, that the leases were issued in connection with the prosecution of World War II. So far as these leases are concerned, the occurrence of World War II was completely coincidental.

In the second place, the lands in sec. 17 are still under lease to the city (Las Cruces 056921). Thus, even if 43 CFR 191.15 were applicable to a situation involving the termination of a lease that was issued for purposes other than the prosecution of World War II, it would not be pertinent as to the lands in sec. 17, because there has not yet been a termination of this lease.

In the third place, the airport lease covering lands in secs. 3 and 10 (Las Cruces 060732) was canceled on April 1, 1946, and such cancellation was noted on the tract book of the district land office on April 15, 1946. No further publication of the cancellation was required or customary. Therefore, on April 15, 1946, at the latest, the lands in these sections became open to filing by the general public. The appellant did not file his request for reinstatement until November 26, 1947, long beyond the period specified by 43 CFR 191.15. Moreover, his request was not accompanied by the filing fees and rentals, as the regulation requires. Consequently, the appellant would not be entitled to rely on this regulation even if it were applicable to the situation resulting from the cancellation of the airport lease on the lands in secs. 3 and 10.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the decision of the Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

ADMINISTRATION OF NATIVE AFFAIRS IN ALASKA

Delegation of Authority—Possessory Rights in Timberland—Extinguishment of Indian Title.

The Secretary of the Interior is authorized by the Indian Delegation Act to delegate to the Commissioner of Indian Affairs the Secretary's power concerning the approval under section 2103, Revised Statutes, of contracts between unorganized Indian tribes and attorneys.

As the Tongass Timber Act of August 8, 1947, vests in the Secretary of Agriculture the exclusive authority to make valid sales of timber growing in the Tongass National Forest, including timber growing on areas which are subject to Indian possessory rights, a native tribe or group which has "Indian title" or possessory rights with respect to an area of timberland within the exterior boundaries of that forest cannot legally sell such timber. The possessory rights of the natives of Alaska based upon aboriginal occupancy and use of lands were not extinguished by the treaty of cession between Russia and the United States under which Alaska was acquired by the United States.

M-35028

MARCH 4, 1948.

TO THE UNDER SECRETARY.

This responds to your oral request for an expression of opinion regarding several legal questions which pertain to the administration of native affairs in Alaska. As only one day is available for the preparation of this memorandum, my discussion of the several legal points, some of which are complex, will necessarily be less complete than would be desirable.

1. The first question is whether the Secretary is authorized to delegate to the Commissioner of Indian Affairs the power to approve contracts between attorneys and Indian tribes. In considering this question, it is necessary to distinguish between tribes which have organized and adopted constitutions under section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 987; 25 U. S. C. sec. 476), and between tribes which have not organized and adopted constitutions under the act. Insofar as the organized tribes are concerned, section 16 empowers such tribes "To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior * * *." The contracts of unorganized tribes with attorneys are subject to section 2103 of the Revised Statutes (25 U. S. C. sec. 81), which provides that every such contract shall "bear the

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approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it."

In an opinion dated January 22, 1946, my predecessor, Solicitor Gardner, held that the Secretary could delegate to the Commissioner of Indian Affairs the power to approve the contracts of organized tribes with attorneys, in view of section 161 of the Revised Statutes (5 U. S. C. sec. 22), authorizing "the head of each department * * * to prescribe regulations, not inconsistent with law, for the government of his department, * * * the distribution and performance of its business. * * *." However, Solicitor Gardner was of the opinion that the function of approving the contracts of unorganized tribes with attorneys could not be delegated by the Secretary of the Interior to the Commissioner of Indian Affairs, because section 2103 of the Revised Statutes refers to the dual approval of such contracts by the Secretary and the Commissioner. I believe that Mr. Gardner's conclusions were correct as of the time when they were expressed.

Subsequent to the date of Solicitor Gardner's opinion, Congress enacted the Indian Delegation Act of August 8, 1946 (60 Stat. 939; 25 U. S. C. A. sec. 1a), which authorizes the Secretary to delegate "to the extent * * * he deems proper, his powers and duties under said laws [governing Indian affairs] to the Commissioner of Indian Affairs, insofar as such powers and duties relate to action in individual cases arising under general regulations promulgated by the Secretary of the Interior pursuant to law, * * *." Thus, Congress broadened the authority of the Secretary of the Interior to delegate his powers and duties in the field of Indian affairs to the Commissioner of Indian Affairs. In using the phrase "to the extent * * * he deems proper," Congress made the scope of such delegations wholly discretionary with the Secretary, except for the limitations expressly imposed by Congress in the Indian Delegation Act upon the exercise of the Secretary's discretion. Those limitations are, (1) only powers and duties under "the laws governing Indian affairs" can be delegated to the Commissioner of Indian Affairs pursuant to the act; (2) such powers and duties can be delegated pursuant to the act only insofar as they "relate to action in individual cases arising under general regulations promulgated by the Secretary of the Interior pursuant to law"; and (3) powers delegated under the act are to be exercised "subject to appeal to the Secretary."

None of the statutory limitations upon the Secretary's authority to delegate mentioned in the preceding paragraph prohibits the Secretary, in my opinion, from delegating to the Commissioner of Indian Affairs the Secretary's function under section 2103 of the Revised Statutes with respect to the approval of contracts between unorgan-

ized Indian tribes and attorneys. Accordingly, I conclude that since August 8, 1946 (the date of the enactment of the Indian Delegation Act), the Secretary has been authorized to delegate to the Commissioner of Indian Affairs the Secretary's function under section 2103 of the Revised Statutes with respect to the approval of contracts between unorganized Indian tribes and attorneys, as well as his function under section 16 of the Indian Reorganization Act relative to the approval of contracts between organized Indian tribes and attorneys.

The act of June 19, 1935 (49 Stat. 388), authorizing the Tlingit and Haida Indians of Alaska to sue the United States, provides in section 3 for the employment of attorneys by the Indians "under contract approved by the Commissioner of Indian Affairs and the Secretary of the Interior." For the reasons which I have given in discussing the delegability of the Secretary's function of approving contracts under section 2103 of the Revised Statutes, I think it is clear that the Secretary has been authorized by the Indian Delegation Act to delegate to the Commissioner of Indian Affairs the Secretary's function in connection with the approval of the attorney contract contemplated by the act of June 19, 1935.

2. The second question is whether, assuming that a native tribe or group in southeastern Alaska has "Indian title" or possessory rights with respect to an area of timberland within the exterior boundaries of the Tongass National Forest, the tribe or group can legally sell the timber without the approval of the Secretary of the Interior.

It is my view that the native tribe or group in the hypothetical case put to me cannot, without securing a proper authorization from the Government, legally sell the timber growing upon the land which is subject to the possessory rights of the tribe or group. Whatever may have been the situation in this respect prior to August 8, 1947,¹ the power to make valid sales of timber growing in such an area is now vested exclusively in the Secretary of Agriculture.

In language too clear to be misunderstood, the Joint Resolution approved August 8, 1947 (61 Stat. 920), authorizes the Secretary of Agriculture to sell "timber growing on any vacant, unappropriated, and unpatented lands within the exterior boundaries of the Tongass National Forest in Alaska, notwithstanding any claim of possessory rights." The joint resolution also validates prior contracts, requires that the receipts from timber sales be impounded until the rights to the lands and timber are finally determined, and declares that the rights acquired by a purchaser under any contract made pursuant thereto shall be "free and clear of all claims based upon possessory rights." "Possessory rights," as used in the resolution, are defined to mean "all

¹ See *United States v. Cook*, 19 Wall. 591 (1873); cf. *Pine River Logging Co. v. United States*, 186 U. S. 279 (1902).

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rights, if any should exist, which are based upon aboriginal occupancy or title, or upon section 8 of the Act of May 17, 1884 (23 Stat. 24), section 14 of the Act of March 3, 1891 (26 Stat. 1095), or section 27 of the Act of June 6, 1900 (31 Stat. 321), whether claimed by native tribes, native villages, native individuals, or other persons, and which have not been confirmed by patent or court decision or included within any reservation."

The existence of unsettled claims of possessory rights by natives of Alaska had long been a formidable obstacle to the development of the vast timber resources of southeastern Alaska. The removal of this obstacle by vesting in the Secretary of Agriculture clear authority to make timber sales for the whole of the Tongass National Forest, including areas subject to possessory rights, thus assuring timber purchasers of valid title and paving the way to early timber development, was the controlling purpose of the joint resolution (see Hearings before Committee on Agriculture, House of Representatives, on H. J. Res. 205, 80th Cong., 1st sess. (1947)).

3. The third question which you have submitted is whether the possessory rights of the natives of Alaska based upon the aboriginal occupancy and use of Alaska lands were extinguished by the treaty of cession dated June 20, 1867 (15 Stat. 539), between Russia and the United States, under which Alaska was acquired by the United States.

I believe that the proper answer to this question is in the negative. I reach this conclusion notwithstanding the contrary statement that appears in the opinion which was announced by the United States Circuit Court of Appeals for the Ninth Circuit on February 11, 1947, in the case of *James Miller et al. v. United States*.² In that case, the precise question before the court was whether the appellants, who were Alaskan Indians, had set forth in their "answer and claim" allegations sufficient to show the existence of a compensable interest on their part in a small tract of land which was involved in a condemnation suit instituted by the Government in order to acquire the tract for a public use. The Government had demurred to the answer and claim, and the demurrer had been sustained by the trial court. The Circuit Court of Appeals reversed the judgment of the trial court. The appellate court held that allegations in the answer and claim indicating that the appellants and "their predecessors * * * in lineal consanguinity" had been in the exclusive possession of the land on May 17, 1884, and at all times subsequent to that date, were sufficient to show that the appellants had a compensable interest in the land, by virtue of section 8 of the act of May 17, 1884 (23 Stat. 24, 26). In the course of its opinion,

² 159 F. 2d 997. [Editor.]

the Circuit Court of Appeals made a statement to the effect that "whatever 'original Indian title' the Tlingit Indians may have had under Russian rule was extinguished by the treaty" of June 20, 1867. However, the court went on to hold, as previously stated, that the appellants could assert possessory rights under section 8 of the act of May 17, 1884, which declared that "the Indians or other persons" in Alaska "shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them * * *."

The view, in the nature of dictum, expressed by the United States Circuit Court of Appeals for the Ninth Circuit in the *Miller* case that the possessory rights of the Indians and other native groups in Alaska based upon aboriginal occupancy and use were extinguished by the treaty of cession is unsound, in my opinion. The pertinent provisions of the treaty of cession respecting Alaska upon which the court based its statement are very similar to the provisions covering the same subject matter in Article II of the Louisiana Cession Treaty (8 Stat. 200). It is clear that the aboriginal possessory rights of Indians to lands within the areas acquired from France in the Louisiana cession survived the cession and were not extinguished by the treaty. *United States v. Shoshone Tribe*, 304 U. S. 111 (1938); see *Chouteau v. Molony*, 16 How. 203 (1853); *Buttz v. Northern Pacific Railroad*, 119 U. S. 55 (1886).

That aboriginal possessory rights of the Indians within the area acquired by the United States under the Mexican Cession Treaty (9 Stat. 922) were not extinguished by the treaty is established by the decision of the Supreme Court in *United States v. Santa Fe Pacific R. R. Co.*, 314 U. S. 339 (1941). Also see *Mitchel v. United States*, 9 Pet. 711 (1835), dealing with the subject of aboriginal possessory rights in the area acquired by the United States from Spain in the Florida Cession Treaty (8 Stat. 252).

Therefore, I am confident that, if and when the question is submitted to the Supreme Court, it will hold that the possessory rights of native tribes or groups in Alaska based upon the aboriginal occupancy and use of lands in that Territory were not extinguished by the treaty of 1867.

4. The fourth question relates to the limitations imposed by statute or departmental regulation upon the activities of a former Associate Solicitor of this Department, in the matter of representing clients before this Department and other agencies of the Government.

The regulation of the Interior Department on this point is contained in 43 CFR, Cum. Supp., 1.6, and reads, in part, as follows:

No one who has held a position as an officer or a policy-making employee of the Department * * * may appear before it in a representative capacity within two years after the termination of such connection with the Department. Any other employee or individual who has held any place of trust or profit under

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the Department of the Interior * * * may not act in any matter before the Department or render any assistance with respect thereto within two years after the termination of such connection with the Department unless he obtains the prior approval of the Committee in each matter: * * *

The Committee on Practitioners (43 CFR, Cum. Supp., 1.3), with some exceptions not relevant here, administers all functions under the regulation. Any applicant for permission to practice before the Department who is disqualified by a final determination of the Committee may appeal to the Secretary. 43 CFR, Cum. Supp., 1.13.

The Associate Solicitor of the Department is not an "Officer of the United States" in the Constitutional sense (Art. II, Sec. 2, Cl. 2), because he is not appointed through the procedure of nomination by the President and confirmation by the Senate. Whether he should be regarded as "an officer or a policy-making employee," within the meaning of that phrase as used in 43 CFR 1.6, would be for the determination of the Committee on Practitioners or the Secretary on appeal.

With regard to former employees of the Department whose employment was not as "an officer or a policy-making employee," the principal standard used by the Committee on Practitioners in deciding whether to permit such former employees to appear before the Department during the 2-year period mentioned in the regulation is: Do the proposed appearances relate to matters which were handled by the applicants while employed in the Department or involve the use of information obtained in the course of performing official duties?

Under the provisions of section 190 of the Revised Statutes (5 U. S. C. sec. 99), it would be unlawful for any person formerly employed by this Department to prosecute or aid in the prosecution against the United States, within 2 years after his separation from the service, of any claim which was pending in any Department during his period of service. 20 Op. Atty. Gen. 695.

MASTIN G. WHITE,
Solicitor.

CONTINENTAL OIL COMPANY

A-24681

Decided March 12, 1948

Oil and Gas Leases—Contracts for Sale of Royalty Gas.

In order to protect the Government's interest in its royalty oil and gas, the Department may appropriately require, as a condition to the approval of fixed price contracts for the sale of oil and gas from its leased lands, running for more than 1 year, that such contracts be subject to certain requirements, including those concerning waste, taking royalty in kind, and the computation of royalties on the basis of a minimum price.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Continental Oil Company is the unit operator of the North McCallum Unit Area, Colorado, involving oil and gas lease, Denver 027442. On July 30, 1945, Continental, as seller, entered into an agreement with the Cardox Corporation, as buyer, covering the disposal of carbon dioxide gas separated from the oil produced from those lands. The agreement is for a term of 3 years, and is renewable under certain circumstances. Under the oil and gas operating regulations, such a contract required the approval of the supervisor "subject to any conditions, modification, or revocation that may be prescribed on review thereof by the Secretary." (30 CFR 221.13, 221.38.) Continental submitted the agreement to the supervisor on November 14, 1945, for his approval. On January 22, 1946, the supervisor approved the agreement "subject to the condition that nothing therein shall be construed as affecting any of the relations between the lessees and the Secretary of the Interior, and further subject to any conditions, modification, or revocation that may be prescribed on review thereof by the Secretary of the Interior."¹

Because the contract was for more than 1 year, the Commissioner of the General Land Office (now the Bureau of Land Management), pursuant to the standard policy of that agency, on March 7, 1946, directed Continental to execute the following stipulation:²

It is hereby agreed that the approval of the sales agreement shall be subject to the condition that nothing therein shall be construed as affecting any of the relations between the United States and its lessee, particularly in matters of gas waste, taking royalty in kind and the method of computing royalties due as based on a minimum price and in accordance with the terms and provisions of the oil and gas operating regulations applicable to the lands covered by said agreement.

On December 10, 1946, Continental was allowed additional time until January 1, 1947, in which to execute the stipulation or to appeal. Continental appealed.

Continental contends that there is nothing to prevent the Secretary from approving a sales contract providing for a fixed sales price.

¹ Such conditional approval of sales contracts by the supervisor under the Oil and Gas Operating Regulations has been the prescribed form of approval since January 28, 1937. (Instructions by Secretary, dated January 28, 1937, on Geological Survey memorandum of December 18, 1936.)

² This stipulation, with minor modification, is now the standard stipulation required under the regulations of January 23, 1947 (30 CFR 223.4, 12 F. R. 703, 704). The practice of requiring this type of stipulation grew out of the Department's efforts to protect the Government's interest by obtaining the highest price for its royalty oil and gas. See *Bell Oil & Gas Co.*, A-11591 (Guthrie 014098, May 14, 1928; motion for rehearing denied July 27, 1928), and *Bell Oil & Gas Co. v. Wilbur*, 50 F. (2d) 1070 (App. D. C., 1931). See also 43 CFR 192.82 (d).

March 12, 1948

This proposition is correct. The Secretary, of course, has authority to approve a fixed price sales contract without requiring a stipulation such as that involved in this appeal, and thus the royalties would be computed on the basis of the fixed contract price rather than upon a minimum price. On the other hand, the Secretary equally is authorized, in order to protect the Government's interest, to require the present stipulation as a condition to the approval of a sales contract.³

Continental's contention that the Department is estopped from requiring the stipulation because the General Land Office delayed for 4 months in notifying Continental of its requirement is without merit. The requirement was actually made only 1½ months after the date of the supervisor's conditional approval, which specifically indicated that his approval was "further subject to any conditions, modification, or revocation that may be prescribed on review." In any event, however, and aside from the traditional inapplicability of the doctrine of estoppel against the United States,⁴ the fact is, as indicated in Continental's appeal, that Continental knew of the existing procedure and was aware that the supervisor's conditional approval was subject to further modification. If Continental was opposed to executing a stipulation of this type, well known to it, Continental could have refrained from executing the agreement, pending the outcome of efforts to secure a commitment from the Department to approve a fixed price contract without such a stipulation. In the light of the supervisor's conditional approval, Continental cannot now urge that the commitments which it undertook in connection with the carbon dioxide gas agreement preclude the Department from requiring the stipulation.

The stipulation with respect to the computation of royalties due as based on a minimum price embodies the well-established policy of the Department to protect the Government's interest in its royalty oil and gas in connection with sales contracts running for periods longer than 1 year. There appears to be no merit in Continental's contention that such a stipulation is inequitable to the Company.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the decision of the Commissioner of the General Land Office (now the Bureau of Land Management) is affirmed.

MASTIN G. WHITE,

Solicitor.

³ See section 2 (d) of the lease; sections 1 and 5 of the unit agreement; *United States v. Ohio Oil Co.*, 163 F. (2d) 633, 640, 641 (C. C. A. 10th, 1947), *cert. denied* 333 U. S. 833 (1948).

⁴ *United States v. Ohio Oil Co.*, 163 F. (2d) 633, 641 (C. C. A. 10th, 1947), *cert. denied* 333 U. S. 833 (1948).

PROPOSED CONTRACT—SAVAGE IRRIGATION DISTRICT

Irrigation Repayment Contracts—Annual Installments.

The verb "to fix," as used in that part of subsection (d), section 9, Reclamation Project Act of 1939, stating that the general repayment obligation of a contracting organization "shall be spread in annual installments, of the number and amounts fixed by the Secretary," means to establish definitely, so that the contracting parties know how many installments are contemplated by the contract and how much money is involved in each installment.

A repayment contract entered into under subsection (d) which prescribes a formula pursuant to which the amount of each annual installment is to be determined, which formula has no relationship to the "normal and percentages plan" authorized by Congress in subsection (d) for variable payments, is not in conformity with the requirements of the Reclamation Project Act of 1939.

M-35031

MARCH 15, 1948.

TO THE SECRETARY.

This responds to the oral request of Assistant Secretary Warne that I furnish to you an opinion concerning the propriety, from the legal standpoint, of paragraph 17 of the * * * draft of a contract which has been prepared for execution by the United States (acting through the Secretary of the Interior) and the Savage irrigation district.

Paragraph 17 is in part B of the proposed contract. Part B relates to the construction by the United States of certain irrigation water distribution works for the benefit of the district. This part was purportedly drafted under subsection (d) of section 9 of the Reclamation Project Act of 1939 (43 U. S. C. sec. 485h), which declares that—

No water may be delivered for irrigation of lands in connection with any new project, new division of a project, or supplemental works on a project until an organization * * * has entered into a repayment contract with the United States, * * * providing among other things * * * (3) That the general repayment obligation of the organization shall be spread in annual installments, of the number and amounts fixed by the Secretary, over a period not exceeding forty years, exclusive of any development period * * *

It will be noted that the number and amounts of the annual installments payable by the contracting organization are to be "fixed by the Secretary." The language used by Congress on this point seems to be plain and unambiguous. The verb "to fix," when used in such a connection, means "To set or place definitely; to establish; * * * settle; * * * to assign precisely * * *" (Webster's New International Dictionary, 2d ed., 1946.) Hence, the "number" and "amounts" of the annual installments provided for in a contract are "fixed" if, and only if, the contracting parties know definitely how many annual installments are called for under the terms of the contract and how much money is involved in each installment. So long as uncertainty exists with respect to these matters, the "number" and

March 15, 1948

“amounts” of the annual installments are not “fixed.” See *Culberson v. Watkins*, 119 S. E. 319 (Ga., 1923); *Bunn v. Kingsbury County*, 52 N. W. 673 (S. Dak., 1892).

It perhaps should be stated, in connection with the point mentioned in the preceding paragraph, that Congress in paragraph (5) of subsection (d), section 9, Reclamation Project Act of 1939, has afforded the Secretary and contracting organizations an opportunity to include in repayment contracts entered into under subsection (d) a provision whereby the amount of each annual installment, as fixed by the Secretary, will be subject to an adjustment upward or downward on the basis of a certain formula, called the “normal and percentages plan” and prescribed in section 4 of the act (43 U. S. C. sec. 485c).

An examination of paragraph 17 of the proposed contract between the United States and the Savage irrigation district will reveal that it does not state precisely the amount of any of the annual installments contemplated by the contract with respect to the repayment of the cost of constructing the distribution works. Instead, each annual installment is to be computed “by multiplying the product of the base charge and the production index factor by the agricultural parity price ratio” (these terms are defined in the section). This formula, it should be noted, bears no relationship to the “normal and percentages plan” outlined in the Reclamation Project Act of 1939. The number of the installments to be paid under the paragraph will depend upon the amounts payable from year to year under the formula, except that whatever amount, if any, remains unpaid in the fortieth year of the repayment schedule is to be paid during that year. Thus, the only thing that is definite in the contract with respect to the repayment schedule on the construction charge obligation for the distribution works is that the total obligation is repayable under the contract in a period of not more than 40 years. Otherwise, uncertainty exists concerning the “amounts” and the “number” of the annual installments, and this uncertainty arises from the use of a formula other than the one prescribed by Congress for variable payments.

In view of the fact that the “number” and “amounts” of the annual installments contemplated by paragraph 17 of the proposed contract between the United States and the Savage irrigation district are uncertain rather than “fixed,” and the further fact that a formula different from the one prescribed by Congress for variable payments has been used in the paragraph, it is my view that paragraph 17 does not conform to the requirements of the Reclamation Project Act of 1939.

MASTIN G. WHITE,
Solicitor.

INDIANS OF CALIFORNIA AS "IDENTIFIABLE" GROUPS OF INDIANS WITHIN THE MEANING OF THE INDIAN CLAIMS COMMISSION ACT

Indian Claims Commission Act of August 13, 1946—Capacity of Claimants to Sue Under the Act—Nature of "Identifiable" Group of Indians—Indians of California, as a Whole, and Particular Organizations of California Indians as "Identifiable" Groups—California Jurisdictional Act of May 18, 1928.

In order to be "identifiable" within the meaning of the Indian Claims Commission Act of August 13, 1946 (60 Stat. 1049; 25 U. S. C. A. sec. 70a-v), a group of Indians must possess characteristics which bear a substantial relationship to the factors that characterize tribes or bands. It must be a group whose political existence has been recognized by Congress or the executive branch of the Government, or one which in the absence of such recognition has a *de facto* collective existence and carries on a type of group life characteristic of the Indians in the United States or Alaska, as the case may be.

Judged by this test, neither the Indians of California as a whole, nor particular organizations of California Indians, such as the Indians of California, Inc., the Mission Indians of California, or the Federated Indians of California, constitute "identifiable" groups of American Indians within the meaning of the Indian Claims Commission Act. To speak of all the Indians of the State of California is to refer solely to a geographical category. The California Jurisdictional Act of May 18, 1928 (45 Stat. 602), dealt with the Indians of California as a group solely for the purposes of that act.

M-35029

MARCH 17, 1948.

TO THE SECRETARY.

This memorandum relates to three contracts between California Indians and attorneys.

One contract is between "the Indians of California" and Messrs. Wilkinson, Goodwin, and Clammer, providing for the employment of these attorneys as general counsel and as counsel to prosecute any claims which the Indians may have against the United States. This contract apparently originated in a convention of California Indians held at Berkeley, California, in September 1945.¹ It purports to have been executed on behalf of the Indians by Clyde F. Thompson, Herbert A. Bellas, and Manuel Cordova, who are supposed to represent various auxiliaries of an organization of California Indians known as the "Indians of California, Inc.," and by Adam Castillo, who is supposed to represent another organization of California Indians designated as the "Mission Indians of California." These are apparently voluntary organizations of California Indians established under the laws of the State of California for purposes not precisely disclosed to the Department.

¹ See letter dated June 30, 1947, from F. G. Collett to Under Secretary Chapman.

March 17, 1948

Adam Castillo has informed the Department of his withdrawal from the Wilkinson contract, and there has been submitted to the Department for approval a contract under which the "Mission Indians of California," purportedly represented by Castillo, have employed Mr. Norman Littell to press their claims before the Indian Claims Commission and to act as general counsel.

Other California Indians, describing themselves as the "Federated Indians of California," have submitted to the Department for approval a contract employing Messrs. John W. Preston, Frederic A. Baker, and John W. Preston, Jr., as attorneys to represent its members before the Indian Claims Commission.

Section 2 of the Indian Claims Commission Act of August 13, 1946 (60 Stat. 1049, 1050; 25 U. S. C. A. sec. 70a), gives the Commission authority to hear and determine "claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska." The terms "tribe" and "band" are not without their perplexities,² but these have been largely resolved in the course of working out satisfactory relationships between the Indians and the Government of the United States. The term "tribe" may be used in two senses, one ethnological and the other political. Some of the Indian groups which have been accorded recognition as tribes by the Government represent mergers of different ethnological stocks for administrative and political purposes.³ On the other hand, some Indian groups that originally were tribes in the ethnological sense have become subdivided in the course of time into separate bands, each exercising political authority, and these bands have secured recognition from Congress or the executive officers of the Government. Governmental recognition of tribes and bands has been accorded in the process of treaty-making, or has been implicit in the establishment of reservations for groups of Indians by acts of Congress or Executive orders, or in other types of legislative or administrative action. There has been no such recognition of "the Indians of California" or the "Indians of California, Inc.," or the "Mission Indians of California" or the "Federated Indians of California" as a tribe or band exercising political authority.

The term "identifiable group of American Indians" had not been employed, either in claims legislation or in Indian legislation generally, prior to the enactment of the Indian Claims Commission Act. That act contains no provision specifically defining the term "identifiable group of American Indians."

² See Cohen, "Handbook of Federal Indian Law" (1942), p. 268 *et seq.*

³ Examples are the Indians of the Fort Belknap Reservation (Gros Ventre and Assiniboine Tribes); the Indians of the Flathead Reservation (Salish and Kootenai Tribes); and the Indians of the Wind River Reservation (Shoshone and Arapahoe Tribes).

It is obvious that, in order to be "identifiable," a group of Indians must possess common characteristics which will serve either to distinguish them from or assimilate them to other groups of Indians. While the act does not enumerate these characteristics, they must necessarily bear a substantial relationship to the factors that characterize tribes or bands. The rule of *ejusdem generis*, which restricts a general term in a statute within the ambit of the specific terms used in the same connection, would seem to be applicable here, unless a broader meaning is suggested by the statute or the circumstances of its enactment.

The Indian Claims Commission Act itself reveals no intention to make a wide departure from established usage in determining the status of Indian groups. The subdivisions of section 2 of the act relating to the types of legal claims which may be prosecuted under the act refer to claims based on laws, treaties, Executive orders of the President, contracts, and agreements. Such claims would arise only if political recognition had been accorded to the particular Indian groups asserting them. The references to other claims "in law or equity" or based on "fair and honorable dealings" also appear to assume the existence of some form of relations between the claimants as groups and the Government.

The provision for representative suits made by section 10 of the Indian Claims Commission Act (25 U. S. C. A. sec. 70i) apparently contemplates the possibility of a state of political disorganization in an Indian group. However, the claim is to be filed in such a situation on behalf of the group, and only group rights are to be adjudicated by the Commission.

Of particular interest is section 13 (a) of the Indian Claims Commission Act (25 U. S. C. A. sec. 70j), which provides:

As soon as practicable the Commission shall send a written explanation of the provisions of this Act to the recognized head of each Indian tribe and band, and to any other identifiable groups of American Indians *existing as distinct entities*, residing within the territorial limits of the United States and Alaska
* * *. [Italics supplied.]

It would hardly be possible for the Commission to mail a written explanation of the act to a group which did not have some recognized form of collective existence.⁴ Moreover, a group could hardly be said to exist as a "distinct entity" unless some means had been established for ascertaining and effectuating the will of the group.

⁴ In complying with section 13 (a), the Commission did not attempt to determine what constituted "identifiable groups of American Indians existing as distinct entities." It requested that the Bureau of Indian Affairs supply a list of "the names and addresses of those to whom the explanation of the act must be sent." See letter of April 17, 1947, from the Commission to the Commissioner of Indian Affairs. The list was supplied on April 24. It included specific bands of California Indians, but none of the organizations of California Indians involved in the pending contracts was included. The list was admittedly incomplete, and a supplementary list was promised.

March 17, 1948

For the reasons indicated above, it is my conclusion that an "identifiable" group of Indians, within the meaning of the Indian Claims Commission Act, is a group whose political existence has been recognized by Congress or the executive branch of the Government, or one which, in the absence of such recognition, has a *de facto* collective existence and carries on a type of group life characteristic of the Indians in the United States or Alaska, as the case may be.

To speak of all the Indians of the State of California is to refer solely to a geographical category. Prior to the act of May 18, 1928 (45 Stat. 602), which authorized "all Indians who were residing in the State of California on June 1, 1852, and their descendants now living in said State" to sue the United States, the Indians in California certainly did not constitute a single entity. Moreover, the jurisdictional act plainly and unequivocally indicated that the California Indians were being dealt with as a group solely for the purposes of that act. Thus, even after the act was passed, there was no new entity known as "the Indians of California"; and since the date of the statute the Indians of California have not maintained any sort of collective existence as a single group.

I am aware that the Legislature of the State of California has adopted legislation⁵ authorizing the Attorney General of the State to represent the Indians of California before the Indian Claims Commission. The Attorney General has ruled⁶ that under this legislation he may not represent any group of California Indians less than the whole group known as "the Indians of California," despite the fact that the legislature adopted a resolution declaring that the legislation was intended to permit him to do so.⁷ In the course of his opinion, the Attorney General expressed the view that "historically the Indians of California as a combined group or entity have been regarded and treated in a sense at least as wards of the government." However, his assumption that the Indians of California historically have been treated as a single entity is not supported by any factual data and is plainly contrary to the specific finding made by the Court of Claims in the case of *The Indians of California v. The United States*, 98 Ct. Cl. 583, 597, as follows:

There was no Nation, band, or tribe known or identified as the "Indians of California."

An argument could be made that the jurisdictional act of May 18, 1928, constituted a recognition by Congress of the "Indians who were residing in the State of California on June 1, 1852, and their descendants now living in said State" as an identifiable group of Indians for

⁵ Laws of California, 1947, chs. 46 and 47.

⁶ Opinion No. 47-205, August 29, 1947.

⁷ Assembly Concurrent Resolution No. 65.

all purposes, including the Indian Claims Commission Act. However, for the reasons set out above, I do not believe that such an argument would be sound. Furthermore, such an argument would not be available to support the contentions of the "Indians of California, Inc.," the "Mission Indians of California," and the "Federated Indians of California," that they constitute identifiable groups of Indians for the purposes of the Indian Claims Commission Act. These three organizations apparently possess none of the attributes which historically have characterized Indian groups in the United States.

It follows from what has been said that, in my opinion, neither the Indians of California, considered as a whole, nor any other of the organizations in whose behalf the contracts under consideration have been executed can properly be regarded as an "Indian tribe, band, or other identifiable group of American Indians" for the purposes of the Indian Claims Commission Act. However, the function of making authoritative determinations on questions of this nature is vested in the Indian Claims Commission. The disapproval of the contracts by this Department for the reason which I have stated would deprive the parties of the opportunity to have the question of status considered by the Commission and by the courts on appeal. Therefore, I believe that, subject to a determination that such contracts otherwise merit approval (as to which I express no opinion), it would be permissible to approve the respective contracts in the following language, thus reserving for future determination by the Indian Claims Commission the question concerning the competency of these several organizations of California Indians to institute proceedings under the Indian Claims Commission Act:

Approved insofar as the contract involves the presentation of claims to the Indian Claims Commission on behalf of the individual Indians who are parties to the contract and the tribe, band, or identifiable group of Indians, if any, actually represented by such individual Indians. It is believed that the decision as to whether the individual Indians who are parties to the contract represent an Indian tribe, band, or other identifiable group of Indians, for the purposes of the act of August 13, 1946 (Public Law 726, 79th Congress), should be made by the Indian Claims Commission.

The suggestion that any approval which may be given to the contracts under consideration should be limited to the contract provisions relating to the presentation of claims to the Indian Claims Commission is made for the reason that two of the contracts provide for employment of the attorneys as general counsel in addition to their employment for the purpose of prosecuting claims before the Commission. Insofar as the employment of general counsel by these organizations of California Indians is concerned, administrative approval of such contracts is not required by law and would not be ap-

March 24, 1948

propriate. Apart from the provisions of the Indian Claims Commission Act, only Indian tribes are required by section 16 of the Indian Reorganization Act (25 U. S. C. sec. 476), or section 2103 of the Revised Statutes (25 U. S. C. sec. 81), as the case may be, to submit contracts with attorneys to this Department for approval;⁸ and none of the organizations of California Indians considered in this memorandum is a tribe within the meaning of either of these statutory provisions.

MASTIN G. WHITE,
Solicitor.

GOVERNOR OF ALASKA

Expiration of Term—Status of Incumbent “Holding Over”—48 U. S. C. sec. 62.

Because of the express statutory provision that the Governor of Alaska “shall hold office for the term of four years and until his successor is appointed and qualified,” the position of Governor of Alaska does not become vacant, nor does the authority of the incumbent to perform the duties of the position terminate, upon the expiration of the 4-year term for which the incumbent was appointed and confirmed. The authority of the incumbent to perform the duties and to receive the emoluments of the office continues until a successor has been appointed and qualified.

The provisions of 5 U. S. C. sec. 56, prescribing limitations with respect to the payment of salary to a “recess appointee” are inapplicable to a situation in which the incumbent of the position of the Governor of Alaska “holds over” until his successor is appointed and qualified.

M-35033

MARCH 24, 1948.

TO ASSISTANT SECRETARY WARNE.

This responds to your oral inquiry as to what the status of the present Governor of Alaska would be if the current session of Congress were to end without the Senate having taken any action on the President's recent nomination of the Governor for a third term. (94 Cong. Rec. 2712.)

I am informed that the Governor's second term began on March 23, 1944. The pertinent statute provides that the Governor of Alaska “shall hold office for the term of four years *and until his successor is appointed and qualified* * * *.” (48 U. S. C. sec. 62; italics supplied.)

In the absence of the italicized portion of the statutory language quoted above, the authority of the present Governor of Alaska to perform the duties of that position would have terminated at the

⁸ The reference in section 2103, Revised Statutes, to “individual Indians not citizens of the United States” is no longer significant, in view of the granting of citizenship to all Indians by virtue of 8 U. S. C. sec. 601.

end of March 22, 1948, or 4 years after the beginning of his most recent term of office. (12 Op. Atty. Gen. 130; 17 Op. Atty. Gen. 648; see 14 Op. Atty. Gen. 259, 263.) However, as Congress has specifically provided that the Governor of Alaska shall hold office "until his successor is appointed and qualified," the position of Governor did not become vacant upon the expiration of the 4-year term which began on March 23, 1944. The authority of the incumbent to continue to perform the duties of the office was not impaired to any extent by the expiration of the 4-year term; and the incumbent may continue to occupy the office, to exercise its powers, to perform its duties, and to enjoy its privileges and emoluments until the beginning of a new 4-year term pursuant to favorable action by the Senate upon the President's nomination of the incumbent to succeed himself, or until another person shall have qualified for the office under an appointment made through the Constitutional procedure of nomination by the President and confirmation by the Senate.

The termination of the present session of Congress, without any action having been taken by the Senate upon the pending nomination mentioned in this memorandum, would not affect the conclusion stated above. The provisions of section 56 of Title 5, United States Code, prescribing limitations with respect to the making of salary payments to so-called "recess appointees," are not pertinent to this discussion. That section is applicable only to the filling of "a vacancy in any existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate." In this case, there is no vacancy in the office of Governor of Alaska, even though the incumbent's 4-year term, which began on March 23, 1944, expired at the end of March 22, 1948.

MASTIN G. WHITE,
Solicitor.

H. LESLIE PARKER ET AL.

A-24622

Decided March 30, 1948

Oil and Gas Leases—Mineral Leasing Act—Preference-Right Applications.

Although an application for an oil and gas lease could, under some circumstances, have been rejected where the applicant was 1 day late in paying the required rental, the subsequent issuance of the lease amounted to a waiver of the delay.

A request for return of the rental deposit made on an application for an oil and gas lease, after an extension of time for payment of rental had been granted by the General Land Office, did not constitute a withdrawal of the application.

The Secretary must recognize a preference-right application for an oil and gas lease which complies with the provisions of section 1 of the act of July

March 30, 1948

29, 1942 (56 Stat. 726, as amended; 30 U. S. C. sec. 226b), and the applicable regulations (43 CFR 192.14d), and issue an oil and gas lease to the applicant.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

H. Leslie Parker, as attorney in fact for the protestants, Carl A. Peterson (Evanston 021086), Gene E. Griffith (Evanston 023900), William G. Griffith (Evanston 023901), and John E. Griffith (Evanston 023902), and as alleged owner of operating rights under one of these applications, has appealed from a decision of the Director of the Bureau of Land Management, dated March 17, 1947, dismissing a protest against the issuance of a preference-right oil and gas lease, covering certain lands in Wyoming, to Elda M. Butterwick, under section 1 of the act of July 29, 1942 (56 Stat. 726), as amended (30 U. S. C., Supp., sec. 226b).¹ The protest was dismissed on the ground that the lands involved in the proceeding were embraced in the Butterwick preference-right oil and gas lease application (Evanston 023812), based on her previous oil and gas lease (Evanston 020981). The facts are set forth in detail in the Director's decision of March 17, 1947.

Parker alleges that the Butterwick noncompetitive 5-year oil and gas lease (Evanston 020981) issued as of January 2, 1942, was invalid from its inception because of certain irregularities which occurred prior to the Department's approval of the lease. The appellant's contentions in this respect are discussed below.

One point on which the appellant relies is that the deposit of the first year's rental under the Butterwick lease (Evanston 020981) was not made until "September 6, 1941, or one full day after the expiration of the thirty (30) days allowed for that payment * * *."² The 1-day delay in paying the rental under the earlier lease is not now a proper basis for refusing to grant Mrs. Butterwick's present application. Although her first application perhaps could, under some circumstances, have been rejected for failure to comply with the 30-day requirement, the issuance of the lease in accordance with that application amounted to a waiver of the delay.

The appellant also argues that because the application filed by Dr. Arbogast on behalf of his daughter, Elda M. Butterwick, for an extension of the time in which to pay the first year's rental under the earlier lease, was not received by the General Land Office until September 8, 1941, the application was filed "three days after expiration of the thirty (30) days allowed the applicant to pay first-year's rental."³ However, the record shows that, in addition to the application filed by

¹ This section was repealed effective August 8, 1946, but rights previously accruing under it were not affected by the repeal. Sections 14, 15 (60 Stat. 950, 958).

² Appeal dated April 21, 1947, p. 2.

³ Appeal dated April 21, 1947, p. 2.

Dr. Arbogast, George W. Bird, an attorney for the applicant, on September 5, 1941, filed with the district land office a request for an extension until January 1, 1942, of the time within which to pay the annual rental. The application therefore was timely filed. Moreover, the conclusion stated in the preceding paragraph is also pertinent to this point.

After the Commissioner of the General Land Office, on September 10, 1941, granted an extension until January 2, 1942, of the time in which to pay the rental, Mrs. Butterwick requested, and obtained, the return of the rental money previously paid on September 6, in order to utilize it in completing drilling operations at Coleville, Utah. Parker contends that this return of the rental money amounted to a withdrawal by Mrs. Butterwick of her application. Plainly, this contention is without merit. Having received an extension of the time in which to pay her rental, Mrs. Butterwick quite naturally wished to secure the use of her money during the extension period. She plainly indicated that she would pay, and she did in fact pay, her rental before the extended due date. The Commissioner treated her application as valid, and a lease was issued on this basis. There was nothing to indicate a withdrawal of her application. The decision in *Henry L. Lubking*, A-24515, June 3, 1947, cited by Parker, is, therefore, inapplicable to this case.

The appellant's other contentions are subsidiary to the points discussed above.

The Butterwick preference-right application was filed on November 27, 1946, a date prior to the expiration of her previous lease, and all the pertinent requirements of the statute ⁴ and the regulations ⁵ have been met. There is no evidence in the record that would have justified the cancellation of Mrs. Butterwick's earlier lease during its lifetime or would now justify a holding that the Butterwick lease was invalid. The Department must observe Mrs. Butterwick's statutory preference right and issue a new lease to her.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the decision of the Director of the Bureau of Land Management dismissing the appellant's protest is affirmed.

MASTIN G. WHITE,
Solicitor.

⁴ Section 1 of the act of July 29, 1942, as amended, *supra*, provided, in part, as follows:

"That upon the expiration of the five-year term of any noncompetitive oil and gas lease * * * the record title holder shall be entitled to a preference right over others to a new lease for the same land * * * if he shall file an application therefor within ninety days prior to the date of the expiration of the lease * * *"

⁵ The applicable regulation provides:

"The lessee must, within the period beginning 90 days prior to the date of expiration of the lease and ending on the date of expiration, submit an application * * * accompanied by a proper filing fee and the first year's rental * * *." [43 CFR 192.14d.]

D. MILLER

A-24692

Decided April 15, 1948

A-24800

Oil and Gas Leases—Withdrawn Land.

An application for an oil and gas lease filed when the land involved is withdrawn is invalid.

An oil and gas lease application for withdrawn land may not be held in suspense until the restoration of the land to entry and then considered as if filed at the instant that the land is restored to entry.

The revocation of a withdrawal does not validate a lease application which covers part of the withdrawn land and which has not been finally rejected as of the time of the revocation.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

In 1945, D. Miller filed three applications for oil and gas leases in Alaska under the Mineral Leasing Act of February 25, 1920 (41 Stat. 437), as amended (30 U. S. C. A. sec. 181 *et seq.*). Anchorage 010774 and 010775 were filed on October 22, 1945, and Anchorage 010809 was filed on December 12, 1945.

On June 10, 1946, Miller filed an amended description of the lands applied for under Anchorage 010775. On August 27, 1946, the Acting Director of the Bureau of Land Management found that there were no such surveyed lands as those described in the amended application, and that the description given therein for the unsurveyed lands sought by the applicant was too indefinite. The Acting Director also held that the application was subject to rejection for another reason, i. e., the application, Anchorage 010775, was not accompanied by the required filing fee and rental payment. The application accordingly was rejected for the latter reason. Thereafter, Miller submitted proof that he had, in fact, deposited the required amount when he filed his original application. He also, on November 29, 1946, submitted a further correction of the description of the surveyed and unsurveyed lands sought under Anchorage 010775.

On February 27, 1947, the Director of the Bureau of Land Management vacated the decision of August 27, 1946, to the extent that it held that Anchorage 010775 had not been accompanied by the required filing fee and rental payment. The Director then rejected Anchorage 010774 and 010775 for the reason that the lands applied for were not, on the date of the filing of the applications, subject to lease for oil and gas purposes. All the lands covered by Anchorage 010775 were found to have been withdrawn by Executive Order No. 5214, dated October 30, 1929. Some of the lands covered by Anchorage 010774 were likewise found to be within the same withdrawal, and the balance of the lands covered by that application were found to have been withdrawn

by Public Land Order No. 82, dated January 22, 1943 (8 F. R. 1599). With respect to the lands involved in Public Land Order No. 82, the Director stated that they had subsequently been restored to entry by Public Land Order No. 323 of August 14, 1946 (11 F. R. 9141), and that the rejection of Anchorage 010774 was without prejudice to the right of Miller to file a new application for the lands outside the area of the Executive-order withdrawal.

The Director, on February 12, 1947, rejected Anchorage 010809 because the lands applied for had likewise been withdrawn by Public Land Order 82.¹

Miller contends on appeal that the applications, insofar as they involved lands withdrawn by Public Land Order No. 82, became effective immediately when the lands were restored to entry by Public Land Order No. 323.² In addition, he requests that so much of the lands covered by his applications as are now withdrawn by Executive Order No. 5214 be reclassified and that leases be granted to him.

The revocation of a withdrawal does not validate a lease application that was filed at a time when the land sought in the application was subject to the withdrawal. *Guy C. Riddell et al.*, A-24055, January 24, 1946 (unreported). An application relating to withdrawn land may not be suspended to await the lifting of the withdrawal and then considered as if filed at the instant that the land is restored to entry. *E. R. Clark et al.*, A-24159, July 9, 1945 (unreported); *Lewis T. Cureton*, A-25196, March 8, 1948 (unreported). Consequently, the Director of the Bureau of Land Management correctly held that Miller's applications, insofar as they related to lands withdrawn by Public Land Order No. 82, were invalid. The revocation of the withdrawal during the period between the filing of the applications and the time when they were finally rejected by the Director could not give validity to applications which were invalid when filed.

As to Miller's request that those lands covered by his applications which are withdrawn by Executive Order No. 5214 be reclassified and leased to him, no leases may be issued to him so long as the withdrawal remains in effect. If the withdrawal should be revoked, Miller's present applications could not be considered, for the reason stated above, and it would be necessary for him to submit new applications subsequent to the revocation of the withdrawal. Moreover, if and when the lands are restored to appropriation under the public-land laws, they must be restored subject to the provisions of section 4

¹ The Director also rejected Anchorage 010809 on another ground, but since Miller does not attack that holding, it will not be reviewed in this decision.

² Under the terms of Public Land Order 323, these lands, being unsurveyed, became subject to application on January 15, 1947.

April 20, 1948

of the act of September 27, 1944 (58 Stat. 748), as amended (61 Stat. 124; 43 U. S. C. A. sec. 282), which accords to honorably discharged veterans of World War II a 90-day preference to file applications under the homestead or desert-land laws or under the Small-Tract Act of June 1, 1938 (52 Stat. 609; 43 U. S. C. sec. 682a), for lands restored from a withdrawal.

It is recommended, however, that the Bureau of Land Management consider Miller's request that the lands that are presently subject to Executive Order No. 5214 be removed from the withdrawal.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the decisions of the Director of the Bureau of Land Management dated February 12 and February 27, 1947, are affirmed.

MASTIN G. WHITE,
Solicitor.

DIAMOND TWO CATTLE COMPANY

A-25210

Decided April 20, 1948

Private Exchange—Taylor Grazing Act.

Reserved lands are not subject to a private exchange under section 8 of the Taylor Grazing Act, even though the exchange application was filed before the selected lands were withdrawn.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Diamond Two Cattle Company, in November 1943 and February 1944, filed applications to select, under section 8 of the Taylor Grazing Act,¹ approximately 1,405.84 acres of public land in Arizona outside of a grazing district in exchange for approximately 1,410 acres of privately owned land in Arizona. Approximately 420.5 acres of the selected lands² had been withdrawn on September 14, 1945, for reclamation purposes under a "first form" withdrawal. The Director of the Bureau of Land Management, by a decision dated October 24, 1947, rejected the exchange insofar as these withdrawn lands are concerned.

In its appeal, the Company urges that, as its applications were filed almost 2 years prior to the date of the withdrawal, the Company's

¹ Act of June 28, 1934 (48 Stat. 1269), as amended by the act of June 26, 1936 (49 Stat. 1976; 43 U. S. C. sec. 315g).

² T. 10 N., R. 3 W., G. & S. R. M., Arizona,

sec. 23, lots 5 and 11;

sec. 25, lots 3 and 4, S $\frac{1}{2}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$.

proposal should have been considered favorably and allowed. The Company further urges that its contemplated use of the land for grazing would not actually interfere with the use of the land for the erection of structures for reclamation purposes. The Company states that it would agree to the reservation of an easement over the selected lands for the use of the Bureau of Reclamation. It is also suggested by the Company that the purpose of the withdrawal order probably will never be effectuated.

Under section 8 of the Taylor Grazing Act, the selected public lands are subject to exchange only if they are unreserved. Conversely, so long as the lands are reserved, they are not subject to exchange. The fact that the exchange applications in this case were filed before the lands were withdrawn by the order of September 14, 1945, did not create in the applicant any vested right to secure the consummation of the exchange. *State of Arizona*, 59 I. D. 317 (1946). Accordingly, the Director of the Bureau of Land Management correctly rejected the applications insofar as they related to withdrawn lands.

The Company's suggestion that the withdrawal is not necessary to achieve the purposes contemplated by it might appropriately be addressed to the Secretary of the Interior in the form of a petition, with supporting data and reasons, for revocation of the reclamation withdrawal.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the decision of the Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

RED SPRINGS OIL COMPANY

A-24664

Decided May 3, 1948

Oil and Gas Leases—Waiver of Rentals.

Under the act of February 9, 1933 (47 Stat. 798; 30 U. S. C. sec. 209), acreage rentals on an oil and gas lease are not waived during lease months when production occurs.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Red Springs Oil Company has appealed from a decision of the Director of the Bureau of Land Management which called upon it to pay rentals accrued on lands committed to the approved Red Springs unit agreement and covered by oil and gas leases, Cheyenne 054221, 054567, and 054569, which have been offered to the Company. These rentals are for various lease months during the period December 20, 1939, to November 20, 1945.

May 3, 1948

The record discloses that on October 15, 1942, Assistant Secretary Chapman assented, as of December 20, 1939, to the suspension of drilling and producing requirements with respect to these leases. As a consequence of this action, "any payment of acreage rental * * * [was] suspended during such period of suspension of operations and production * * *." (47 Stat. 798; 30 U. S. C. sec. 209.) Thereafter, the unit operator from time to time engaged in the production of small amounts of oil. On October 21, 1946, Assistant Secretary Davidson approved retroactively the suspension of the drilling and producing requirements for the period from December 20, 1939, to November 20, 1945, excluding those months in which there was production of oil.

The Company admits that oil was produced by the unit operator during the months for which rentals were demanded by the Director of the Bureau of Land Management. However, the Company asserts that the oil was fit for use only as road oil; that a directive of the Petroleum Administration for War, which was issued on July 12, 1942, and terminated on June 15, 1946, precluded the production of the Company's oil for road purposes; and that its vendees refused to accept any substantial quantity of its oil for other purposes. The Company contends, therefore, that the directive was, in effect, an order of the Government suspending its operations and, consequently, that no rental should be paid for any of the period covered by the directive.

Whatever may have been the economic effect of the P. A. W. directive, the fact remains that oil was in fact produced during certain lease months during the period from December 20, 1939, to November 20, 1945. Such production was not required by any order or directive of any agency of the United States. On the contrary, it constituted voluntary action on the part of the Company. Since oil was in fact produced during the months in issue, the Company cannot validly claim with respect to those months advantages which pertain only to periods of nonproduction.

The Company also requests that in this proceeding it be accorded rental relief for unspecified portions of 1946 and 1947. The request must be rejected in this proceeding, but the rejection is without prejudice to the renewal of the request through the filing of an appropriate application with the oil and gas supervisor (43 CFR 191.25; 11 F. R. 12954).

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the decision of the Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

JOHN H. TRIGG, CUCA BARRIENTOS, GEORGE H. WILLIAMS,
MALCO REFINERIES, INC.

A-24483

Decided May 13, 1948

Oil and Gas Leases—Application—Mineral Leasing Act.

An oil and gas lease application is properly rejected where the applicant already holds under lease, and has pending other lease applications for, a total acreage in excess of the amount he is permitted by statute to hold under such leases.

An applicant will not be heard to deny the validity of an oil and gas lease application which he has filed and continues to maintain.

MOTION FOR REHEARING¹

John H. Trigg filed a motion for rehearing of a departmental decision which affirmed a decision of the Acting Director of the Bureau of Land Management rejecting Trigg's noncompetitive oil and gas lease application that had been filed on August 1, 1945, under section 17 of the Mineral Leasing Act, as amended (41 Stat. 443, 46 Stat. 1523, 49 Stat. 676; 30 U. S. C., 1940 ed., sec. 226). The rejection was on the ground that the land embraced in the application was included within an outstanding oil and gas lease originally issued to Cuca Barrientos (Las Cruces 055561).

In his motion for rehearing, Trigg asserts that Barrientos' lease, to the extent that it covers the land sought by him, had expired by operation of law on the day preceding the filing of his application.

It is not necessary to determine whether the Barrientos lease had expired, as asserted by Trigg, since the records of the Department disclose that Trigg was not qualified to file an application for this land. On August 1, 1945, when he filed this application, Trigg held under an oil and gas lease issued by the Department 870.64 acres of land in New Mexico.² In addition, he was maintaining applications for such leases on 8,987.88 acres of other lands in the same State.³

When Trigg filed his application, section 27 of the Mineral Leasing Act, as amended (41 Stat. 448, 44 Stat. 373, 46 Stat. 1007, 1524; 30 U. S. C., 1940 ed., sec. 184), provided that—

* * * no person * * * shall take or hold at one time oil or gas leases * * * exceeding in the aggregate seven thousand six hundred and eighty acres granted hereunder in any one State * * *

¹ The motion for rehearing was filed prior to the issuance of Departmental Order No. 2354 (12 F. R. 5596), which deleted provisions for such motions from the Rules of Practice (43 CFR, Part 221).

² Las Cruces 060255.

	Acres		Acres
³ Las Cruces 061058-----	2,469.73	Las Cruces 063863-----	147.97
Las Cruces 061302-----	2,400.00	Las Cruces 062973-----	160.00
Las Cruces 062902-----	2,568.86	Las Cruces 062490-----	160.00
Las Cruces 060592-----	1,081.32		

⁴ By subsequent amendment, not relevant here, the limitation was changed to 15,360 acres in any one State (60 Stat. 954; 30 U. S. C., 1946 ed., sec. 184).

May 14, 1948

The Department has held that this statutory limitation as to leases is also applicable to lease applications, because the Department cannot very well entertain applications which it is specifically prohibited by law from granting. *W. D. Clack*, A-24517, December 12, 1947; *cf. Securities & Exchange Commission v. Chenery Corporation*, 332 U. S. 194, 201-203 (1947). The fact that some of Trigg's applications were suspended for one reason or another would not warrant the Department in disregarding them when computing the total acreage that he had under lease and application. An applicant will not be heard to deny the validity of a lease application which he has filed and continues to maintain. *W. D. Clack, supra.*

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the motion for rehearing is denied.

MASTIN G. WHITE,
Solicitor.

THOMAS ROSELLE v. HARRY R. HARN AND GUY R. CAMPBELL

A-25222

Decided May 14, 1948

Oil and Gas Leases—Preference Rights Under Section 20 of Mineral Leasing Act—Patentees Under Stock-Raising Homestead Act.

An entryman or patentee of the surface title to land under the Stock-Raising Homestead Act of December 29, 1916 (43 U. S. C., 1946 ed., sec. 291), does not have a preference right, over prior applicants, to a lease under section 20 of the Mineral Leasing Act of February 25, 1920 (30 U. S. C., 1946 ed., sec. 229).

Section 20 of the Mineral Leasing Act does not grant a preference right to any entryman or patentee whose rights as such were initiated after the enactment of that act.

Oil and Gas—Minerals.

Oil and gas deposits are "minerals" within the meaning of the Stock-Raising Homestead Act, which reserves to the United States the minerals in lands patented thereunder.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Harry R. Harn and Guy R. Campbell filed oil and gas lease applications, Blackfoot 055515 and 055861, for certain lands in Idaho, under section 17 of the Mineral Leasing Act of February 25, 1920, as amended.¹ Thereafter, Thomas Roselle filed a protest against the issuance of leases to Harn and Campbell, and he also filed an oil and gas lease application, Blackfoot 055885, for the same lands.

¹ Act of August 8, 1946 (60 Stat. 950; 30 U. S. C., 1946 ed., sec. 226).

Under section 17, "When the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding." Roselle, however, urges that since he owns the surface of the lands under a patent² issued to him in 1935 pursuant to a stock-raising homestead entry,³ he has a preference right to lease the oil and gas deposits in the lands.

The Director of the Bureau of Land Management dismissed Roselle's protest, and suspended his application pending adjudication of the prior Harn and Campbell applications. The Director took the position that the Mineral Leasing Act does not grant to the owner of the surface title derived from a patent under the Stock-Raising Homestead Act a preference right over a prior applicant insofar as the leasing of the oil and gas deposits in the land is concerned.

The only provision of the Mineral Leasing Act which gives the owner of the surface a preference right to an oil and gas lease for mineral deposits owned by the United States is section 20. That section provides, in part (30 U. S. C., 1946 ed., sec. 229) :

In the case of lands bona fide entered as agricultural, *and not withdrawn or classified as mineral at the time of entry*, * * * the entryman or patentee, or assigns, * * * if the entry has been patented with the mineral right reserved, shall be entitled to a preference right to a permit and to a lease, * * * in case of discovery; * * *. [Italics supplied.]

Roselle's surface title is derived from a patent issued pursuant to the Stock-Raising Homestead Act. This statute provides, in part (43 U. S. C., 1946 ed., sec. 299) :

All entries made and patents issued * * * shall be subject to and contain a reservation to the United States of all * * * minerals in the lands so entered and patented * * *.

Because of this statutory reservation, the Department has consistently held that lands patented under the Stock-Raising Homestead Act are to be regarded as having been "withdrawn or classified as mineral at the time of entry" and, accordingly, that an entryman or patentee of the surface title to land under the Stock-Raising Homestead Act does not have a preference right under section 20 of the Mineral Leasing Act.⁴

Moreover, Roselle's entry was filed in 1929 and was allowed in 1931. The Department has held that section 20 of the Mineral Leasing Act

² Patent No. 1075089.

³ Blackfoot 044431, filed in 1929 and allowed in 1931.

⁴ Digest of Decisions and Opinions in Connection With the Administration of the Act of February 25, 1920, as Applied to Oil and Gas, 47 L. D. 463, 465, 468-469 (1920); *Charles R. Haupt*, 47 L. D. 588, 589 (1920); *Tieck v. McNeil*, 48 L. D. 158, 159 (1921); *Nick G. Kritsas*, 60 I. D. 109 (1948).

May 17, 1948

does not apply to persons (such as Roselle) whose rights as patentees or entrymen originated after the enactment of the Mineral Leasing Act (February 25, 1920), or to those whose rights as assignees originated after January 1, 1918.⁵

In his appeal, Roselle also contends (for the first time) that the reservation to the United States of the "coal and other minerals" to which his patent is subject does not include oil and gas, and, therefore, that he now owns the oil and gas deposits. This contention is without merit. The word "minerals" includes oil and gas. *Burke v. Southern Pacific R. R. Co.*, 234 U. S. 669, 676-679 (1914); *United States v. Southern Pacific Co.*, 251 U. S. 1 (1919); *United States v. State of California*, 55 I. D. 121 (1935).

The Director was correct in dismissing Roselle's protest and suspending his application.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the decision of the Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

ZONING REGULATIONS FOR KINGS CANYON AND YOSEMITE NATIONAL PARKS

National Parks—Jurisdiction.

Subject to certain exceptions, the United States has exclusive jurisdiction over the privately owned lands within the exterior boundaries of Yosemite and Kings Canyon National Parks.

Zoning.

A zoning restriction which bears a substantial relation to the public health, safety, morals, or welfare is not an unconstitutional limitation upon the use of private property.

Lands that are subject to the exclusive jurisdiction of the United States may be zoned by the United States to the same extent and for the same purposes as could be accomplished by a State if the lands were subject to State jurisdiction.

National Parks—Regulations.

The statutes delegating to the Secretary of the Interior the authority to make rules and regulations with respect to the use and management of the national parks do not constitute an unconstitutional delegation of legislative power to an executive officer of the Government.

⁵ Oil and Gas Regulations of March 11, 1920 (Circ. 672), 47 L. D. 437, 444; Digest of Decisions and Opinions in Connection With the Administration of the Act of February 25, 1920, as Applied to Oil and Gas, 47 L. D. 463, 466, 469, 470 (1920); *Charles E. Haupt*, 47 L. D. 588, 589 (1920), 48 L. D. 355 (1921); Circ. 932 of April 28, 1924, 50 L. D. 400, 43 CFR 192.45 (1940 ed.); Circ. 1552 of May 31, 1943, 8 F. R. 7710, 43 CFR, Cum. Supp., 192.45; Circ. 1624 of October 28, 1946, 43 CFR 192.70.

National Parks—Zoning.

The Secretary of the Interior is authorized to impose on privately owned lands in Yosemite and Kings Canyon National Parks zoning restrictions which are designed "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations" and which have a reasonable relationship to the public health, safety, morals, or welfare, in the light of local conditions.

M-35017

MAY 17, 1948.

TO THE DIRECTOR, NATIONAL PARK SERVICE.

Assistant Secretary Davidson forwarded to this office your request for an opinion on the question whether there is legal authority for the promulgation of zoning regulations to control developments on private lands within the exterior boundaries of Kings Canyon and Yosemite National Parks. Although the specific nature of these developments is not described, they are represented as being inimical to the best interests of the United States.

You indicate that, in your opinion, the contemplated zoning regulations "should provide the following controls":

1. A comprehensive zoning plan for the entire area, including Federal as well as private property within the master plan boundaries of the park.
2. A division of the area into districts for the regulation of the heights of buildings, size of yards and open spaces, and the use of land and structures. Provision for the amendment of the regulation to meet changed conditions in the park.
3. That in case of unreasonable hardships in carrying out the provisions of the regulation, authority be placed in the Park Service to grant equitable relief insofar as it does not conflict with the intent and purposes of the regulation; and
4. Authority to carry out and enforce the provisions of the regulation in the prevention of violations thereof.

1. FEDERAL JURISDICTION

The United States acquired exclusive jurisdiction, subject to exceptions not here relevant, over the lands embraced in Yosemite National Park by virtue of three statutes of the State of California ceding this jurisdiction and two acts of Congress accepting the cessions.¹ Exclusive Federal jurisdiction over Kings Canyon National Park is derived in part from cession statutes of the State of California relating to General Grant National Park,² which has since become a part of Kings Canyon National Park.³ In addition, the State of California in 1943 ceded to the United States exclusive jurisdiction "over and

¹ Calif. Stat. 1891, ch. 181; Calif. Stat. 1905, ch. 60; Calif. Stat. 1919, ch. 51; 34 Stat. 831, 16 U. S. C., 1946 ed., sec. 47; 41 Stat. 731, 16 U. S. C., 1946 ed., sec. 57; *Collins v. Yosemite Park & Curry Co.*, 304 U. S. 518, 523-530 (1933).

² See footnote 1, *supra*.

³ 54 Stat. 48; 16 U. S. C., 1946 ed., sec. 80a.

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within all of the territory which is now or may hereafter be included in those several tracts of land in the State of California set aside and dedicated for park purposes by the United States as 'Kings Canyon National Park'.⁴ In 1945, the United States accepted this cession of jurisdiction.⁵

In the case of Yosemite National Park, this office has previously held that the cession of exclusive jurisdiction to the United States includes jurisdiction over privately owned lands within the exterior boundaries of the park.⁶ I concur in that view.

As the State of California ceded to the United States jurisdiction over Kings Canyon National Park in the same terms that it used in ceding jurisdiction over Yosemite National Park, the rationale of the previous opinion of this office concerning privately owned lands in Yosemite National Park supports the conclusion that there is now vested in the United States exclusive jurisdiction over the privately owned lands within the exterior boundaries of Kings Canyon National Park.

2. PERMISSIBLE SCOPE OF ZONING RESTRICTIONS

Every zoning statute, ordinance, or regulation circumscribes in some way the uses to which the owners of land affected by it may devote their properties. However, where a zoning restriction bears a substantial relation to the public health, safety, morals, or welfare, the courts do not regard such a limitation on the landowners' freedom of action as unconstitutional.⁷

Under the constitutional test mentioned in the preceding paragraph, the Supreme Court has upheld an ordinance forbidding the maintenance of livery stables in certain parts of a city, even when applied to a livery stable which had been established prior to the adoption of the ordinance;⁸ an ordinance forbidding the manufacture of bricks in a certain district of a city, as applied to a brick factory built long before the particular district became part of the city;⁹ an ordinance prohibiting the erection of billboards in residential districts;¹⁰ an ordinance limiting the size and imposing other restrictions upon the erection of billboards;¹¹ an ordinance forbidding the storage of petroleum (except for small quantities) within 300 feet of any dwelling, as applied to oil storage tanks which had been

⁴ Calif. Stat. 1943, ch. 96.

⁵ Letter from Secretary of the Interior to Governor of California, dated April 21, 1945, pursuant to the act of October 9, 1940 (54 Stat. 1083; 40 U. S. C., 1946 ed., sec. 255). The letter is reproduced at 10 F. R. 6041. See, also, Calif. Stat. 1943, ch. 536.

⁶ Op. Sol., 54 I. D. 483 (1934). See, also, Op. Sol. M-33679, June 29, 1944.

⁷ *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926); see *Nectow v. Cambridge*, 277 U. S. 183, 188 (1928).

⁸ *Reinman v. Little Rock*, 237 U. S. 171 (1915).

⁹ *Hadacheck v. Sebastian*, 239 U. S. 394 (1915).

¹⁰ *Ousack Co. v. City of Chicago*, 242 U. S. 526 (1917).

¹¹ *St. Louis Poster Adv. Co. v. St. Louis*, 249 U. S. 269 (1919).

moved to their existing locations at the specific request of the city;¹² a statute which required existing lodging houses to comply with new requirements, including the installation of an automatic wet-pipe sprinkler system;¹³ an ordinance regulating the distance to be preserved between new buildings and the street lines of the lots on which erected;¹⁴ and an ordinance which prohibited the erection and maintenance in certain residential districts of industrial establishments, apartment houses, business houses, and retail stores and shops.¹⁵

The zoning restrictions mentioned above as having been upheld by the Supreme Court represented exercises of the so-called "police power" which is vested in the several States and which may be delegated by them to their political subdivisions, such as municipalities. However, the Federal Government, within its spheres of activity under the Constitution, also possesses power that is equivalent to the "police power" of the States.¹⁶ Accordingly, lands that are subject to the exclusive jurisdiction of the United States may be zoned by the Federal Government to the same extent and for the same purposes as could be accomplished by a State if the lands were subject to State jurisdiction; and this zoning power may be delegated by the Congress to administrative officials.¹⁷

3. AUTHORITY OF THE SECRETARY OF THE INTERIOR

We turn now to a consideration of the extent to which the Government's zoning power with respect to privately owned lands within Yosemite National Park and Kings Canyon National Park has been delegated to the Secretary of the Interior.

The Secretary is authorized by law to—

* * * make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service * * *¹⁸

As a standard to guide the Secretary in the issuance of such rules and regulations, Congress has indicated that they should—

* * * conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild-life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.¹⁹

¹² *Pierce Oil Corp. v. City of Hope*, 248 U. S. 498 (1919).

¹³ *Queenside Hills Co. v. Sawl*, 328 U. S. 80 (1946).

¹⁴ *Gorieb v. Fox*, 274 U. S. 603 (1927).

¹⁵ *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926).

¹⁶ See Lyons, "Development of a National Police Power," 14 *Tenn. L. Rev.* 11 (1935); 3 Willoughby, "Constitution of the United States" (2d ed., 1929) 1765, footnote 1.

¹⁷ *Larrabee et al. v. Bell et al.*, 10 F. (2d) 986 (D. C. App., 1926); *cert. denied* 271 U. S. 670.

¹⁸ 16 U. S. C., 1946 ed., sec. 3.

¹⁹ 16 U. S. C., 1946 ed., sec. 1. In addition, 16 U. S. C., 1946 ed., sec. 61, is pertinent insofar as Yosemite National Park is concerned.

May 17, 1948

The Supreme Court apparently has not passed upon the constitutionality of the statutory provisions vesting broad regulatory or quasi-legislative power in the Secretary of the Interior with respect to national parks. However, the Court has upheld a similar grant of power to the Secretary of Agriculture with respect to the use and management of national forests.²⁰ Consequently, it seems clear that the standard furnished by Congress to guide the Secretary of the Interior in the issuance of rules and regulations respecting the use and management of national parks is adequate to safeguard these statutory provisions against any attack that might be made upon the ground that they are an unconstitutional delegation of legislative power to an executive officer of the Government.

It will be observed that Congress, in delegating to the Secretary of the Interior the power to issue rules and regulations respecting the use and management of national parks, has made no distinction between the Secretary's power to regulate the use of Government-owned lands within the parks and the Secretary's power to regulate the use of those privately owned lands within the parks which are subject to the exclusive jurisdiction of the Federal Government. As the Congress has not indicated in any way that the Secretary's regulations governing the use of park lands are to be applicable only to Government-owned lands within the parks, there is no reason for this Department, by administrative construction, to read such a limitation into the statutory provisions which confer the rule-making power upon the Secretary. Accordingly, I conclude that the Secretary's power to regulate the use of national park lands extends to the regulation of the use of any privately owned park lands which are subject to the exclusive jurisdiction of the Federal Government, as well as to the regulation of the use of Government-owned lands within the parks.

The Secretary's power to regulate the use of privately owned national park lands which are subject to the exclusive jurisdiction of the Federal Government is, in my opinion, sufficiently broad to authorize the Secretary to impose reasonable zoning restrictions with respect to such lands. The restrictions applicable to privately owned lands within a particular national park must, of course, be within the framework of the standard which Congress has provided for the guidance of the Secretary in regulating the use of park lands, i. e., "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

²⁰ *United States v. Grimaud*, 220 U. S. 506 (1911).

4. CONCLUSION

The preceding discussion outlines the principles which, in my opinion, are applicable to the problem presented in your memorandum. A consideration of the question whether particular zoning restrictions of the sort indicated generally in your memorandum can properly be imposed by the Secretary of the Interior with respect to privately owned lands in Yosemite and Kings Canyon National Parks must be deferred until the proposed restrictions shall have been drafted in specific detail. As previously indicated, any such zoning restrictions must be in accordance with the statutory standard prescribed by Congress for the guidance of the Secretary in regulating the use of lands within national parks, and they must meet the constitutional test of having a reasonable relationship to the public health, safety, morals, or welfare, in the light of local conditions.²¹ In this connection, it seems that any zoning restriction which could be brought within the framework of the statutory standard would also meet the constitutional test.

MARTIN G. WHITE,
Solicitor.

MARGARET STEPP

A-25219

Decided May 17, 1948

Oil and Gas Leases—Ceded Indian Lands.

The order of September 14, 1938, restoring to tribal ownership for the use and benefit of the Southern Ute Tribe of Indians certain ceded Ute lands in Colorado then undisposed of, includes minerals reserved to the United States under patents issued for the surface of the opened lands of that reservation.

Minerals restored to an Indian tribe are not subject to disposition under the Mineral Leasing Act (30 U. S. C., 1946 ed., sec. 181 *et seq.*).

Oil and gas deposits restored to the Southern Ute Tribe may be leased by authority of the tribal council, with the approval of the Secretary of the Interior, pursuant to the act of May 11, 1938 (25 U. S. C., 1946 ed., sec. 396a *et seq.*).

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This is an appeal by Margaret Stepp from the rejection of her application for an oil and gas lease under the Mineral Leasing Act (30 U. S. C., 1946 ed., sec. 181 *et seq.*) on lands in sec. 23, T. 33 N., R. 8 W. and secs. 29 and 30, T. 33 N., R. 7 W., N. M. P. M., Colorado. The

²¹ See Op. Sol., 54 I. D. 483 (1934); and *Curtin v. Benson*, 222 U. S. 78 (1911), holding that the pasturing of livestock on privately owned land in Yosemite National Park could not be prohibited as a penalty for the failure of the landowner to mark the metes and bounds of his land so that it could readily be distinguished from park lands.

May 17, 1948

application was filed on April 22, 1946, and was rejected on November 14, 1947.

The lands described in the application are within that part of the Southern Ute Indian Reservation that was ceded to the United States by an agreement with the Confederated Bands of the Ute Tribe of Indians, ratified by the act of June 15, 1880 (21 Stat. 199), and later opened to entry by Presidential proclamation (1 Kappler 994), under the provisions of the act of February 20, 1895 (28 Stat. 677).

By his order of September 14, 1938 (3 F. R. 2444), the Acting Secretary of the Interior restored to tribal ownership, for the use and benefit of the Southern Ute Tribe of Indians, all the ceded Ute Indian lands within Tps. 32, 33, and 34 N., Rs. 11½ to 13 W., inclusive, N. M. P. M., Colorado,¹ that had not been disposed of prior to the issuance of the order. This action was taken pursuant to sections 3 and 7 of the Indian Reorganization Act of June 18, 1934 (25 U. S. C., 1946 ed., secs. 463 and 467).

It has been determined that a similar order, restoring ceded lands of the Uintah and Ouray Reservation in Utah to tribal ownership, restored to that ownership minerals underlying ceded lands the surface of which had already been disposed of by the United States. Solicitor's opinion, M-34836, January 27, 1947, 59 I. D. 393; *A. A. Brigman*, A-24678, March 30, 1948 (unreported). Nothing in the history of the ceded Southern Ute lands, or in the manner in which they were administered during the period when they were subject to disposition under the land laws of the United States, requires any different conclusion than that reached with respect to the lands of the Uintah and Ouray Reservation. *Cf. The Confederated Bands of Ute Indians v. The United States*, 100 Ct. Cl. 413 (1943).

The Mineral Leasing Act governs the disposition of oil and gas deposits and lands containing such deposits "owned by the United States." 30 U. S. C., 1946 ed., sec. 181. The United States did not on the date of the present application (April 22, 1946), and it does not now, own the oil and gas deposits in the lands involved in the application. Such deposits were then, and they are now, owned by the Southern Ute Tribe of Indians. Accordingly, the Director of the Bureau of Land Management correctly rejected the application.

However, the oil and gas deposits in the lands involved in this application may be leased by authority of the tribal council of the

¹ The order recites that the reservation was established "under the treaty of June 15, 1880" and that the lands were ceded "pursuant to the provisions of the Act of February 20, 1895." This is not entirely accurate. For a full discussion of the status of the Ute lands in Colorado see the Solicitor's opinion of June 15, 1938 (M-29798), and the memorandum for the Acting Secretary dated August 27, 1938, re the proposed Order of Restoration. See also *The Confederated Bands of Ute Indians v. The United States*, 100 Ct. Cl. 413 (1943).

Southern Ute Tribe of Indians, with the approval of the Secretary of the Interior, pursuant to the act of May 11, 1938 (25 U. S. C., 1946 ed., sec. 396a *et seq.*).

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the decision of the Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

REGULATION OF TRADERS ON THE NAVAJO INDIAN RESERVATION

Indian Laws—Statutory Construction—Indian Traders—Licensing—Tribal Powers—Conditions—Commissioner of Indian Affairs—Regulations—Business Leases—Permits—Secretarial Approval—Tribal Property—Individual Property Rights.

The effectiveness of a trading license issued by the Commissioner of Indian Affairs is not dependent upon the consent of the Navajo Tribal Council with whose members the licensee is authorized to engage in trade; and the lack of such consent cannot impair the validity of the license.

The Commissioner of Indian Affairs has the discretionary power to specify the sales prices at which traders shall sell goods to the Indians, and he can either make or decline to make rules and regulations in that respect. The action of the Navajo Tribal Council in proposing to fix prices or to determine what the traders' mark-ups on goods shall be is an attempted encroachment upon a power which is vested solely in the Commissioner.

A licensed trader is privileged to engage in trade with the Indians under whatever conditions and requirements the Commissioner of Indian Affairs may prescribe, and the Navajo Tribal Council has no authority to impose additional conditions or requirements without the concurrence of the Commissioner.

A distinction exists between the privilege of engaging in trade with the Indians and the privilege of using the land of another in carrying on that trade. The latter privilege may be acquired only from the landowner; and if the land is held in trust by the United States for an Indian tribe or for an individual Indian, the regulations of the Department relating to the use of such land for business purposes must be observed.

Under the applicable departmental regulations, the consent of the tribal council and concurrent action by the Secretary or his authorized representative are required with respect to the issuance of a permit to use tribal lands for business purposes. The tribal council may give its consent or withhold it for any reason deemed by it to be sufficient. However, the tribal council has no voice in connection with the utilization of individually allotted lands for business purposes.

Conditions prescribed by the tribal council to affect either new trading licensees or those traders whose licenses have not expired cannot be made effective unless adopted by the Commissioner as a part of the regulations prescribed by him in this field, or unless they are incorporated, with the approval of the Secretary or his authorized representative, in permits covering the use by traders of lands belonging to the tribe.

M-35040

MAY 20, 1948.

TO ASSISTANT SECRETARY WARNE.

On April 27, 1948, you referred to me four questions from the Acting Commissioner of Indian Affairs relative to the licensing of traders on the Navajo Indian Reservation. These questions arise out of a resolution which was adopted by the Navajo Tribal Council on March 20, 1948, and which purports to regulate traders on the reservation.

1. One of the questions propounded by the Acting Commissioner is—

Whether the Commissioner may issue a license to a trader doing business on tribal, allotted, or fee patented land within the reservation even though the Tribal Council refuses to consent to the issuance of a permit or a lease therefor?

By the act of August 15, 1876,¹ Congress vested in the Commissioner of Indian Affairs "the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." In the act of March 3, 1901, as amended and extended by the act of March 3, 1903,² the Commissioner of Indian Affairs again was designated by the Congress to determine what persons shall be permitted to trade with the Indians on any Indian reservation and to prescribe appropriate rules and regulations for the protection of the Indians.³

The scope of the Commissioner's authority under the statutes mentioned above was discussed by the Solicitor of this Department in an opinion dated October 25, 1934.⁴ The Solicitor held, among other things, that the taxing power of Indian tribes does not extend to the levy by a tribe of a tax upon licensed traders, in the absence of an authorization from the Commissioner of Indian Affairs, because the Congress has conferred upon the Commissioner the exclusive authority to appoint traders on Indian reservations and to prescribe the terms and conditions governing their operations. The courts likewise have held that full power and responsibility with respect to granting or refusing a license to trade are vested in the Commissioner of Indian Affairs, and that the privilege of doing business as a trader with the

¹ 19 Stat. 176, 200; 25 U. S. C., 1946 ed., sec. 261.

² 31 Stat. 1058, 1066, 32 Stat. 982, 1009; 25 U. S. C., 1946 ed., sec. 262.

³ The penalty provision relating to the laws governing trade with the Indians is found in 25 U. S. C., 1946 ed., sec. 264, which excepts persons trading with the Five Civilized Tribes.

⁴ 55 I. D. 14, 48. See, also, the Solicitor's memorandum dated August 7, 1937, and a memorandum of the First Assistant Solicitor, dated May 1, 1940, both of which were addressed to the Commissioner of Indian Affairs.

Indians on a reservation is dependent upon a license issued by the Commissioner.⁵

The effectiveness of a license issued by the Commissioner, under the authority exclusively vested in him by the Congress, is not dependent upon the consent of the tribe with whose members the licensee is authorized to engage in trade; and the lack of such consent cannot impair the validity of the license.

The question on this point is accordingly answered in the affirmative.

2. Another question is—

Whether the requirement that Indian traders must conform to mark-ups for certain merchandise prescribed in the resolution contravenes the Act of August 15, 1876, 25 U. S. C. 261?

As pointed out above, the act of August 15, 1876, confers on the Commissioner of Indian Affairs the power not only to appoint traders to the Indian tribes but to specify "the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." In conferring this power on the Commissioner, the Congress necessarily withheld it from the tribes. Thus, any resolution adopted by a tribe dealing with the subject of price control in relation to traders could become effective only to the extent that the Commissioner might see fit to adopt it as a part of his regulations.

The general regulations governing licensed traders in their trade with the Indians on any Indian reservation were prepared by the Commissioner of Indian Affairs and approved by the Secretary of the Interior on June 29, 1927. On June 1, 1937, special regulations covering trade on the Navajo, Zuni, and Hopi Indian Reservations were prepared by the Commissioner, and these regulations were approved by the Assistant Secretary on June 2, 1937.⁶ Section 276.22 of the 1927 regulations directs the local superintendent to see that prices charged by licensed traders are fair and reasonable. To that end, the traders are required, upon request, to submit records which reflect the cost and selling prices of goods handled by them. A specific provision dealing with the regulation of prices was not included originally in the special 1937 regulations pertaining to traders on the Navajo Reservation. The omission appears to have been intentional.⁷ On November 5, 1942, the 1937 trading regulations were amended to include a provision stating that the prices of all articles of merchandise placed on sale shall be plainly and visibly marked by the traders.⁸

⁵ See *United States v. Parton et al.*, 132 F. (2d) 886 (1943); *Blair, Supt. v. McAlhoney*, 123 F. (2d) 142 (1941).

⁶ See 25 CFR, Part 277. The text of the regulations approved in 1927 may be found in 25 CFR, Part 276.

⁷ See Indian Office file 7141-36-124, dealing with trading regulations affecting the Navajo Indians. See particularly Superintendent Fryer's recommendation of February 5, 1937, to the Commissioner of Indian Affairs.

⁸ 25 CFR, Cum. Supp., 277.7. Prior to this amendment, the Superintendent of the Navajo Agency had been authorized by the Commissioner's office on July 30, 1941, to direct traders on the Navajo Reservation to mark the sales prices of all goods offered to the Indians.

May 20, 1948

Apparently, the Commissioner has not yet determined that there is a need for setting the sales prices of, or fixing mark-ups on, goods sold by the traders. Such a determination is within the discretionary power exclusively vested in him by the laws mentioned above, and he can either make or decline to make rules and regulations in that respect. I believe, therefore, that the action of the Navajo Tribal Council in proposing to fix prices at which traders may sell goods to Indians or to determine what the traders' mark-ups on goods shall be is an attempted encroachment upon a power which is vested solely in the Commissioner of Indian Affairs.⁹

3. A third question asked by the Acting Commissioner is—

Whether the Tribal Council may require as a condition for permitting traders to use and occupy tribal, fee patented, or allotted lands within the reservation for business purposes a payment of rental and other conditions such as mark-ups for the sale of merchandise, prices to be paid Indians for merchandise, and the types of records to be kept. If so, is the same legal principle applicable to traders doing a substantial business with Indians on fee patented or allotted lands outside the exterior boundaries of the reservation?

As previously indicated, a licensed trader is privileged to engage in trade with the Indians under whatever conditions and requirements the Commissioner may prescribe. Without the concurrence of the Commissioner, the Navajo Tribal Council has no authority to impose additional conditions or requirements.¹⁰

However, a distinction must be made between the privilege of engaging in trade with the Indians and the privilege of using the land of another in carrying on that trade. The latter privilege may be acquired only from the landowner; and if the land is held in trust by the United States for an Indian tribe or for an individual Indian, the regulations of the Department relating to the use of such land for business purposes must be observed.

Insofar as tribal lands are concerned, the applicable regulations require that the consent of the tribe to the use of such land for business purposes be obtained.¹¹ The tribal council may give such consent in a given case or the consent may be withheld for any reason deemed by the council to be sufficient. Therefore, through the concurrent action of the Secretary, or his authorized representative, and the Navajo Tribal Council, any permit issued for the use of Navajo tribal land by a trader may contain appropriate conditions relating to the payment of rent and such other conditions as may be deemed to be essen-

⁹ See Solicitor's opinions dated May 8, 1940 (57 I. D. 124, 125, 126), and May 31, 1940 (57 I. D. 129, 141).

¹⁰ *Of. Sperry Oil Co. v. Chisholm*, 264 U. S. 488 (1924); *Blanset v. Cardin*, 256 U. S. 319 (1921).

¹¹ 25 CFR 277.12, and the regulations approved February 17, 1948 (13 F. R. 829-831, sec. 171.10).

tial to the protection of the Indians and the promotion of their welfare.

On the other hand, a tribal council has no voice in connection with the utilization for business purposes of lands allotted in severalty to individual members of the tribe.

4. The final question to be considered is—

Would the rentals and other prescribed conditions in the resolution be applicable to traders whose licenses have not expired on June 1, 1948?

It follows from what has been said in the preceding parts of this memorandum that the several conditions set forth in the resolution of March 20, 1948, insofar as they affect the business of licensed traders, cannot be made effective unless they are adopted by the Commissioner as a part of the regulations prescribed by him in the exercise of his exclusive authority in this field, or unless they are incorporated, with the approval of the Secretary or his authorized representative, in permits covering the use by traders of lands belonging to the tribe. Standing alone, such conditions cannot be enforced either against new licensees or against those whose licenses have not yet expired.

MASTIN G. WHITE,
Solicitor.

**CONTRACTS UNDER SECTION 9 (e), RECLAMATION PROJECT ACT
OF 1939**

Irrigation Repayment Contracts—Repayment Period—Secretarial Discretion.

The Secretary, in embarking upon a program to furnish water for irrigation purposes under section 9 (e), Reclamation Project Act of 1939, is not necessarily limited to a 40-year period for effecting the reimbursement to the United States of that part of the cost of the construction of works connected with water supply and allocated to irrigation.

M-35047

MAY 24, 1948.

TO THE SECRETARY.

In accordance with your oral request, I have considered the * * * draft of a proposed communication from the Secretary of the Interior to the Director of the Bureau of the Budget, with particular reference to whether the draft takes a sound legal position in asserting that the Secretary, in embarking upon a program for the furnishing of water for irrigation purposes under subsection (e) of section 9 of the Reclamation Project Act of 1939 (43 U. S. C., 1946 ed., sec. 485h (e)), is not necessarily limited to a 40-year period for effecting the reimbursement to the United States of that part of the cost of the construction of works connected with water supply and allocated to irrigation.

May 24, 1948

The statutory provision mentioned in the preceding paragraph states that—

In lieu of entering into a repayment contract pursuant to the provisions of subsection (d) of this section to cover that part of the cost of the construction of works connected with water supply and allocated to irrigation, the Secretary, in his discretion, may enter into either short- or long-term contracts to furnish water for irrigation purposes. Each such contract shall be for such period, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, due consideration being given to that part of the cost of construction of works connected with water supply and allocated to irrigation; and shall require payment of said rates each year in advance of delivery of water for said year. * * *

As indicated in the introductory clause of subsection (e), this is one of two alternative statutory provisions which may be utilized by the Department with respect to the furnishing of water for irrigation purposes in connection with a new reclamation project, a new division of an existing project, or supplemental works on a project. The other statutory authorization is contained in subsection (d) of section 9.* With regard to a contract entered into under that subsection, it is specifically provided that "the part of the construction costs allocated by the Secretary to irrigation shall be included in a general repayment obligation of the organization; * * *" and that "the general repayment obligation * * * shall be spread in annual installments * * * over a period not exceeding forty years * * *" (following the end of the development period, if one is fixed by the Secretary).

The legislative history of the Reclamation Project Act of 1939 does not contain anything which requires a holding that the 40-year maximum period fixed by Congress in subsection (d) of section 9 for the reimbursement to the United States of the part of the construction costs allocated to irrigation is also, by necessary implication, applicable to contracts entered into under subsection (e) of section 9. Although a congressional report (H. Rept. 995, 76th Cong., p. 2) on the bill, which later became the Reclamation Project Act of 1939, stated generally that "It should be noted that the bill retains the principle of a 40-year repayment period in effect since the Adjustment Act of 1926," this general observation in the report is less significant than the actual difference that is found in the language of subsections (d) and (e) with respect to the point under consideration. As previously indicated, there is a specific requirement in subsection (d) that contracts entered

*It should be noted that the alternative choice respecting the two types of contracts is not applicable to the recovery of the costs of "irrigation water distribution works" constructed by the Government. Such costs must be covered by a repayment contract entered into pursuant to subsection (d) of section 9.

into pursuant to that subsection shall provide for the repayment to the United States within a 40-year period of the part of the construction costs allocated to irrigation, whereas subsection (e) does not contain any such express requirement. The provision in subsection (e) to the effect that each contract under that subsection shall be for a period "not to exceed forty years" merely places a maximum limitation on the authorization for entering into "either short- or long-term contracts." If Congress had intended to impose, with respect to contracts entered into under subsection (e), a 40-year limitation on the recovery of the part of the construction costs allocated to irrigation, it could easily have inserted language indicating such intention, as was done in subsection (d).

I find no basis for reading into subsection (e) of section 9 of the Reclamation Project Act of 1939 a limitation upon the authority of the Secretary which the Congress omitted from the language of that subsection. Accordingly, I concur in the soundness of the legal position taken in the proposed communication to the Director of the Bureau of the Budget that the process of recovering for the Government, under contracts entered into pursuant to subsection (e), that part of the cost of the construction of works connected with water supply and allocated to irrigation may properly extend beyond a 40-year period, if the Secretary of the Interior, in his discretion, believes the utilization of such an extended period to be advisable. Of course, the question whether the Secretary should or should not utilize his discretionary power in this respect to such an extent is one of policy, to be decided in the light of the circumstances surrounding each case.

MASTIN G. WHITE,
Solicitor.

CHARLES W. TROUNSON

A-24583

Decided May 27, 1948

Private Exchange—Withdrawn Land.

An application filed while land is withdrawn from entry is invalid.

The revocation of a withdrawal during the pendency of an applicant's appeal from the rejection of his application does not validate the application.

APPEAL FROM THE GENERAL LAND OFFICE¹

On August 17, 1943, Charles W. Trounson filed an application to exchange the NW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 24, T. 7 S., R. 22 E., B. M., Idaho, for lot 1, sec. 24, T. 9 S., R. 16 E., B. M., Idaho, pursuant to the provisions of section 8 of the Taylor Grazing Act (48 Stat. 1269, 49

¹ Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

May 27, 1948

Stat. 1976; 43 U. S. C., 1946 ed., sec. 315g). On December 6, 1943, Mr. Trounson filed a supplemental application in which, in addition to the lands previously mentioned, he offered to exchange other lands.

On March 1, 1945, the Assistant Commissioner of the General Land Office rejected the supplemental application insofar as it included lot 1, sec. 24, T. 9 S., R. 16 E., B. M., Idaho, because that lot had been classified as valuable for power purposes and included in Power Site Classification No. 337 on February 10, 1943, and so was not subject to disposition under the public-land laws. Mr. Trounson appealed.

While this appeal was pending, Mr. Trounson died. His widow, Mrs. May Trounson, was, by a decree of the probate court of Jerome County, Idaho, dated May 14, 1946, decreed to be the owner of the NW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 24, T. 7 S., R. 22 E., B. M., Idaho, the land offered in the original application. Mrs. Trounson has withdrawn the application to exchange the lands offered in the supplemental application, except that she still seeks to acquire lot 1, sec. 24, T. 9 S., R. 16 E., B. M., Idaho, in exchange for the NW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 24, T. 7 S., R. 22 E., B. M., Idaho.

By Restoration Order No. 1150 of February 28, 1947 (12 F. R. 1695), the lot sought was opened to disposition under the public-land laws, subject to the provisions of section 24 of the Federal Power Act. Under that order, the lot became subject to entry by the general public on August 2, 1947.

At the time when the application was filed, the lot in question was withdrawn from entry. It is well settled that an application filed while land is withdrawn from entry is invalid. *Lewis T. Cureton*, A-25196, March 8, 1948 (unreported); *Guy C. Riddell et al.*, A-24055, January 24, 1946 (unreported). Consequently, the Assistant Commissioner of the General Land Office was correct in rejecting Mr. Trounson's application insofar as it related to the land withdrawn by the order of February 10, 1943.

The revocation of a withdrawal during the pendency of an applicant's appeal from the rejection of his application does not validate the application. *Guy C. Riddell et al.*, *supra*; *Katharine Davis*, 30 L. D. 220 (1900).

Though it follows that the decision appealed from must be affirmed, such affirmance is without prejudice to the right of Mrs. May Trounson to file a new application for the land desired by her.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the decision of the Assistant Commissioner of the General Land Office is affirmed.

MASTIN G. WHITE,
Solicitor.

S. N. HODGES ET AL. v. PHILLIPS PETROLEUM COMPANY

A-25168

*Decided May 27, 1948***Public Lands—Oklahoma Panhandle South of the Cimarron Base Line and North of the Texas State Boundary Line.**

Lands in the Oklahoma panhandle south of the Cimarron base line and north of the Texas State boundary line are public lands of the United States, the surface title of which may, under the act of August 7, 1946 (60 Stat. 872), be patented under certain conditions, the minerals being disposable "under applicable laws." The Mineral Leasing Act of February 25, 1920 (30 U. S. C. sec. 181), is one of the "applicable laws" under which these minerals may be disposed of by the United States.

Oil and Gas Leases—Preference Right Under Mineral Leasing Act.

Section 20 of the Mineral Leasing Act does not apply to those whose rights as patentees or entrymen originated after February 25, 1920, or to those whose rights as assignees originated after January 1, 1918. Consequently, a person who acquired the surface title to the public lands in the Oklahoma panhandle south of the Cimarron base line by a patent under a 1946 statute is not eligible to claim, on the basis of that surface title, the benefits of section 20.

Oil and Gas Leases—Preference Right Under Mineral Leasing Act—Authority of the Secretary.

Since section 17 of the Mineral Leasing Act specifically provides the methods for issuing oil and gas leases on lands within a known geologic structure of a producing oil or gas field, the Secretary of the Interior is not authorized, under his general authority over minerals in the public lands, to award a preference-right oil and gas lease, except as provided in the Mineral Leasing Act.

Statutory Construction—Act of August 7, 1946.

The act of August 7, 1946 (60 Stat. 872), was a remedial statute, conferring certain rights upon the persons intended to be benefited thereby. But the act does not deprive them of any rights they might have under any other laws of Congress.

Public Lands—Oklahoma Panhandle South of the Cimarron Base Line—Homestead Settlement—Oil and Gas Leases—Preference Right Under Mineral Leasing Act.

Since the public lands in the Oklahoma panhandle south of the Cimarron base line were subject to homestead settlement, any person who can show compliance with the Federal laws and regulations covering the establishment prior to 1920, and continuous maintenance thereafter, of settlement under the homestead laws, would have settlement rights which could be made the basis for a claim to a preference-right oil and gas lease under section 20 of the Mineral Leasing Act. The fact that such person had previously mistakenly claimed the lands as grantee of the State of Texas does not impair his rights, whatever they may be, under the homestead and mineral-leasing laws.

May 27, 1948

**Public Lands—Oklahoma Panhandle South of the Cimarron Base Line—
Election to Make Entry.**

Since the question as to the treatment to be accorded to the equitable claims of the supposed owners of the public lands in the Oklahoma panhandle south of the Cimarron base line was for many years the subject of congressional consideration, those persons were not required by Circ. 932, 43 CFR 192.48, to anticipate the ultimate congressional decision by filing an election to make future homestead entry on the land with reservation of the minerals to the United States.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

S. N. Hodges, Maude Young Yates, W. M. Harland, and Elias Nelson, as administrator of the estate of Lars Hill, Sr., have filed applications, B. L. M. 012363, 012364, 012365, and 012429, respectively, seeking preference-right oil and gas leases under section 20 of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437, 445; 30 U. S. C. secs. 181, 229),¹ on certain lands which are situated north of the State boundary between the Oklahoma and Texas panhandles and south of the Cimarron base line, and which are within the known geologic structure of the Hugoton gas field. Their applications are opposed by the Phillips Petroleum Company, which was the high bidder for competitive oil and gas leases on these lands, pursuant to a notice by the Bureau of Land Management requesting bids for leases under section 17 of the Mineral Leasing Act (30 U. S. C. secs. 181, 226), as amended by the act of August 8, 1946 (60 Stat. 950, 951).² Briefs have been filed and served by the applicants and by the Company.

The background of this case reaches back to the establishment, in 1850, of the boundary line between the panhandles of Oklahoma and Texas at the parallel of latitude 36° 30' N.³ This boundary line was surveyed in 1860 by John H. Clark, pursuant to the act of June 5, 1858

¹ Section 20 of the Mineral Leasing Act provides:

"Sec. 20. In the case of lands bona fide entered as agricultural, and not withdrawn or classified as mineral at the time of entry, but not including lands claimed under any railroad grant, the entryman or patentee, or assigns, where assignment was made prior to January 1, 1918, if the entry has been patented with the mineral right reserved, shall be entitled to a preference right to a permit and to a lease, as herein provided, in case of discovery; and within an area not greater than a township such entryman and patentees, or assigns holding restricted patents may combine their holdings, not to exceed two thousand five hundred and sixty acres for the purpose of making joint application. Leases executed under this section and embracing only lands so entered shall provide for the payment of a royalty of not less than 12½ per centum as to such areas within the permit as may not be included within the discovery lease to which the permittee is entitled under section 14 hereof."

² Section 17 of the Mineral Leasing Act provides, in part:

"Sec. 17. All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits may be leased by the Secretary of the Interior. When the lands to be leased are within any known geological structure of a producing oil or gas field, they shall be leased to the highest responsible qualified bidder by competitive bidding under general regulations * * *"

³ Act of September 9, 1850 (9 Stat. 446); act of Texas Legislature, approved November 25, 1850 (2 Sayles' Early Laws of Texas 267); Presidential Proclamation of December 13, 1850 (9 Stat. 1005); *Oklahoma v. Texas*, 272 U. S. 21, 25 (1926).

(11 Stat. 310), and was confirmed by Congress and by Texas in 1891.⁴ The Clark line is the present north boundary of Texas.⁵

The Cimarron base line, on which the survey of the public lands in the panhandle of Oklahoma is based, was surveyed in 1881 from the 103° to the 100° meridian of west longitude from Greenwich by Richard O. Chaney and William W. Smith, purportedly along the parallel of latitude 36° 30' N. The lands north of the Cimarron base line were surveyed and dealt with as public lands of the United States in Oklahoma. The lands south of the Cimarron base line, which was supposed to coincide with the Texas-Oklahoma boundary, were assumed to be in the State of Texas. But although the two surveys had been supposed to be identical, it later developed, from the monuments found on the ground, that the Cimarron base line is as much as 500 feet north of the north boundary of Texas. The difference in surveys left a strip of unsurveyed land in Oklahoma 156 miles long, varying in width from a point (on the east) to 500 feet at the west and containing about 4,900 acres.⁶ By Executive Order No. 6681 of April 17, 1934, this unsurveyed land was "withdrawn from settlement, location, sale, or entry, for classification and pending legislation authorizing the disposal thereof and for the relief of *bona fide* claimants." These lands were later surveyed, but the plats of survey were kept unfiled, pending action by Congress. In 1945, the lands here involved were classified as being within the known geological structure of the Hugoton gas field.

Section 1 of the act of August 7, 1946 (60 Stat. 872),⁷ authorized the issuance of a patent for the surface of these lands under certain conditions, upon application made within 1 year from the official filing of the township plat of survey of these lands;⁸ the minerals,

⁴ Act of March 3, 1891 (26 Stat. 948, 971); Texas Joint Resolution, Texas Laws (1891), p. 193; H. Doc. 259, 59th Cong., 1st sess., pp. 13-18; H. Rept. 2359, 79th Cong., 2d sess.

⁵ *Oklahoma v. Texas*, 272 U. S. 21, 25 (1926); 276 U. S. 596, 597 (1928).

⁶ H. Rept. 2359, 79th Cong., 2d sess., p. 2 (June 27, 1946); H. Rept. 572, 75th Cong., 1st sess. (April 8, 1937).

⁷ Section 1 of the act of August 7, 1946, is as follows:

"That whenever it shall be shown, under such regulations as the Secretary of the Interior may prescribe, that public land situated south of the Cimarron base line in Oklahoma and north of the north line of Texas has been used, improved, or cultivated in connection with abutting land, and has been held in good faith, in peaceful, open, adverse possession by a citizen or citizens of the United States, his or their ancestors, or grantors, for a period not less than twenty years prior to the passage of this Act, such citizen or citizens shall be entitled to receive a patent therefor upon payment of \$1.25 per acre: *Provided*, That oil, gas, or other mineral deposits contained therein are hereby reserved to the United States; that said minerals shall be and remain subject to sale or disposal by the United States under applicable laws; and that permittees, lessees, grantees, or agents of the United States shall have a right to enter upon said lands for the purpose of prospecting for and mining said minerals: *And provided further*, That any person entitled to patent under this Act shall present his application within one year from the official filing of the township plat."

⁸ The plats of survey were filed on November 14, 1947. Public Land Order 408 of September 12, 1947 (12 F. R. 6293), authorized the filing, until November 14, 1948, of applications for patents under the provisions of section 1 of the act of August 7, 1946, "subject to valid existing rights."

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reserved to the United States, were to "remain subject to sale or disposal by the United States under applicable laws."

The Bureau's notice, requesting sealed bids on or before July 16, 1947, for oil and gas leases on these and other lands, stated:

* * * The lands in Parcels Nos. 10 to 15 inclusive are subject to the act of August 7, 1946 (Public Law 617, 79th Congress [60 Stat. 872]), and any person believing or claiming to have a preference right under section 20 of the mineral leasing act as amended (43 CFR 192.70) for any of these lands must file his application for preference right lease with the Director, Bureau of Land Management, Washington 25, D. C., on or prior to the date herein set for the opening of bids. * * *

Hodges, Yates, Harland, and Administrator Nelson, claiming preference rights under section 20 of the Mineral Leasing Act, filed their applications, timely, for preference-right oil and gas leases on the following lands:

Hodges:

	Acres
T. 1 S., R. 12 E., C. M., Oklahoma,	
sec. 1, Tr. 1.....	2.28
T. 1 S., R. 13 E., C. M., Oklahoma,	
sec. 3, Tr. 2.....	9.67
Tr. 3.....	2.31
Tr. 4.....	26.61
sec. 4, all.....	53.69
sec. 5, all.....	54.28
sec. 6, all.....	54.86
Total acreage.....	203.70

Yates:

T. 1 S., R. 12 E., C. M., Oklahoma,	
sec. 6, Tr. 2.....	4.30
Tr. 3.....	19.90
Tr. 4.....	8.19
T. 1 S., R. 11 E., C. M., Oklahoma,	
sec. 1, Tr. 1.....	21.35
Tr. 2.....	2.40
Total acreage.....	56.14

Harland:

T. 1 S., R. 12 E., C. M., Oklahoma,	
sec. 1, Tr. 4.....	20.55
sec. 2, Tr. 1.....	12.26
Total acreage.....	32.81

Administrator Nelson:

T. 1 S., R. 14 E., C. M., Oklahoma,	
sec. 1, Tr. 2.....	14.94
Tr. 3.....	16.69
Total acreage.....	31.63

All of them alleged continuous, peaceful, open, adverse possession of these lands since before February 25, 1920.

The Phillips Petroleum Company was the high bidder for oil and gas leases on most of the lands here involved.⁹

On August 26, 1947, the Bureau of Land Management rejected all four of the preference-right lease applications, holding that the applicants had no preference right under section 20 of the Mineral Leasing Act because their right or title was not acquired from the United States prior to February 25, 1920, but through patents from the State of Texas, and because the act of August 7, 1946, authorizing the issuance of patents on these lands, did not provide that the patentee should have a preference right to an oil and gas lease.

The act of August 7, 1946, reserved the minerals to the United States and authorized the patenting under that act of only a surface title to those who had, for more than 20 years, used and improved the lands under claim or ownership in the mistaken belief that the lands were not public lands.¹⁰ And with respect to the mineral deposits, the act provided that the minerals shall be disposed of by the United States "under applicable laws." The Mineral Leasing Act is obviously one of the "applicable laws." The very fact that the oil and gas leases which the Bureau of Land Management offered at public auction on these lands were to be under section 17 of the Mineral Leasing Act indicates that the Bureau regarded the Mineral Leasing Act as applicable to these oil and gas deposits. Section 20 of the Mineral Leasing Act is as applicable to the oil and gas deposits in these lands as section 17 would be. The question, then, is whether the applicants can come within the scope of section 20.

Section 20 of the Mineral Leasing Act provides:

In the case of lands bona fide entered as agricultural, and not withdrawn or classified as mineral at the time of entry, * * * the entryman or patentee, or assigns, where assignment was made prior to January 1, 1918, if the entry has been patented with the mineral right reserved, shall be entitled to a preference right to a permit¹¹ and to a lease, as herein provided, in case of discovery; * * *.

This provision has been consistently interpreted by this Department as not applying to those whose rights as patentees or entrymen

⁹ A few parcels of the lands applied for by Hodges, Yates, Harland, and Nelson were not offered for competitive oil and gas lease bidding.

¹⁰ This was pursuant to this Department's suggestion that "Such equities may be fully protected by the granting of the surface title." H. Rept. 2359, 79th Cong., 2d sess., p. 3 (June 27, 1946).

¹¹ After the amendatory act of August 21, 1935 (49 Stat. 674), provided for the issuance of noncompetitive leases instead of prospecting permits on unproven oil and gas lands (43 CFR 192.1 (1940 ed.)), applicants entitled to permits under section 20 of the Mineral Leasing Act received leases instead of permits. Circ. 1552 of May 31, 1943, 43 CFR, Cum. Supp., 192.45 (8 F. R. 7710).

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originated after the enactment of the act (February 25, 1920), or to those whose rights as assignees originated after January 1, 1918.¹² It is apparent, therefore, that a person who acquires the surface title to the land by a patent under the 1946 act, a title which could not possibly antedate the act of August 7, 1946, is clearly not eligible to claim, on the basis of that surface title, the benefits of section 20. Furthermore, there is no provision in the 1946 act conferring a preference right to lease the minerals upon those receiving patents to the surface under that act. Moreover, since section 17 of the Mineral Leasing Act specifically provides that "lands * * * within any known geological structure of a producing oil or gas field * * * shall be leased to the highest responsible qualified bidder by competitive bidding," the Secretary is not authorized, under his general authority over minerals in the public lands, to award a preference-right oil and gas lease except as provided in the Mineral Leasing Act, and therefore he cannot issue such a preference-right lease to one who may own the surface title only by virtue of a patent under the 1946 act. As to any land here involved, therefore, with respect to which the applicants can claim the surface title only pursuant to a patent under the 1946 act, the applicants have no basis for asserting a preference right to a lease of the mineral deposits in those lands.

The 1946 act was plainly a remedial statute. It was intended to confer the benefit of the surface title upon those persons who, despite ample equities to support their claim to the lands, had no legal right to obtain them. But the 1946 act, in conferring upon certain persons the right to receive patents for the surface of these lands, was not intended to deprive them of whatever rights they might have under any other laws of Congress.

The lands here involved were opened to homestead settlement by the act of May 2, 1890 (26 Stat. 81, 82, 90), as amended by the act of October 20, 1893 (28 Stat. 3). The applicants for preference-right oil and gas leases allege in their appeal that they have settlement rights on these lands which were acquired, directly or by assignment, prior to 1918, and they "have lived on the land, developed and improved it by building homes and cultivating the soil, at all times * * * these appellants had a bona fide intent to settle these * * * lands for agricultural purposes * * *." If they can substantiate their allegations and show compliance with the Federal laws and regulations

¹² Oil and Gas Regulations of March 11, 1920 (Circ. 672), 47 L. D. 437, 444; Digest of Decisions and Opinions in Connection With the Administration of the Act of February 25, 1920, as Applied to Oil and Gas, 47 L. D. 463, 466, 469, 470 (1920); *Charles R. Haupt*, 47 L. D. 588, 589 (1920), 48 L. D. 355 (1921); Circ. 932 of April 28, 1924, 50 L. D. 400, 43 CFR 192.45 (1940 ed.); Circ. 1552 of May 31, 1943, 43 CFR, Cum. Supp., 192.45 (8 F. R. 7710); Circ. 1624 of October 28, 1946, 43 CFR 192.70.

governing the establishment and continuous maintenance of settlement rights under the homestead laws, they would have Federal rights to acquire the title to the surface of these lands without any need to rely on the 1946 act. The requirements under the homestead laws are different from the requirements for a patent under the 1946 act. And if the applicants can as settlers qualify under, and establish their rights to the surface title of these lands pursuant to, the homestead laws, they would then be in a position to seek to qualify for preference-right oil and gas leases under the provisions of section 20 of the Mineral Leasing Act.

Pursuant to the purpose of Congress in enacting section 20 as a "relief" provision, "designed to recognize the equities of persons who had gone upon the public domain * * * upon the theory and under the belief that they were obtaining an unrestricted title to the land,"¹³ this Department has held that one who settled upon the public domain prior to the enactment of the Mineral Leasing Act (February 25, 1920), where the lands were not, at the time of settlement, withdrawn or classified as valuable for oil and gas deposits, is entitled under certain conditions to a preference-right oil and gas lease on those lands under section 20 of the Mineral Leasing Act.¹⁴ This preference right could be exercised by a settler on lands subject to settlement even though he had not yet made his entry, if his failure to file his entry papers was because the lands were not open to entry under the homestead laws.¹⁵ If these applicants can show that they have complied with the settlement requirements of the homestead laws, that they are now entitled to complete such settlement rights by homestead entry, and that they comply with the requirements of section 20, they can obtain preference-right oil and gas leases under section 20. They would not now be penalized under the homestead and mineral leasing laws by the fact that they had previously mistakenly claimed these lands as grantees of the State of Texas.¹⁶

Nor is it here material that the applicants had not, at the time the lands were declared valuable for minerals, filed an election to make entry when the lands would become subject to entry, with a reservation of the oil and gas deposits to the United States, as required by

¹³ Digest of Decisions and Opinions in Connection With the Administration of the Act of February 25, 1920, as Applied to Oil and Gas, 47 L. D. 463, 469 (1920).

¹⁴ Instructions of April 28, 1924, Circ. 932, 50 L. D. 400, 43 CFR 192.45 (1940 ed.); Regulations of October 28, 1946, Circ. 1624, 43 CFR 192.70.

¹⁵ Circ. 932, *supra* (footnote 14); 43 CFR 192.48 (1940 ed.). The revised regulations of October 28, 1946, *supra* (footnote 14), are not inconsistent. The plats of survey of the lands here involved were not filed until November 14, 1947. Until they were filed, no homestead entry could be made on the lands by any settler. 43 CFR 166.2, 166.17; *Ben-McLendon*, 49 L. D. 548, 561 (1923); *Anderson v. State of Minnesota*, 37 L. D. 390 (1909); *Cobb v. Oregon and California R. R. Co.*, 36 L. D. 268 (1908).

¹⁶ *Simpkins v. Hays*, 15 L. D. 293, 295 (1892).

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paragraph 3 of Circular 932, Instructions of April 28, 1924.¹⁷ These lands were not like ordinary public lands. They had long been supposed to be part of Texas. The present applicants had long claimed them under patents from the State of Texas. When their public-land status was discovered, the question as to what treatment would be accorded to the equitable claims of these persons was the subject of congressional consideration for several years.¹⁸ It would be entirely unreasonable to have required the applicants, in these circumstances, to anticipate the ultimate congressional decision by filing an election to make future homestead entry on the land with reservations of the minerals to the United States. The purpose of the election required by the regulation was to facilitate the administration of the lands by the United States with respect to their mineral deposits. No such purpose could have been accomplished as to these lands until after Congress had decided what action to take with respect to the equitable claims of those who thought they had owned these lands, and with respect to the mineral deposits in the lands.

Since these applicants claim valid settlement rights on these lands, they should promptly file in the Bureau their applications for entry under the homestead laws. In addition, if they have not already done so, they should, before November 14, 1948, file applications for patents under the act of August 7, 1946, indicating therein that the latter applications may be rejected as to any lands on which the respective applicant is held to have established a valid settlement homestead right. The Bureau should award preference-right oil and gas leases to these applicants under their present applications, if they are otherwise qualified, on those lands for which they establish homestead rights which can be recognized as the basis for a preference right under section 20 of the Mineral Leasing Act and continuously maintained since then, and should reject the preference-right-lease applications as to those lands on which they have no such homestead settlement rights but only rights to a patent under the 1946 act. The Bureau may award section 17 leases to Phillips Petroleum Company on those lands to which section 20 preferences are not established. The case is remanded to the Bureau for further action not inconsistent with this decision.

OSCAR L. CHAPMAN,
Under Secretary.

¹⁷ 50 L. D. 400, 43 CFR 192.48 (1940 ed.). This provision was eliminated in the revised regulations of October 28, 1946, *supra* (footnote 14).

¹⁸ 79th Cong., S. 1387 and H. R. 3593 (which became the act of August 7, 1946, 60 Stat. 872); 78th Cong., S. 1868; 76th Cong., S. 2621 and H. R. 2957; 75th Cong., H. R. 4890; 74th Cong., S. 2526 and H. R. 12163; 73d Cong., H. R. 9137.

ORDERS DELEGATING SECRETARIAL POWERS

Under Secretary—Assistant Secretaries.

The statutes creating the position of Under Secretary and the positions of Assistant Secretary do not contain an express authorization for such officials to exercise the powers of the Secretary of the Interior.

The Under Secretary and the Assistant Secretaries are only authorized to exercise such powers as are delegated to them by the Secretary of the Interior.

The Under Secretary and the Assistant Secretaries are not authorized to delegate Secretarial powers to subordinate officials of the Department.

M-35051

JUNE 1, 1948.

TO ASSISTANT SECRETARY DAVIDSON.

This responds to your memorandum of May 21 concerning orders delegating Secretarial powers.

The statutes creating the position of Under Secretary of the Interior and the positions of Assistant Secretary of the Interior do not, as assumed in your memorandum, contain an express authorization for such officials to exercise the powers of the Secretary of the Interior. Perhaps it would be helpful, in this connection, to discuss in some detail the various statutory provisions which relate to these positions.

The first position on the sub-Cabinet level in the Department of the Interior was established by section 6 of the act of March 14, 1862 (12 Stat. 355, 369), which provided:

That the President shall appoint in the Department of the Interior, by and with the advice and consent of the Senate, a competent person, who shall be called the Assistant Secretary of the Interior, * * * who shall perform such duties in the Department of the Interior as shall be prescribed by the Secretary, or may be required by law, and who shall act as the Secretary of the Interior in the absence of that officer.

When the Federal statutes in effect on December 1, 1873, were revised and consolidated as the Revised Statutes of the United States, the provisions of law relating to the position of Assistant Secretary of the Interior were reenacted as sections 438 and 439 of the Revised Statutes, reading as follows:

There shall be in the Department of the Interior an Assistant Secretary of the Interior, who shall be appointed by the President, by and with the advice and consent of the Senate * * *.

The Assistant Secretary of the Interior shall perform such duties in the Department of the Interior as shall be prescribed by the Secretary, or may be required by law.

These provisions of law relating to the Assistant Secretary of the Interior were carried forward into sections 482 and 483 of Title 5

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of the original United States Code (44 Stat., Part 1, p. 55).¹ No other statutory provisions pertaining to the functions or duties of the occupant of this position have been enacted by the Congress.²

The second position in this Department on the sub-Cabinet level was established through the appropriation, in the act of March 3, 1885 (23 Stat. 478, 497), of a sum—

For an additional Assistant Secretary of the Interior, who shall be known and designated as First Assistant Secretary of the Interior * * *.

This position became a permanent part of the Department as a result of the appropriation annually by Congress of money to pay the salary of the "First Assistant Secretary." When the laws of the United States were codified as of December 7, 1925, and reissued in the form of the United States Code, section 482 of Title 5 of the Code (44 Stat., Part 1, p. 55) provided that—

There shall be in the Department of the Interior a First Assistant Secretary of the Interior, * * * who shall be appointed by the President, by and with the advice and consent of the Senate.

The designation was changed from "First Assistant Secretary" to "Assistant Secretary" by the provision in the act of February 29, 1944 (58 Stat. 107), to the effect that—

The Assistant Secretaries of the Interior shall be without numerical distinction of rank * * *.

No statutory provisions respecting the functions or duties of the occupant of this position have ever been enacted by the Congress.³

The position of Under Secretary of the Interior came into existence as a result of language in the Interior Department Appropriation Act for the fiscal year 1936 (49 Stat. 176, 177) making the funds appropriated in the item "Salaries" under the Office of the Secretary available—

For the * * * Under Secretary (which position is hereby established in the Department of the Interior * * * with appointment thereto by the President, by and with the advice and consent of the Senate) * * *.

There are no statutory provisions dealing with the functions and duties of the Under Secretary of the Interior.⁴

¹ In addition, the codifiers inadvertently set out in the final sentence of section 483, as relating to the Assistant Secretary, a provision which actually had been enacted by the Congress with reference to "the assistant to the Secretary of the Interior." (40 Stat. 499, ch. 29.) That sentence has been clarified in section 483 of the 1946 edition of the United States Code, so that it relates to "the assistant to the Secretary."

² Perhaps it might be mentioned in this connection that the so-called Indian Delegation Act (25 U. S. C., 1946 ed., sec. 1a) states that powers delegated by the Secretary under that act to officials of the Bureau of Indian Affairs shall be "subject to appeal to the Secretary * * * or, as from time to time determined by him, to the Under Secretary or to an Assistant Secretary of the Department of the Interior * * *."

³ See footnote 2.

⁴ See footnote 2.

The unsatisfactory state of the legislation relating to these positions, particularly the position of Under Secretary and the position of Assistant Secretary that was created in 1885, was pointed out in my memorandum of December 2, 1946, to the Secretary, suggesting that corrective legislation should be sought by the Department.

It will be noted that there is nothing in any of the statutory provisions relating to the sub-Cabinet positions in the Department of the Interior, and I may add that there is nothing in any of the decisions known to me on the subject of delegation of Secretarial powers, which indicates that the Under Secretary and Assistant Secretaries are authorized to decide which of the powers vested in the Secretary of the Interior by law shall be delegated to subordinate officials of the Department, and which officials shall be the recipients of such delegated powers. Moreover, the Secretary has not attempted to vest such authority in the Under Secretary and Assistant Secretaries. Section 4.0 of 43 CFR states that these officials may themselves "exercise" Secretarial powers, but it does not say that they may delegate Secretarial powers to other persons.

MASTIN G. WHITE,
Solicitor.

FLOYD HAMILTON

A-24495

Decided June 4, 1948

Homestead Entry—Railroad-Grant Lands.

Lands which were within the primary limits of the grant to the Northern Pacific Railroad Company and were released by the company to the United States pursuant to the act of September 18, 1940 (54 Stat. 954; 49 U. S. C., 1946 ed., sec. 65), are not subject to entry under the homestead laws in the absence of a determination by the Congress or the Department as to when and how such restored lands shall be opened for disposal.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Floyd Hamilton has appealed from the rejection by the Acting Director, Bureau of Land Management, of his homestead application (Coeur d'Alene 014148) filed in 1945 for lots 5 to 12, inclusive, sec. 29, T. 56 N., R. 2 E., B. M., Idaho, containing 175 acres. The basis of the appeal is that he settled on the land in 1932, erected a dwelling house and other improvements, and cultivated more than 10 acres of ground.

The land consists of an island in Clark's Fork of the Columbia River. It is within an odd-numbered section of land included within the primary limits of the grant made to the Northern Pacific Railroad Company by the act of July 2, 1864 (13 Stat. 365). By section 3 of that act, there were granted to the company, *in praesenti*, and

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within certain limits, the odd-numbered sections of public land, not mineral in character, which were not reserved, sold, granted, or otherwise appropriated, and which were free from preemption or other claims as of the time when the line of the railroad was definitely located. Section 6 of the act provided that, after the general route of the railroad should be fixed, the odd-numbered sections thereby granted should not be liable to sale, entry, or preemption, except by the company.

The line of the railroad was definitely located in the area of the island in question in the early eighties.¹ There is nothing in the records of the Department to indicate that the land was at that time reserved, sold, granted, or otherwise appropriated, or that it was subject to preemption or other claims or rights. This being so, the island passed to the railroad company, unless it was mineral in character.

By the act of February 26, 1895 (28 Stat. 683), this Department was directed to cause all lands within the Coeur d'Alene land district, Idaho, within the land-grant limits of the Northern Pacific Railroad Company, to be examined and classified with special reference to the mineral or nonmineral character of such land, and to reject, cancel, and disallow any and all claims or filings made by or on behalf of the railroad company on any lands in that land district which, upon examination, should be classified as mineral lands. The act required that lands which had been surveyed prior to the passage of the act should be examined and classified first, and that lands which had not then been surveyed should be examined and classified as speedily as practicable. No patent could issue to the company for any land in the Coeur d'Alene land district until the land had been examined and classified as nonmineral.²

The plat of survey of T. 56 N., R. 2 E., B. M., Idaho, with the section lines of section 29 shown thereon, was approved on April 19, 1897. Although the section lines of section 29 were surveyed, the meander lines of the island were not run, and the island was thus left unsurveyed. Certain portions of section 29 were examined and classified, but the island for which application is now made was not so examined and classified.

On July 1, 1898, Congress passed an act (30 Stat. 597, 620) which opened up a way for an adjustment of the many disputes which had arisen between the railroad company and its grantees, on the one side, and settlers on and purchasers of the land, claiming under the laws

¹ The map of definite location from Sand Point to Clark's Fork was filed on December 12, 1882, while the map of definite location from Spokane to Lake Pend Oreille was filed on August 30, 1881.

² Section 7 of the act of February 26, 1895; *Northern Pacific Ry. Co.*, 31 L. D. 394 (1902).

of the United States, on the other side. By its acceptance of the act, the company was required, upon demand by the Secretary of the Interior, to relinquish to the United States lands settled on prior to January 1, 1898, unless the company had, prior to the passage of the act, sold or contracted to sell the land, or unless the company used or needed the land for railroad purposes.³ That act also provided that—

* * * whenever any qualified settler shall in good faith make settlement in pursuance of existing law upon any odd-numbered sections of unsurveyed public lands within the said railroad grant to which the right of such railroad grantee or its successor in interest has attached, then upon proof thereof satisfactory to the Secretary of the Interior, and a due relinquishment of the prior railroad right, other lands may be selected in lieu thereof by said railroad grantee or its successor in interest * * *.

This provision of the act was not mandatory upon the company but merely extended a privilege to the company to select other lands for such as it might relinquish in favor of those who settled on unsurveyed railroad lands after January 1, 1898. *Northern Pacific Ry. Co. v. Violette*, 36 L. D. 182 (1907); *Miller v. Northern Pacific Ry. Co.*, 36 L. D. 526 (1908). In the *Miller* case, the Department held that it could not control the action of the railroad company in refusing to relinquish its claim to unsurveyed lands in favor of one who settled thereon subsequent to January 1, 1898, and that, upon the refusal of the company to relinquish, the Department was powerless to recognize the claim of a homestead applicant by permitting him to make entry of the land.

Hamilton does not allege settlement on the land until 1922. At that time, it was unsurveyed land the title to which had passed to the railroad company, unless it was mineral land, a fact not then determined by the Department. Unless the land was in fact mineral land, the railroad company undoubtedly could have maintained an action against Hamilton for the possession of the land. *Deseret Salt Company v. Tarpey*, 142 U. S. 241 (1891); *cf. Barden v. Northern Pacific Railroad*, 154 U. S. 288, 331 (1894). A field examination of the island made after the receipt of Hamilton's application discloses no evidence of minerals on the land.

Had Hamilton brought his settlement on the land to the attention of the Department at any time prior to September 18, 1940, it is possible that the Department might have been instrumental in getting the company to relinquish its claim to the land in favor of Hamilton under the provisions of the act of July 1, 1898.

On September 18, 1940, however, the Congress passed an act (54 Stat. 954; 49 U. S. C., 1946 ed., sec. 65) which provided for the elimination of preferential traffic rates enjoyed by the United States

³ *Humbird v. Avery*, 195 U. S. 480, 499 (1904).

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in connection with certain of its railroad transportation requirements. The act required that before any carrier by railroad which had received a land grant might take advantage of the benefits offered by that act, it must release "any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest * * *." The act provided further that nothing therein should be construed to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior should find had been theretofore sold by any such carrier to an innocent purchaser for value, or as preventing the issuance of patents to lands listed or selected by such carrier, when such listings or selections had theretofore been fully and finally approved by the Secretary of the Interior.

Pursuant to the provisions of the 1940 act, the railroad company filed the required release, and the release was approved by the Secretary of the Interior on April 18, 1941. The company did not list the land embraced in Hamilton's application as having been sold by it to an innocent purchaser for value.

Though the company has released its claim and complete title to the land is now in the United States, the land is not now subject to entry under the homestead laws. The Department has held that, although restored lands become part of the public domain immediately, it remains for the Department, in the absence of congressional direction, to determine when and how such lands shall be opened for disposal. *Earl Crecelowis Hall*, 58 I. D. 557 (1943). Because of the complex and numerous problems presented by the return to the Government of such a large amount of land as that released by the railroad companies pursuant to the act of September 18, 1940, the Department has recommended to Congress that legislation be enacted to provide a governmental policy for all such lands.⁴ Until the enactment of such legislation, or until the Department determines, in the absence of such legislation, that the land is to be opened for disposal under the land laws of the United States, homestead entries will not be allowed thereon.

One other feature of the case requires brief comment. Section 7 of the Taylor Grazing Act, as amended (48 Stat. 1269; 49 Stat. 1976; 43 U. S. C., 1946 ed., sec. 315f), authorizes the Secretary of the Interior to examine and classify any lands withdrawn or reserved by Executive Order No. 6910 of November 26, 1934, and amendments thereto. It also forbids settlement on such lands until they are

⁴ H. R. 838, 78th Cong.; S. 1098, 79th Cong.

classified and opened to entry. Executive Order No. 6910 withdrew all the vacant, unreserved, and unappropriated public lands in 12 of the Western States, including Idaho, from settlement, location, sale, or entry. (43 CFR 297.11.) By Executive Order No. 7048 of May 20, 1935, Executive Order No. 6910 was amended to make the withdrawal applicable to all lands within the States mentioned therein upon the cancellation or release of prior claims. (43 CFR 297.14.) Therefore, when the land in question was relieved of the claim of the railroad company through the approval of its release by the Secretary of the Interior on April 18, 1941, it immediately became subject to the withdrawal order of May 20, 1935, so that it has not at any time since Hamilton's alleged settlement been subject to settlement under the laws of the United States.

Hamilton apparently settled on the land under the mistaken view that it was unappropriated public lands of the United States. He has built certain improvements on the land and cultivated some parts of it. It may be that when the restored railroad lands are opened to entry Hamilton and others in similar circumstances will be accorded special consideration in the disposition of the lands. Pending the announcement of policy with respect to the disposition of the restored railroad lands, Hamilton may, if he wishes to continue to occupy the land on which his improvements are located and to continue his cultivation of the land, apply for an annual special-use permit, covering the area of his improvements and present cultivation, pursuant to 43 CFR, Part 258, 1943 Cum. Supp., and thereafter apply annually for a renewal of the permit. Any such permit granted upon the application of Hamilton should specifically provide that in no event will the privilege accorded thereby extend beyond the date upon which the land shall be opened for disposal under the land laws of the United States.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the decision of the Acting Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

RUBERT RAY SPENCER

A-24566

Decided June 7, 1948

Desert-Land Entry—Unsurveyed Land—Withdrawn Land.

Where a person takes possession of unsurveyed land and reclaims it, his right to make entry under the desert-land laws is governed by section I of the act of March 28, 1908 (35 Stat. 52; 43 U. S. C., 1946 ed., sec. 326).

The right to make the entry must have been initiated prior to the withdrawal of the land from entry.

Under the long-established rule of the Department, the quarter quarter section, or the fractional lot, is ordinarily the minimum unit of land for classification

June 7, 1948

and disposal. Deviation from the rule is permitted only where no public interest is prejudiced and where it facilitates the administration of the public lands.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On February 25, 1946, Rubert Ray Spencer filed an application to make a desert-land entry on 157½ acres of land in secs. 11 and 12, T. 19 N., R. 35 E., M. D. M., Nevada, under the act of March 3, 1877 (19 Stat. 377), as amended by the act of March 3, 1891 (26 Stat. 1096; 43 U. S. C., 1946 ed., sec. 321). The land sought under the application is, roughly, an L-shaped tract, said to lie along the course of Horse Creek, and is described as follows:

	<i>Acres</i>		<i>Acres</i>
Sec. 11: NE¼NW¼NW¼ -----	10.00	Sec. 11: SW¼SE¼NE¼SW¼--	2.50
NE¼SE¼NW¼NW¼--	2.50	N½N½SE¼SW¼-----	10.00
NW¼SW¼NE¼NW¼--	2.50	N½S½SE¼-----	40.00
S½SW¼NE¼NW¼--	5.00	E½SW¼NW¼SE¼-----	5.00
N½SE¼NW¼-----	20.00	S½SE¼NW¼SE¼-----	5.00
SW¼SE¼NW¼-----	10.00	S½S½NE¼SE¼-----	10.00
W½NW¼NE¼SW¼--	5.00	Sec. 12: N½SW¼SW¼-----	20.00
SW¼NE¼SW¼-----	10.00		

The application was accompanied by a petition for classification of the land and its restoration to entry under section 7 of the Taylor Grazing Act, as amended (48 Stat. 1269, 49 Stat. 1976; 43 U. S. C., 1946 ed., sec. 315f). The petitioner stated that all the land applied for was at one time arid, but that he had brought it under irrigation by means of the waters of Horse Creek; that the land is within a mountainous area, where most of the land is exceedingly steep and rocky, so that only small portions of the flatter slopes are susceptible of irrigation and cultivation; and that these areas alone were chosen and irrigated. Spencer stated that he had already successfully reclaimed the land.

The application was rejected by the manager of the district land office, because the land was not described by the smallest legal subdivisions of 40 acres. Spencer was informed that his improvement of the land was in trespass unless he could show a settlement right prior to November 26, 1934, at which time all the public lands in Nevada were withdrawn from settlement, sale or entry, by Executive Order No. 6910. (43 CFR 297.11.)

The Director of the Bureau of Land Management affirmed the decision of the manager, but without prejudice to Spencer's right to withdraw the application and to file a new one for not more than 160 acres,¹ "in terms of the public land surveys of not less than a legal

¹ Spencer has already received 320 acres of land under the homestead laws. He may not, therefore, acquire more than 160 acres under the desert-land laws (act of February 27, 1917, 39 Stat. 946; 43 U. S. C., 1946 ed., sec. 330).

subdivision, and in as compact form as possible." In this connection, the Director called attention to the requirement of 43 CFR 232.8.

On appeal, Spencer claims to have gone on the land in 1930. He contends that his entry is in as compact a form as is possible, taking into account the topography of the country; that the land which is now irrigated is sustaining a family; and that the surrounding tracts would be worthless to anyone else seeking to irrigate them, because he is using all the available water supply. He contends that he has met the requirements of 43 CFR 232.8 and that the allowance of his entry in the form applied for is discretionary with the Department. He calls attention to the regulations of the Department governing the disposal of tracts in reasonably compact form and in units of as little as $1\frac{1}{4}$ acres under the Small-Tract Act of June 1, 1938 (52 Stat. 609; 43 U. S. C., 1946 ed., sec. 682a; 43 CFR, Cum. Supp., Part 257).

The land applied for was not surveyed until September 10, 1941, when the approved plat of survey was filed in the local land office. As Spencer claims to have taken possession of the land in 1930, before it was surveyed, and to have reclaimed it (although the record is not clear as to when he commenced his work of reclamation or if and when he completed it), his right to make entry, if he can prove that he initiated a valid right to the land prior to November 26, 1934,² must be governed by section 1 of the act of March 28, 1908 (35 Stat. 52; 43 U. S. C., 1946 ed., sec. 326). That act provides that where an individual has, prior to survey, taken possession of a tract of unsurveyed desert land in compact form and has reclaimed it, or has in good faith commenced the work of reclaiming it, the individual shall have the right to make a desert-land entry of such tract in conformity with the public-land surveys.

The rectangular system of surveys of the public lands was established by Congress in 1796 (43 U. S. C., 1946 ed., secs. 751-774). The smallest subdivisions mentioned by Congress are the "quarter quarter sections," i. e., 40 acres (43 U. S. C., 1946 ed., sec. 753). And the long-established rule of the Department is that the quarter quarter section, or the fractional lot, is ordinarily the minimum unit of land for classification and disposal. *L. S. Keye*, A-24369, August 5, 1946 (unreported). Further division has been permitted only where peculiar conditions have required otherwise, or where Congress has specially provided otherwise.³ *Edward A. Kelly*, A-23430, December 31, 1942 (unreported).

Deviations from the rule due to special circumstances have been rare. Ordinarily, the rule is waived only in those cases where no public interest would be prejudiced by the waiver and where the de-

² See *Fred Bartine*, 59 I. D. 110 (1945).

³ Examples of congressional directions to the contrary may be found in the placer and lode mining laws (30 U. S. C., 1946 ed., ch. 2), and in the Small-Tract Act.

June 9, 1948

departure from the rule would facilitate the administration of the public lands. Illustrative of the type of case where such deviations have been permitted is *State of Arizona*, 53 I. D. 149 (1930).

Although the statements made by Spencer regarding the topography of the area, the worthlessness of the remaining portions of the 40-acre subdivisions, and his reclamation of the land prior to its withdrawal from entry in 1934, might, if proved, justify a departure from the rule that not more than four subdivisions may be included in an entry for not to exceed 160 acres, there is nothing in the present record to justify the allowance of the entry in the extreme form sought by the applicant. As stated above, the land applied for is an L-shaped tract extending into at least 10 quarter quarter sections.⁴ Control of this land, with the control of the waters of the creek, would amount to control of a much larger area of land than that contemplated under the desert-land laws. Further, the public interest might be prejudiced through the inability of the Department to dispose of or to administer effectively the remaining portions of the subdivisions.

However, because of the statements made by the applicant regarding the character of the land and the compactness of the entry, none of which has been investigated, a field examination of the land should be made in order that it may be determined whether any departure from the rule of disposition of the public lands in not less than quarter quarter sections should be made in this case.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the case is remanded to the Bureau of Land Management with instructions to cause a field examination to be made of the land and of the claims made by Spencer regarding his going on to the land and his reclamation of it prior to November 26, 1934, the compactness of the entry, and of the worthlessness of the remaining portions of the subdivisions involved. Upon completion of the field examination, the application should be reconsidered by the Bureau of Land Management.

MASTIN G. WHITE,
Solicitor.

AUTHORITY OF EXECUTIVE BRANCH WITH RESPECT TO OIL AND GAS IN SUBMERGED COASTAL LANDS

Submerged Coastal Lands—Implied Protective Authority—Litigation Power of Attorney General—Naval Petroleum Reserves.

The implied authority of the executive branch of the Government to take protective measures where lands of the United States are found to contain oil

⁴ Spencer states that it extends into fourteen 40-acre tracts.

or gas which is being drained by adjoining landowners, and where such lands are not subject to the Mineral Leasing Act, is applicable to the submerged coastal lands.

The statutory power of the Attorney General to conduct litigation on behalf of the United States is broad enough to permit him to negotiate an operating stipulation with California effective when the current one expires on September 29, 1948, and similar stipulations with Louisiana and Texas as an incident of litigation which the Attorney General is expected to commence. In the absence of such stipulations, the Attorney General may seek injunctions and the appointment of receivers to manage the properties involved in the litigation.

The President could by Executive order set the submerged coastal areas, or any portion of them, apart as naval petroleum reserves. The Secretary of the Navy could then administer them for the production of oil and gas pursuant to existing legislation on naval petroleum reserves.

M-35052

JUNE 9, 1948.

TO THE SECRETARY.

This is in response to your oral request for advice on the authority of the executive branch of the Government with respect to the development of the oil and gas deposits in the submerged coastal lands (*United States v. California*, 332 U. S. 19 (1947)), in the absence of the passage of relevant legislation by Congress before adjournment.

Under the Constitution, Congress has the power "to dispose of and make all needful Rules and Regulations respecting * * * Property belonging to the United States * * *." (Art. IV, Sec. 3, Cl. 2.) On August 8, 1947, I held that the Mineral Leasing Act of February 25, 1920, as amended (30 U. S. C., 1946 ed., sec. 181 *et seq.*), which is applicable generally to the leasing of public lands for the production of oil and gas, does not authorize the issuance of oil and gas leases with respect to the submerged lands below low tide off the coasts of the United States and outside the inland waters of the States. (60 I. D. 26.) The Attorney General of the United States, on August 29, 1947, rendered an opinion which, in effect, agreed with mine. [40 Op. Atty. Gen. 540.]

However, even in the absence of legislation specifically authorizing the issuance of oil and gas leases or the making of other agreements for the production of oil and gas from the submerged coastal lands, there are three possible bases of authority for the taking of action by the executive branch of the Government.

One of these bases of authority is what the Attorney General, in his opinion of April 2, 1941, referred to as the "implied authority in the Executive branch to take protective measures in cases where lands * * * [of] the United States * * * are found to contain oil which is being drained by adjoining owners—such lands not being subject to the Mineral Leasing Act of February 25, 1920 * * *." (40 Op. Atty. Gen. 41.) There are two obstacles, however, to the use

June 9, 1948

of this implied authority in connection with the submerged coastal lands. In the first place, its use is limited to situations in which oil is being drained from Government lands by adjoining owners. It may well be desirable, in the light of the great need for further oil and gas development, that arrangements for such development in the submerged coastal lands be made even in the absence of drainage. In the second place, it is probable that this implied authority, as a practical matter, cannot be used effectively with respect to the Government's submerged coastal lands so long as the precise boundaries of such lands are uncertain. Until the dividing lines between the Government's submerged coastal lands and the adjacent lands owned by the States or other persons shall have been definitely ascertained, it will always be difficult, and frequently impossible, to establish the fact that oil or gas is being drained by an adjacent landowner from land that is subject to the paramount rights of the United States. Moreover, oil operators will be averse to making the financial outlay necessary for the drilling of offset wells under protective leases issued by the executive branch of the Government, so long as there is a possibility that the areas selected for drilling will turn out, in the end, to belong to persons other than the Government.

As I understand it, there are three coastal areas where there are oil and gas operations at the present time, namely, the areas off California, Louisiana, and Texas. As to California, the decision of the Supreme Court in *United States v. California* established a rule of law that the United States has paramount rights to oil and gas deposits in the marginal belt beyond low tide and outside the inland waters of California, but the actual low tide lines along the California coast and the seaward limits of the inland waters of California have not yet been fixed. Consequently, the precise boundaries of the Government's lands in the submerged coastal areas adjacent to California are unknown at the present time. Moreover, as to the submerged coastal lands adjacent to Louisiana and Texas, particularly the latter by virtue of certain provisions in the annexation agreement under which Texas entered the Union, the rights of the Federal Government have not yet been clearly established. I understand that the Attorney General is presently making preparations for the commencement of actions in the Supreme Court to establish such rights.¹

Another source of authority for the taking of action is the statutory power of the Attorney General to conduct litigation on behalf of

¹The rights of the Federal Government in the submerged coastal lands adjacent to Louisiana and Texas were subsequently established in *United States v. Louisiana*, 339 U. S. 699 (1950), and *United States v. Texas*, 339 U. S. 707 (1950). [Editor.]

the United States. (Rev. Stat. sec. 359; 5 U. S. C., 1946 ed., sec. 309.) It was in the exercise of this power that the operating stipulation between the United States and California was entered into on July 26, 1947, as an incident to the conduct of the case of *United States v. California*, pending in the Supreme Court. That stipulation provides that if no pertinent legislation is enacted by the Congress prior to July 31, 1948, it shall terminate 60 days thereafter; and that, in the meantime, the parties shall meet within 30 days after July 31, 1948, to reconsider the terms of the stipulation and to determine whether this stipulation or a revision of it should be continued for a further period.² If California and the Government should be unable to agree on an extension of the stipulation, then it is assumed that the Attorney General would seek an injunction and the appointment of a receiver to manage the property that is involved in the litigation. (*Of. Oklahoma v. Texas*, 252 U. S. 372 (1920).) A similar course could be followed as an incident to the proceedings which the Attorney General is expected to commence in the Supreme Court against Texas and Louisiana. That is, the Attorney General could attempt to negotiate a stipulation for continued operations and the holding in escrow of any proceeds accruing to the States, pending a final determination of the issue of superior right as between the United States and the respective States, and, if the United States is successful, pending an actual fixing of the low-tide lines and the seaward limits of the inland waters of those States. If it should be impossible to negotiate with either State a stipulation satisfactory to the United States, an application for an injunction and the appointment of a receiver to manage the property involved in the case would be appropriate.

Finally, the President could by Executive order set these submerged coastal areas, or any portions of them, apart as naval petroleum reserves. (*Of. Executive Order No. 3797-A*, February 27, 1923, Naval Petroleum Reserve No. 4 in Alaska, which includes some water areas.) Thereupon, the existing legislation with respect to naval petroleum reserves would apply to the submerged coastal lands so set apart, and the Secretary of the Navy could administer them for the production of oil and gas pursuant to the terms of such legislation. (34 U. S. C., 1946 ed., sec. 524.) However, practical difficulties in the development of oil and gas production under such legislation would doubtless be encountered. Congress is not likely to appropriate funds for drilling operations by the Navy Department in the submerged coastal lands so long as there is strong sentiment in the Congress for the transfer of such lands to the adjacent coastal States. Moreover, private com-

² This stipulation was subsequently extended, with revisions, on July 28, 1948, to July 31, 1949; on August 2, 1949, to July 31, 1950; and on August 21, 1950, to October 1, 1951. [Editor.]

June 28, 1948

panies might not be willing to undertake the expense of such drilling operations under leases issued by the Secretary of the Navy so long as there is uncertainty on the point of whether the submerged coastal lands will be retained by the United States or transferred to the States. In addition, the present uncertainty as to whether some of the important areas from the standpoint of oil and gas production are lands beneath the marginal sea, and thus subject to the paramount rights of the United States, or tidelands or lands beneath inland waters, and thus not subject to the paramount rights of the United States, would also be an obstacle to effective development operations in the submerged lands under the laws relating to naval petroleum reserves.

MASTIN G. WHITE,
Solicitor.

J. D. KOUBA

A-24804

Decided June 28, 1948

Grazing Leases—Cancellation—Right of Renewal—Notice.

The action of a lessee under a grazing lease in assigning the leased area without obtaining the consent of the Department is a violation of the terms of the lease and of the regulations of the Department and affords a basis for cancellation of the lease.

The cancellation of a grazing lease must be accomplished in accordance with the procedure outlined in the lease and in the regulations.

Any violation of a grazing lease which affords a basis for cancellation of the lease affords a basis for the denial of the contractual right of renewal of the lease.

The procedural requirement of notice and opportunity to make a showing applies to a forfeiture of the right to a renewal granted by the lease.

The procedural requirement is satisfied by a denial of a petition for renewal of the lease where that denial sets forth the reason for the denial and affords the petitioner a right to appeal.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On July 19, 1940, J. D. Kouba obtained a 5-year grazing lease on the SW $\frac{1}{4}$ SE $\frac{1}{4}$ and the W $\frac{1}{2}$ of sec. 15, T. 26 S., R. 67 W., 6th P. M., Colorado, under section 15 of the Taylor Grazing Act (48 Stat. 1275, 49 Stat. 1978; 43 U. S. C., 1946 ed., sec. 315m). On January 23, 1945, Mr. Kouba petitioned for a renewal of the lease for a term of 10 years.

On June 2, 1947, the Director of the Bureau of Land Management denied the petition because (1) it was in conflict with the grazing-lease application of one Juan A. Martinez, (2) Mr. Kouba had leased his adjoining land to Mr. Martinez, and (3) Mr. Kouba had subleased to Mr. Martinez for a period of 5 years the public land described in the petition.

Mr. Kouba admits that he rented "the land" to Mr. Martinez. Presumably his admission covers both the land which he owns and the public land involved in his petition for renewal.¹

Mr. Kouba's lease, which he seeks to have renewed, provides that—

* * * if at the end of said period [of 5 years] it shall be determined 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 the absence of a determination that the land in question should not be leased further, this provision of the lease is to be construed as giving the lessee a contractual right to a renewal of the lease. *R. J. Cruce and Tom White*, A-24682, April 1, 1948; *Elmer R. Chandler and Dan O'Keeffe*, 59 I. D. 244 (1946).

The principal question for consideration is whether the Director was correct in taking the position that the contractual right had been forfeited because of Mr. Kouba's action in subleasing the leased land.

The lease was granted "subject * * * to all rules and regulations which the Secretary of the Interior has prescribed." It provides that—

If the lessee * * * shall fail to comply with the provisions of the act, or make default in the performance or observance of any of the terms, covenants, and stipulations hereof or of the general regulations promulgated and in force at the date hereof, and such default shall continue 60 days after service of written notice thereof by the lessor, then the lessor may, in his discretion, terminate and cancel this lease.

The lease also provides:

That the lessee shall not assign this lease or any interest therein, nor sublet any portion of the leased premises without the written consent of the Commissioner of the General Land Office.²

One of the regulations prescribed by the Secretary of the Interior, and in force when the lease was entered into, is that found in 43 CFR 160.26, which provided that a lease might be canceled—

(d) If the lessee shall fail to comply with any of the regulations in this part or the terms of the lease.

* * * * *
(f) If the lessee assigns or sub-leases all or any part of the leased area without obtaining the approval of the Secretary of the Interior.

The regulation further provided that—

* * * No decision will, however, be rendered until the lessee has been

¹ The examiners who made the field investigation report that they saw copies of two 5-year agreements entered into by Mr. Kouba and Mr. Martinez on April 30, 1945, whereby, in one agreement, Mr. Kouba leased his privately owned land to Mr. Martinez and, in the other, the land covered by the petition.

² Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

June 28, 1948

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.³

It appears that Mr. Kouba's action in assigning the leased area without obtaining the consent of this Department was in direct violation of the terms of his lease and of the regulation of the Department, and that it would have afforded a basis for the cancellation of the lease, but that such cancellation could have been accomplished only in accordance with the procedure outlined in the lease and in the last quotation above. However, Mr. Kouba's violation of the lease and of the regulation did not come to the attention of the Department until after the expiration of the lease.⁴ The lease, having expired, there was no occasion for serving on Mr. Kouba the written notice of default provided for in his lease.

Any violation of a grazing lease which affords a basis for cancellation of the lease affords a basis for the denial of the contractual right to renewal, particularly where, as here, the violation was not known to the Department during the term of the lease.

Therefore, it must be held that on the basis of the information then before the Director, he was correct in holding that the contractual right had been forfeited by Mr. Kouba.

Having determined that there was a sufficient basis for the Director's action, it now becomes necessary to determine whether the procedural requirement of notice and opportunity to make a showing likewise applies to a forfeiture of the right of renewal granted by the lease, where it appears that the lessee has violated the provisions of the lease and the Department regulation by subleasing the leased land without the consent of the Department, and, if so, whether that requirement was met in this case.

The Department, in considering a petition for the renewal of a grazing lease similar in form to Mr. Kouba's lease,⁵ held in 1946 that notwithstanding evidence in the record showing clearly that the lessee had permitted another person to use the leased area, a forfeiture of the right of renewal of the lease should be declared only after notice to the lessee and after giving him an opportunity to reply, as contemplated by the regulation relating to the cancellation of leases. *J. P. Wilson, A-24183, Motion for Rehearing, August 9, 1946 (unreported)*. However, in that case, the applicant, by way of appeal,

³ The regulation now in effect does not list the causes for cancellation of a lease. It provides: "If the lessee shall fail to comply with any of the provisions of the regulations in this part or of the lease, and such default shall continue for 60 days after service of written notice thereof, the lease may be terminated and canceled by the Director." 43 CFB 160.17; 12 F. R. 6925.

⁴ The field investigation was made on March 1, 1946, and the report of the examiners was submitted on June 13, 1946.

⁵ No preference right of renewal is granted under the lease form now used by the Department.

showed that the use of the leased area by the other person had been temporary only, had resulted in a financial loss to him, and that he, the applicant, had need of the land for his own livestock operation.

In the present case, the appellant has made no such showing. His permission to another to use the leased area is covered by a 5-year written lease for an annual rental of \$75, while his rental under the 1940 lease was \$3.60 a year. The appellant has admitted the violation of the terms of his lease and of the regulation and has offered no satisfactory explanation for his action.

Although the procedural requirement applies with equal force to both a cancellation and a forfeiture of the right to renewal and although that right may not be summarily declared to be forfeited without giving the applicant an opportunity to show cause, the procedural requirement has been substantially met in the present case.

The denial of the petition for the stated reason that Mr. Kouba had subleased the public lands was, in effect, a notice to the applicant that his action in subleasing the leased area was cause for the forfeiture of the right to renewal of the lease. The decision of the Director was subject to the right of appeal, and thus Mr. Kouba was given the opportunity, by way of appeal, to show cause why the right to renewal of his lease should not be denied to him.

His appeal presents no justification for his violation of the terms of his lease and of the regulations to which his lease was subject and, thus, no good cause why the right to the renewal of his lease should not be declared forfeited.

The decision of the Director that the right to a renewal of the lease had been forfeited by Mr. Kouba's action in subleasing the leased land is fully justified by the record. In view of this fact, no consideration need be given to the two other grounds on which the Director denied the petition.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the decision of the Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

**THE INTERNATIONAL TRUST COMPANY, AS TRUSTEE UNDER
THE LAST WILL AND TESTAMENT OF CHARLES T. LUPTON,
DECEASED**

A-25123

Decided June 30, 1948

Oil and Gas Leases—Preference Right—Withdrawn Land.

Section 2 of the act of June 25, 1910, has no application to one who goes upon the public lands under a lease issued pursuant to the Mineral Leasing Act.

June 30, 1948

The preference right of a lessee to a new oil and gas lease under the act of July 29, 1942, was not a right as against the Government, but a right to prior consideration over other applicants if the Government had decided to lease the land for a further period.

A withdrawal of the land from appropriation prevented the exercise of the preference right granted by the act of July 29, 1942.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On December 14, 1944, The International Trust Company, as trustee under the last will and testament of Charles T. Lupton, deceased, filed a preference-right application under the act of July 29, 1942 (56 Stat. 726), for a noncompetitive oil and gas lease on the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of sec. 3, T. 30 S., R. 60 W., 6th P. M., Colorado, based upon its 5-year lease (Pueblo 046135) on the same land entered into as of January 1, 1940, pursuant to the terms of the Mineral Leasing Act, as amended (30 U. S. C., 1946 ed., sec. 181 *et seq.*).

On August 25, 1947, the Director of the Bureau of Land Management rejected the application because the land applied for had, on July 21, 1942, been withdrawn from all forms of appropriation under the public-land laws and reserved for the use of the Department of the Interior in connection with the prosecution of the war. (Public Land Order No. 13; 7 F. R. 5917.)

The trustee contends that because it held a valid lease on the date of the withdrawal and because it filed its application for a new lease within 90 days prior to the expiration date of its lease, as required by the act of July 29, 1942, it is entitled to a new lease notwithstanding the withdrawal, since the withdrawal was made subject to valid existing rights. The trustee contends that it had a valid existing right not only by virtue of its lease but also by virtue of that portion of section 2 of the act of June 25, 1910 (36 Stat. 847; 43 U. S. C., 1946 ed., sec. 142), which provides that—

* * * the rights of any person who, at the date of any order of withdrawal, is a bona fide occupant or claimant of oil- or gas-bearing lands and who, at such date, is in the diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work: * * *

The trustee's argument that it has a valid existing right which excepts the land applied for from the withdrawal is untenable.

The provision of the 1910 act quoted above has no application to one who goes upon the public lands under a lease issued pursuant to the Mineral Leasing Act. Prior to the enactment of the Mineral Leasing Act in 1920, all valuable mineral deposits, including oil and gas, in lands belonging to the United States were open to exploration and purchase, and the lands in which they were found were open to occupation and purchase by citizens of the United States. (Rev. Stat.

secs. 2319, 2329.) The Mineral Leasing Act provided an entirely different method of disposing of the oil and gas deposits in the public lands. After the passage of that act, the right to explore the public lands for oil and gas could be acquired only pursuant to the terms of the Mineral Leasing Act. No rights in the land or in the deposits could be acquired thereafter, except pursuant to the terms of that act. *Wilbur v. United States ex rel. Barton*, 46 F. (2d) 217, affirmed 283 U. S. 414 (1931). The trustee makes no claim with regard to the land involved in this proceeding which antedates the Mineral Leasing Act.

The trustee acquired a valid right by its lease of January 1, 1940, and, during the term of that lease, its right could not be, and was not, disturbed or affected in any way by the withdrawal. The act of July 29, 1942, did not, however, give the trustee a vested right to a new lease. That act merely gave the trustee a "preference right over others to a new lease for the same land." Under this provision, the trustee had no right as against the Government, but only a right over other applicants to have its application considered first if the Government had decided to lease the land for a further period. *Carlton Beal*, A-23731, January 17, 1944; *Harry J. Lane, Administrator of the Estate of Mary A. Lane*, A-24028, April 30, 1945; *Harald W. C. Prommel*, A-24219, March 14, 1946; *Helen F. Carlile, Trustee of the Estate of Louise L. Leuholtz, deceased*, A-24201, February 19, 1947 (all unreported). As the land applied for was withdrawn from the operation of the Mineral Leasing Act prior to the expiration date of the 1940 lease, there was no occasion for the recognition of the lessee's preference right over other applicants for a lease.

The trustee refers to the regulation approved on September 5, 1947, relating to the reinstatement of applications rejected because of the withdrawal of lands for use in connection with the prosecution of the war. (43 CFR 191.15; 12 F. R. 6112.) It requests that, in the event the decision of the Director is affirmed, its appeal be considered as an application for reinstatement upon the revocation of the withdrawal. Although the land in question became subject to lease for oil and gas purposes by virtue of a modification of Public Land Order No. 13 on October 14, 1947 (12 F. R. 6926), the request of the trustee cannot be granted. The regulation referred to by the trustee relates only to the reinstatement of applications which were rejected because of the withdrawal of the lands while the applications were pending. The land here in question was withdrawn approximately 2½ years before this lease application was filed.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the decision of the Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

NOMINAL CONSIDERATION FOR CONVEYANCE OF GOVERNMENT LAND

Constitutional Power of Congress—Administrative Discretion.

The Constitution vests in the Congress the power to determine whether lands of the United States shall be disposed of and to prescribe the conditions under which any such disposition may be effected.

An officer of the executive branch of the Government, in conveying a tract of Government land pursuant to an authorization or a directive from the Congress, cannot disregard any of the conditions which the Congress has imposed in the enabling legislation, because he is acting as the agent of the Congress and is not at liberty to substitute his judgment for that of the Congress.

When a statute authorizes and directs the Secretary of the Interior to convey a tract of Government land to a State "for and in consideration of \$1," the Secretary of the Interior is required to collect \$1 in connection with the conveyance.

M-35059

JULY 8, 1948.

TO ASSISTANT SECRETARY WARNE.

This responds to your informal note of July 1, asking whether the Secretary of the Interior is required to collect \$1 in connection with the conveyance to the State of Oklahoma of the tract of land referred to in the act of June 3, 1948 (62 Stat. 301).

The Constitution (Art. IV, Sec. 3, Cl. 2) vests in the Congress the power to determine whether lands of the United States shall be disposed of and to prescribe the conditions under which any such disposition may be effected. An officer of the executive branch of the Government, in consummating a conveyance of Government land pursuant to an authorization or a directive from the Congress, cannot disregard any of the conditions which the Congress has imposed in the enabling legislation. An administrative officer acts as the agent of the Congress in such a situation, and he is not at liberty to substitute his judgment for that of the Congress.

In the exercise of its constitutional power, the Congress provided in the act of June 3, 1948 (62 Stat. 301):

That the Secretary of the Interior is authorized and directed to grant and convey, for and in consideration of \$1, to the State of Oklahoma for the use and benefit of the Northeastern State College, Tahlequah, Oklahoma, all the right, title, and interest of the United States in and to certain land in Tahlequah, Oklahoma, more particularly described as follows: * * *

It will be noted that the statute plainly states that the conveyance of the land to the State of Oklahoma is to be "for and in consideration of \$1." This requirement is binding upon the Secretary of the Interior.

I am not aware of any other provision of law which could reasonably be construed as authorizing the Secretary of the Interior to waive the collection of the amount fixed by the Congress as the price at which a tract of Government land administered by this Department may be disposed of, irrespective of how small that amount may be. Accordingly, it is my opinion that the sum of \$1 must be collected in connection with the conveyance to the State of Oklahoma of the tract of land mentioned in the act of June 3, 1948.

It seems certain, of course, that the cost to the Government of handling the fiscal details involved in collecting the sum of \$1 in connection with this transaction will greatly exceed the amount collected. In order to avoid similar situations in the future, the Department of the Interior, when it reports on proposed legislation of this sort hereafter, should recommend that any provisions calling for the collection of nominal sums as consideration for grants of Government lands be eliminated from such proposed legislation.

MASTIN G. WHITE,
Solicitor.

MRS. PAULINE L. McGRATH

A-25301

Decided July 12, 1948

Oil and Gas Leases—Application—Reservoir Easement.

Lands within a reservoir site for which an easement has been granted and which are not on the known geologic structure of a producing oil or gas field are subject to leasing for oil and gas only pursuant to the act of May 21, 1930.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Mrs. Pauline L. McGrath has appealed from a decision of the Director of the Bureau of Land Management, who rejected her non-competitive oil and gas lease application filed on December 6, 1945 (30 U. S. C., 1940 ed., Supp. V, sec. 226), because the lands for which application was made are within the outer boundaries of the No. 1 King Reservoir, for which an easement was granted on June 24, 1902, to the Great Plains Water Company (43 U. S. C., 1946 ed., sec. 946).

Mrs. McGrath contends that the tract has never, in fact, been used for reservoir purposes, and that the project has, in effect, been abandoned.

Even though the lands may not have been used for reservoir purposes, the fact is that there is outstanding an easement which has never been declared forfeited or otherwise terminated. These lands therefore are subject to oil and gas leasing only under the act of May 21, 1930 (30 U. S. C., 1946 ed., secs. 301-306). *E. A. Wight, A-24101,*

July 12, 1948

November 5, 1945; *W. A. Sheets*, A-24394, September 3, 1946. They cannot be leased to Mrs. McGrath under that act because the lands, as Mrs. McGrath notes in her application and the Geological Survey confirms, are not on the known geologic structure of a producing oil or gas field and because she is not a member of the class of persons specified in the act as being eligible to obtain oil and gas leases for areas such as this reservoir site. *E. A. Wight, supra*; *W. A. Sheets, supra*.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the decision of the Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

WAIVER OF FRANCHISE FEE PAYABLE BY PARK CONCESSIONER*

Secretarial Discretion—Relationship Between United States and Park Concessioner—National Park Service.

A section in a contract between the United States and a concessioner operating in the national park system which requires the concessioner to pay to the Government as a franchise fee a sum equal to 10 percent of its annual profits, but provides that the Secretary may waive the payment of this fee in whole or in part in order to enable the financing of additional facilities or improvements in existing facilities, is authorized by law.

Congress has vested in the Secretary the authority to prescribe the terms and conditions under which "privileges, leases, and permits for the use of land for the accommodation of visitors in the various parks, monuments, or other reservations" administered by the National Park Service shall be granted.

The relationship between the United States and a park concessioner is not that of lessor and lessee of Government property, but a broader one involving contractual arrangements for the operation within the park system of facilities for the accommodation of the public.

M-35062

JULY 12, 1948.

TO ASSISTANT SECRETARY DAVIDSON.

You have requested my advice concerning the legality of a written proposal made by National Park Concessions, Inc., that the payment to the Government by that company of a sum equal to 10 percent of its net profits for the year 1947 under contract No. I-1p-18179 be waived, upon the condition that the amount so waived be used by the company to construct cabins for guests in Mammoth Cave National Park.

The contract mentioned above, which is between the United States and National Park Concessions, Inc., and relates to the operation by

*On January 27, 1953, the Attorney General rendered an opinion taking a position contrary to that taken in this opinion of the Solicitor. (41 Op. Atty. Gen., No. 23.) [Editor.]

the latter of accommodations for the public in Mammoth Cave National Park and certain other areas under the jurisdiction of the National Park Service, provides in section 11 that the concessioner shall pay to the United States as a franchise fee the sum of \$100 per year and, in addition, a sum equal to 10 percent of the net profits under the contract during each calendar year. Section 11 then states that—

It is expressly agreed and understood that in order to enable the financing of improvements and additional facilities the payment of the amount equal to the aforesaid percentage of net gain which may accrue to the Government at the end of any accountable year under the terms of this contract may be extended or waived in whole or in part by the Secretary, upon application in writing.

Any buildings constructed by the concessioner, either through the use of franchise fees waived under section 11 or otherwise, become the property of the United States under section 4 of the contract.

It appears, therefore, that the proposal now under consideration is authorized by and within the terms of section 11 of the contract, and that the approval or disapproval of the proposal is discretionary with the Secretary of the Interior.

The validity of the portion of section 11 of the contract quoted above is not open to serious question. Section 3 of the act of August 25, 1916, as amended (16 U. S. C., 1946 ed., sec. 3), vests in the Secretary of the Interior broad power to "grant privileges, leases, and permits for the use of land for the accommodation of visitors in the various parks, monuments, or other reservations" administered by the National Park Service. The Congress has not prescribed the terms and conditions under which the privileges, etc., may be granted by the Secretary, but has left such matters to be decided by the Secretary.

Of course, the Secretary, in the exercise of his discretion with respect to these matters, is to be guided by the objective which the Congress has said shall be sought in the management of the parks, monuments, and reservations under the jurisdiction of the National Park Service, i. e., "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." (16 U. S. C., 1946 ed., sec. 1.) However, the portion of section 11 of contract No. I-1p-18179 presently under consideration does not appear to be inconsistent in any way with this standard.

The conclusion stated above is not affected by 16 U. S. C., 1946 ed., sec. 452, which provides that "All revenues of the national parks shall be covered into the Treasury to the credit of miscellaneous receipts * * *." This provision relates solely to the disposition of the funds that are actually received by the Government. It does not restrict in any way the discretion of the Secretary in the matter of entering into a concession contract under which the concessioner may

July 16, 1948

be required to devote a portion of its profits to the enlargement or improvement of the facilities owned by the Government and operated by the concessioner.

Perhaps 40 U. S. C., 1946 ed., sec. 303b, should also be mentioned. This section provides that—

Except as otherwise specifically provided by law, the leasing of buildings and properties of the United States shall be for a money consideration only, and there shall not be included in the lease any provision for the alteration, repair, or improvement of such buildings or properties as a part of the consideration for the rental to be paid for the use and occupation of the same. The moneys derived from such rentals shall be deposited and covered into the Treasury as miscellaneous receipts.

Section 303b by its terms relates only to "the leasing of buildings and properties of the United States." It governs the contents of such a "lease," and states what shall be done with the rentals collected under it. The legal relationship between the United States and a concessioner in the national park system is not one of lessor and lessee. The relationship is broader, involving contractual arrangements for the operation within the park system of facilities for the accommodation of the members of the public who visit the parks. The permission that is granted by the United States for the use of Government property by a concessioner in discharging its obligations is an incident of the broader contractual arrangements designed to promote the public interest. Moreover, the making of such arrangements is "otherwise specifically provided by law," as indicated in the earlier part of this discussion.

For the reasons stated above, it is my opinion that there is no legal objection to the waiver discussed in this memorandum, and that the proposal may be approved if it seems advisable from the standpoint of public policy.

MASTIN G. WHITE,
Solicitor.

E. A. WIGHT

A-25408

Decided July 16, 1948

Oil and Gas Leases—Application—Reorganization Plan No. 3 of 1946.

When reached for processing, an oil and gas lease application, which erroneously described lands involved as having been transferred to the jurisdiction of the Department of the Interior for disposition of the minerals under Reorganization Plan No. 3 of 1946, when in fact the lands were former public domain patented with a reservation of the minerals, and which was filed in the Washington office of the Bureau of Land Management rather than in the appropriate district land office as required by the regulations issued under the Mineral Leasing Act, was properly rejected in favor of a subsequent application for the same lands which had been filed in the district land office.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On April 18, 1947, E. A. Wight filed in the Washington office of the Bureau of Land Management an application for an oil and gas lease embracing, among others, certain lands in secs. 13, 14, and 23, T. 44 N., R. 64 W., 6th P. M., Wyoming. The application described the lands as "subject to the provisions of § 4.7 of the Rules and Regulations of the Secretary of Agriculture, issued May 13, 1944 (9 F. R. 5103) * * *," and recited that the functions of the Department of Agriculture with respect to the uses of mineral deposits in the lands involved in the application had been transferred to the Department of the Interior by Reorganization Plan No. 3 of 1946.

The Director of the Bureau of Land Management rejected the application. He stated that these are former public-domain lands which were patented under the Stock-Raising Homestead Act of December 29, 1916, with the minerals being reserved by the Government (39 Stat. 862; 43 U. S. C., 1946 ed., secs. 291-301). He then pointed out that application for a lease of such lands should have been filed in the district land office at Buffalo, Wyoming (43 CFR 192.42, 11 F. R. 12956); that a conflicting application was filed in the district land office at Buffalo by Howard M. Brickel (Buffalo 040455), on June 24, 1947; and that if Mr. Wight should thereafter file his application in the district land office, his application would be suspended pending the final disposition of the prior application of Mr. Brickel.

Mr. Wight has appealed from the Director's decision. He contends that, during the period of more than 60 days which elapsed between the date of the filing of his application in Washington and the date of the filing of Mr. Brickel's application in the district land office, the Bureau should have notified him that he had filed his application in the wrong office or should have transferred the application to the district land office. He further asserts that he relied on communications received from officials of the Bureau of Land Management to the effect that his application was properly filed in Washington and would have preference over any application filed thereafter by any other person.

If Mr. Wight's application had actually involved, as it indicated on its face, lands within the purview of section 402 of Reorganization Plan No. 3 of 1946, his application would properly have been submitted to the Bureau of Land Management in Washington (43 CFR 200.34). However, as the Bureau of Land Management discovered when it reached Mr. Wight's application for processing, the application really related to former public-domain lands the minerals in which had been retained by the Government when it patented the lands. Such lands are subject to lease for oil and gas only under the

July 22, 1948

Mineral Leasing Act of February 25, 1920, as amended (30 U. S. C., 1946 ed., sec. 181 *et seq.*), and an application for a lease under that act is required by the regulations to be filed in the appropriate district land office (43 CFR 192.42).

The advice given to Mr. Wight by the officials of the Bureau of Land Management and their retention of his application were justified, because such advice and retention were based upon Mr. Wight's representation, made in his application, that the lands which he desired to lease were lands affected by section 402 of Reorganization Plan No. 3 of 1946. Consequently, if Mr. Wight was misled, this and the retention of his application in Washington were results of his own error in improperly indicating the status of these lands in his application. *Robert D. Fox*, A-24161, February 6, 1946.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the decision of the Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

JAMES F. RAPP

A-25284

Decided July 22, 1948

Homestead Entry—Reclamation Withdrawal—Reinstatement.

Where lands subject to an existing homestead entry are withdrawn under the Reclamation Act, the withdrawal becomes effective as to such land without any further order as soon as the existing entry is canceled, and the land is thereafter no longer subject to homestead entry while remaining so withdrawn.

A previous homestead entry, canceled more than 10 years ago for failure to comply with the homestead law, cannot be reinstated and its statutory life extended in order to permit compliance with the law.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

James F. Rapp made a homestead entry on certain lands in Colorado in 1931. In 1936, the register of the district land office notified Mr. Rapp, by registered mail sent to his address of record and to the post office nearest the land, of the expiration of the statutory period of 5 years in which final proof is required.¹ No action having been taken by Mr. Rapp, his entry was canceled in 1937 for failure to comply with the homestead law.

In 1947, Mr. Rapp filed an application to reinstate his previously canceled homestead entry. By a decision dated February 9, 1948, the

¹ Sec. 2291 Rev. Stat.; 43 U. S. C., 1946 ed., sec. 164; 43 CFR 166.47.

Director of the Bureau of Land Management rejected his application for reinstatement, on the ground that the lands had been withdrawn from entry on March 7, 1935, under a first-form reclamation withdrawal, pursuant to the act of June 17, 1902 (32 Stat. 388; 43 U. S. C., 1946 ed., sec. 416).

On appeal, Mr. Rapp contends that the withdrawal order of March 7, 1935, does not apply to the land covered by his homestead entry because the normal 5-year period for the submission of proof on his 1931 homestead entry had not expired when the withdrawal order was issued, and he urges that he is entitled to reinstatement of his entry because he never received the expiration notice.

Where lands subject to an existing homestead entry are withdrawn under the Reclamation Act, the withdrawal becomes effective as to such land without any further order as soon as the existing entry is canceled. *Wendell H. Brodhead*, A-24315 (Bismarck 024824), June 25, 1946; 43 CFR 230.19. Therefore, the lands involved in this proceeding were withdrawn as of 1937, and they are not subject to homestead entry so long as they remain so withdrawn.

Mr. Rapp's previous homestead entry was canceled for failure to comply with the homestead law. Ten years elapsed before he filed his present application for reinstatement. There is no authority under which this Department can reinstate his homestead entry and extend its statutory life in order to permit him to comply with the requirements of the law.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the decision of the Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

HARLEY JOHN LAMMERS

A-25357

Decided July 22, 1948

Homestead Entry—Residence Requirements.

The homestead law requires a homestead entryman to reside on his entry for at least 7 months annually for 3 years. An entryman who resided on land adjoining his entry and did not reside for the required time on the entry itself has not complied with the residence requirements of the homestead law.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The homestead entry of Harley John Lammers, covering certain land in Oregon, was allowed on November 7, 1942. In 1947, Mr. Lammers filed final homestead and reclamation proofs in support of his entry.

July 22, 1948

The record indicated that he had constructed various improvements upon and had cultivated some of the land in his homestead entry, but that early in 1943 he had moved to an adjoining tract just north of the homestead and had subsequently lived there. As the homestead law requires actual residence for 3 years on the land in the entry, the Director of the Bureau of Land Management rejected Mr. Lammers' final proofs and canceled his entry.

Mr. Lammers has filed an appeal in which he states that, because of war conditions and a shortage of labor, he was forced to move to the land adjoining his homestead in order to "handle the work to the best advantage with the least amount of help." He requests an extension of time so that he can live on the homestead entry in order to complete the residence requirements or, in the alternative, that he be allowed to make a new homestead entry.

Section 2291 of the Revised Statutes (43 U. S. C., 1946 ed., sec. 164) requires that a homestead entryman shall "have actually resided upon and cultivated the same for the term of three years succeeding the time of filing the affidavit." Under the law, a homestead entryman may absent himself from the land for not more than two periods, aggregating not more than 5 months, in each year (43 CFR 166.38, 166.39). The law authorizes variations in the residence requirements where climatic conditions make it difficult to reside on the homestead for 7 months in each year (43 U. S. C., 1946 ed., sec. 231; 43 CFR 166.29); or where the homesteader has settled on unsurveyed public land (43 U. S. C., 1946 ed., sec. 232; 43 CFR 166.37); or where the homesteader is a veteran receiving vocational rehabilitation or treatment for wounds (43 U. S. C., 1946 ed., sec. 233); or where failure of crops, sickness, or other unavoidable casualty has prevented the entryman from supporting himself and his family by cultivation of his homestead lands (43 U. S. C., 1946 ed., sec. 234); or where the entryman's crops have been destroyed by grasshoppers (43 U. S. C., 1946 ed., sec. 235). Also see 43 U. S. C., 1946 ed., secs. 237a, 237b, 237c, 237e, and 238.

None of the statutory provisions cited above excuses the lack of residence after the early part of 1943 that is involved in this case. It is clear that Mr. Lammers has not complied with the residence requirements of the homestead law. There is no authority for extending the time for the making of final proof, so as to permit him to meet these residence requirements (43 U. S. C., 1946 ed., sec. 164).

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the decision of the Director of the Bureau of Land Management is affirmed. This decision is without prejudice to, and without indicating any conclusion with respect to, any application which Lammers may file with the

Bureau of Land Management under the act of September 5, 1914 (38 Stat. 712; 43 U. S. C., 1946 ed., sec. 182), to make a second homestead entry upon proof that his present entry was lost, forfeited, or abandoned because of matters beyond his control. *Cf.* act of February 3, 1911 (36 Stat. 896).

MASTIN G. WHITE,
Solicitor.

**ADMINISTRATION, LEASE, AND SALE OF CHOCTAW AND
CHICKASAW COAL AND ASPHALT LANDS**

Indian Lands—Statutory Construction—Interpretation of Contracts—Authority to Sell or Lease Pending Performance of Executory Contract.

Where a statute authorizing the purchase by the United States of lands and mineral deposits provides that the properties "when acquired" shall become a part of the public domain subject to the applicable public-land mining and mineral leasing laws, the date upon which the lands and mineral deposits become a part of the public domain is determined by the date of acquisition.

A contract by which the Choctaw and Chickasaw Nations agree to sell, and the United States agrees to buy, for a consideration of \$8,500,000, lands and mineral deposits, with provision for conveyance when the appropriation of the purchase price has been made, is executory in nature and operates to vest in the United States on the date of the appropriation the full equitable title, with the right to a conveyance, as of that date, of the legal title.

As the date of the appropriation of the purchase price becomes the date of acquisition by the United States and the date upon which the acquired properties become a part of the public domain, any lease made prior to that date under the leasing laws applicable to the public domain would be without authority of law.

Under the act of April 21, 1932 (47 Stat. 88), as amended by the act of July 31, 1947 (61 Stat. 686), renewals of existing leases and permits, completed within extension periods granted by the Secretary of the Interior prior to the execution of the contract of sale to the United States, may be approved by the Bureau of Indian Affairs.

A contract of sale executed on October 8, 1947, became binding, upon ratification by the Congress, from the date of its execution, and operated to prevent the vendor from selling, leasing, or otherwise disposing of the properties contracted to be sold unless specifically authorized by the contract of sale.

A provision in a contract between the Choctaw and Chickasaw Nations and the United States, declaring that all "proceeds from the sale of any of the properties mentioned herein made subsequent to the date of this contract, and prior to the appropriation of the purchase price, shall be credited on the purchase price," is construed to contemplate and, therefore, to authorize sales by the vendor to third persons at any time prior to the appropriation of the purchase price.

M-35064

AUGUST 13, 1948.

TO THE SECRETARY.

By the act of June 24, 1948 (62 Stat. 596), the Congress ratified a contract by which the United States agreed to buy, and the Choctaw and Chickasaw Nations agreed to sell, for a consideration of \$8,500,000,

August 13, 1948

the interest of the two Indian nations in certain lands chiefly valuable for their coal and asphalt deposits. Section 3 of the contract provides that when the purchase price has been appropriated by the Congress, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation shall execute a conveyance or conveyances, satisfactory in form and substance to the Secretary of the Interior, vesting in the United States all the right, title, and interest of the Choctaw and Chickasaw Nations. Pending performance under the contract by the parties—that is to say, the appropriation of the purchase price by the Congress and the execution of a proper conveyance or conveyances by the officials of the Choctaw and Chickasaw Nations, which performance is not expected until sometime after the Eighty-first Congress convenes in January of 1949—certain questions concerning the administration, lease, and sale of the mineral deposits have arisen and have been referred to me for an opinion.

1. The first question is—

During the interim period mentioned above, may coal and asphalt leases on the property be issued by the Department under the mineral leasing laws applicable to lands and mineral deposits owned by the United States?

The contract was executed under authority contained in the Interior Department Appropriation Act, 1945 (58 Stat. 463, 483, 485). That act provides, among other things, that the lands and mineral deposits “when acquired hereunder shall become part of the public domain subject to the applicable public land mining and mineral leasing laws.” The lands and mineral deposits here in question will, therefore, become part of the public domain and subject to the public-land mineral leasing laws on the date of acquisition by the United States. That date, in my opinion, will be the date upon which the appropriation of the purchase price is made.

In connection with executory contracts of this nature, the courts have frequently said that immediately upon execution of such a contract the vendee becomes the equitable owner of the property, and the vendor retains the legal title as security for the payment of the purchase price. But, as pointed out in *National Bank of Kentucky v. Louisville Trust Co.*, 67 F. (2d) 97, 101 (C. C. A. 6th, 1933), this means no more than that the vendee has a right to compel specific performance, but that the vendor will not be required to convey unless and until the purchase price is paid. When the purchase price is paid in full prior to the execution of a conveyance, the vendee immediately becomes the full equitable owner of the property.¹

¹ *Sutton v. Commissioner of Internal Revenue*, 95 F. (2d) 845 (C. C. A. 10th, 1938); *National Bank of Kentucky v. Louisville Trust Co.*, 67 F. (2d) 97 (C. C. A. 6th, 1933); *California Delta Farms, Inc. v. Chinese American Farms, Inc.*, 278 Pac. 227, 232 (1929), appeal dismissed, 280 U. S. 520; *Magee v. Young*, 198 S. W. (2d) 883 (Tex., 1947); *Long v. Godfrey*, 32 S. E. (2d) 306 (Ga., 1944).

That the title to the lands and mineral deposits under consideration here was not to pass prior to the payment of the purchase price is made clear by the provisions of the ratified contract, which must be given controlling effect.

Under section 2 of the contract, the purchase price, when appropriated, is to be placed to the credit of the Choctaw and Chickasaw Nations in the Treasury and will then be subject to per capita distribution, as provided in section 4 of the contract. Under section 3 of the contract, the officials of the two nations become obligated to convey immediately upon appropriation of the purchase price. Accordingly, when the appropriation is made, the Indian nations become the owners of the appropriated moneys, and the Government becomes the owner of the equitable title to the lands and mineral deposits covered by the contract and will be entitled, as of that date, to a conveyance of the legal title.

Section 5 of the contract provides that the proceeds received from any sale of any of the properties involved in the contract, made subsequent to the date of the contract and prior to the appropriation of the purchase price, shall be credited upon the purchase price, and that all royalties received from any coal, asphalt, oil, gas, or other minerals mined from the properties until the first of the month in which the purchase price shall have been appropriated, shall be placed to the credit of the Choctaw and Chickasaw Nations on the books of the Treasury of the United States. As the right to the royalty income from, and the right to the proceeds of any sale of, the mineral deposits go hand in hand with ownership of the deposits, and as the parties, by the terms of the contract, have unequivocally recognized that these rights remain with the Choctaw and Chickasaw Nations down to the date of the appropriation of the purchase price, it necessarily follows that, until such date, the United States does not have a disposable interest in these mineral deposits.

Therefore, it is my opinion that any lease of the properties made at the present time pursuant to the mineral leasing laws applicable to Government-owned lands and mineral deposits would be without authority of law.

In reaching this conclusion, I am not unmindful of the fact that the report of the Senate Committee on Interior and Insular Affairs on the bill to ratify the contract of purchase contains a statement to the effect that, upon ratification of the contract, the lands and mineral deposits would become a part of the public domain and subject to the applicable public-land mining and mineral leasing laws.² I find no support for this statement either in the enabling provisions of the Interior Department Appropriation Act, 1945, or in the provisions of the contract made pursuant to that act. As explained above, the

² S. Rept. No. 1266 on S. J. Res. 203, 80th Cong., 2d sess.

August 13, 1948

addition of these properties to the public domain does not, under the act and the contract, become an accomplished fact until the purchase price shall have been appropriated.

2. The second question is—

In the event that leases cannot be made under the mineral leasing laws applicable to lands owned by the United States, may administration of the coal and asphalt deposits and the issuance of leases during the interim period be continued in the Bureau of Indian Affairs, pursuant to the regulations in 25 CFR, Part 207?

The regulations to which reference is made were prescribed under authority of the act of April 21, 1932 (47 Stat. 88). That act authorizes the leasing of "developed tracts" of Choctaw and Chickasaw coal and asphalt lands for periods of not to exceed 15 years from September 25, 1932, such leases to be made, subject to the approval of the Secretary of the Interior, by the Choctaw and Chickasaw mining trustee or by such other officer as the Secretary may designate. Leases made pursuant to this act would have expired, in the absence of renewal or extension, on September 25, 1947. The act of April 21, 1932, was, however, amended by the act of July 31, 1947 (61 Stat. 686), to provide that leases or renewal leases might be made for periods of not to exceed 15 years. As shown by its legislative history, the amendatory act was enacted not only to prevent the loss of a substantial royalty income to the Choctaw and Chickasaw Nations, but to protect the holders of existing leases and permits, then about to expire, who had expended large sums of money in the development and operation of the properties.³ By letter dated September 22, 1947, the Secretary of the Interior authorized the Superintendent for the Five Civilized Tribes to grant extensions to the holders of existing leases and permits, pending the negotiation of renewals, such extensions to be "effective until the approval by the Commissioner of Indian Affairs of renewal leases or permits, but in no event to be effective for a period extending beyond September 25, 1948."

In view of the action taken by the Secretary under the amendatory act of July 31, 1947, in authorizing the Superintendent of the Five Civilized Tribes to grant extensions of existing leases and permits, it would be permissible, in my judgment, for the Bureau of Indian Affairs, notwithstanding the execution and ratification in the meantime of the contract of sale between the Indian nations and the United States, to approve renewal leases or permits properly executed within the time limit specified in the Secretarial letter of September 22, 1947.

In view, however, of the ratification by the Congress of the contract for the sale to the United States of the lands and mineral deposits

³ See H. Rept. No. 466 on H. R. 2005, 80th Cong., 1st sess.

no new leases of developed or undeveloped tracts and no additional extensions of existing leases or permits can now be made. The contract of sale between the Indian nations and the United States, upon ratification by the Congress, became binding on the parties. The interest which the Choctaw and Chickasaw Nations contracted to sell to the United States is the interest which these nations owned on the date of the execution of the contract,⁴ with such exceptions as are specifically authorized by the contract. The contract contains no provision which authorizes the Choctaw and Chickasaw Nations to grant additional leasehold interests in the coal and asphalt deposits pending the consummation of the transaction between the two nations and the United States.

3. The third and final question is—

During the interim period mentioned above, may any tracts be sold pursuant to the provisions of the act of June 19, 1930 (46 Stat. 788), and the regulations in 25 CFR, Part 213?⁵

This question must be answered in the affirmative, for the reason that the contract between the Indian nations and the United States specifically contemplates, and therefore must be deemed to authorize, sales at any time prior to the appropriation of the purchase price. It does this by including in section 5 a provision, to which I have already referred, declaring that all "proceeds from the sale of any of the properties mentioned herein made subsequent to the date of this contract, and prior to the appropriation of the purchase price, shall be credited on the purchase price." The requirement that the proceeds be credited upon the purchase price makes it clear that the sales contemplated are to be sales made on behalf of the Indian nations and not on behalf of the United States.

The effect of such sales would be to eliminate the tracts sold from the contract between the nations and the United States, and to relieve the United States of the obligation to pay for the tracts sold by crediting the proceeds of sale on the price which the Government agreed to pay.

If any sales are to be made to persons other than the United States—and this presents an administrative question on which I express no opinion—it would be appropriate, inasmuch as the sales would be made on behalf of the Indians, to conduct such sales under the act of June 19, 1930, and the regulations prescribed under that act.

MASTEN G. WHITE,
Solicitor.

⁴ See Assistant Secretary's memorandum to the Commissioner of Indian Affairs, dated October 5, 1944.

⁵ This act and the regulations referred to relate to the sale of the coal and asphalt deposits during the period of ownership by the Choctaw and Chickasaw Nations.

H. L. RATH, WM. H. HEADY, S. EARL CHASE,
MARGARET H. LUMSDEN, EARL DAGGETT

A-25415

Decided September 20, 1948

Oil and Gas Leases—Application—Preference or Equal Rights.

Oil and gas lease applications which describe unsurveyed lands merely by legal subdivisions are defective, and those persons filing them acquire no preference or equal rights as against a proper application filed before the defects are corrected, even though the register erroneously suspends rather than rejects the defective applications.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

These oil and gas lease applications, filed under the amendatory Mineral Leasing Act of August 8, 1946 (60 Stat. 950; 30 U. S. C., 1946 ed., sec. 184), with respect to unsurveyed lands, were suspended by the register of the district land office at Salt Lake City, on the ground that they did not include a metes-and-bounds description or a statement as to whether settlers were on the lands described in the applications, as required by applicable regulations. The applicants were also notified that 30 days were allowed within which to submit this information and to complete the applications. During this 30-day period and before the defects were corrected, however, an intervening application, Salt Lake City 066113, was filed by L. D. Welling. The Director of the Bureau of Land Management, in a decision dated October 24, 1947, held that the Welling application, being in proper form as to the tracts with respect to which it conflicted with the earlier applications, was entitled to prior consideration over the applications of these parties.

The regulations require a description by metes and bounds in an application for a lease of unsurveyed lands. (43 CFR 192.42 (d); 11 F. R. 12958.) As these applicants failed to include the required type of description, their applications were defective and should have been rejected. *Witbeck v. Hardeman*, 51 F. (2d) 450, 453, *aff'd on other grounds* 286 U. S. 444 (1932).

As no rights were acquired by reason of the filing of defective applications, the erroneous suspension of the applications did not entitle the applicants to preference rights over or equal rights with a person filing a valid application at a later date. *Edwina S. Elliott*, 56 I. D. 1 (1936).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the decision of the Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

CLIFFORD E. MUENDER

A-24602

*Decided October 1, 1948***Stock-Raising Homestead Entry—Reinstatement of Canceled Entry.**

A contention by an entryman that he failed in a former proceeding under the homestead laws adequately to present available evidence on the subject of residence does not constitute a proper basis for the reinstatement of an entry which was canceled after full consideration and an observance of all the procedural steps that have been prescribed for the purpose of insuring fair treatment to those who seek to acquire public lands under the homestead laws.

APPEAL FROM THE GENERAL LAND OFFICE¹

This case involves an original stock-raising homestead entry of Clifford E. Muender, allowed June 14, 1953, pursuant to the act of December 29, 1916 (39 Stat. 862).²

The record shows that on October 5, 1933, the entryman was granted an additional period of 6 months for establishing his residence; that when called upon for final proof on August 19, 1938, he requested that action be suspended until a resurvey could be made because of uncertainty concerning the boundaries of his homestead, which request was granted; that the resurvey was completed and corner posts were set in September 1939; and that on July 5, 1943, he offered final proof, which was rejected by the register on July 7, 1943, because of failure to comply with the residence requirements of the statute. This decision was affirmed by the Commissioner of the General Land Office. The decision of the Commissioner was, in turn, affirmed by Assistant Secretary Chapman (A-23814, May 22, 1944), and the entry was canceled when the entryman failed to take advantage of the opportunity that was accorded him for the filing within 30 days of a motion for rehearing with respect to Assistant Secretary Chapman's determination. However, the entryman subsequently filed an application for reinstatement of the entry, which application was denied by the Acting Assistant Commissioner of the General Land Office in the decision from which this appeal is taken.

The entryman now avers that the proof of residence which he offered in 1943 was incomplete, in that it only related to the periods of time during which his entire family was in residence upon the land and did not show the additional periods in each year when he occupied the land alone while the other members of the family were absent in order that the children might attend school. He submits affidavits in sup-

¹ Effective July 16, 1946, Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776) abolished the General Land Office and the Grazing Service and transferred their functions to the Bureau of Land Management.

² The 1916 act has, in effect, been repealed by the act of June 28, 1934 (48 Stat. 1269). *George J. Propp*, 56 I. D. 347 (1938).

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port of his contention that he actually lived on the land for the periods of time required by the pertinent statute.

A contention by an entryman that he failed in a former proceeding under the homestead laws adequately to present available evidence on the subject of residence does not constitute a proper basis for the reinstatement of an entry which was canceled after full consideration and an observance of all the procedural steps that have been prescribed for the purpose of insuring fair treatment to those who seek to acquire public lands under the homestead laws. Such a rule is necessary in order to clothe proceedings under the homestead laws for the issuance of patents with a reasonable degree of finality, and in order to cause entrymen to present to the Department in such proceedings the best available evidence in support of their applications for patents.

Consequently, without regard to the sufficiency of the data offered by the entryman in his second attempt to show compliance with the residence requirements of the applicable homestead law, the decision of the Acting Assistant Commissioner of the General Land Office, denying Clifford E. Muender's application for reinstatement, was correct.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the decision of the Acting Assistant Commissioner of the General Land Office is affirmed.

MASTIN G. WHITE,
Solicitor.

WILLIAM G. TAYLOR, WILLIAM I. MOORE

A-24484 *Motion for Rehearing decided October 4, 1948*¹

WILLIAM I. MOORE, LELAND G. TURNER, MOORE SHEEP COMPANY

A-25288 *Decided October 4, 1948*

Applications—Grazing Leases—Public Sale.

Where the conduct of an individual and of a corporation who seek public lands is such as to mislead the Department and third persons as to whether the individual and the corporation act as separate entities or whether they act in the relationship of principal and agent, disclosed or undisclosed, the Department will not seek to determine their relationship but will hold that they have acted independently or as principal and agent, as may be required in each transaction in order to avoid prejudice to third persons and to the United States.

¹The motion for rehearing was filed prior to the issuance of Departmental Order No. 2354 (12 F. R. 5596), which deleted provisions for such motions from the Rules of Practice (43 CFR, Part 221).

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The first of these two cases, A-24484, involves the conflicting grazing-lease applications of William G. Taylor and William I. Moore. (43 U. S. C., 1946 ed., sec. 315m.) The Director of the Bureau of Land Management awarded the SW $\frac{1}{4}$ sec. 30 and all of sec. 31, T. 40 N., R. 74 W., 6th P. M., Wyoming, to Mr. Moore. In a decision dated April 1, 1947, on the appeal of Mr. Taylor, Under Secretary Chapman reversed the Director's decision on the ground that Mr. Taylor has greater need for the land than does Mr. Moore in connection with the proper use of his base land. It was noted that Mr. Taylor's grazing lands are completely surrounded by the extensive holdings of the Moore Sheep Company and of Leroy Moore, who is the father of William I. Moore and with whom William I. Moore appears to be associated. In his motion for rehearing, William I. Moore has denied that he has any connection with the Moore Sheep Company or with the grazing activities of his father.

The other case, A-25288, involves conflicting bids submitted at the public sale of certain public land in T. 42 N., R. 74 W., 6th P. M., Wyoming. (43 U. S. C., 1946 ed., sec. 1171.) The original application for the offering of the land, in the form of an affidavit, was submitted by William I. Moore, who specifically averred that he owned lands, described in the application, adjoining the lands which he desired the Government to sell; that he had not been "requested by anyone to apply for the ordering of the tract into market"; that he was not "acting as agent for any person or persons or directly or indirectly for or in behalf of any person other than self in making said application"; that he intended "to appear at the sale of said tract, if ordered, and bid for same"; and that he had "no agreement or understanding, expressed or implied, with any other person or persons, that * * * [he would] bid upon or purchase the land for them or in their behalf * * *." In an accompanying affidavit, Leroy Moore averred that the statements of William I. Moore were true.

At the public sale, which was held on July 29, 1947, William I. Moore and Leland G. Turner bid upon the tracts in controversy. On the same day, a nonmineral affidavit was filed by "Moore Sheep Co. By Wm. I. Moore Ass't Sec.," an entity described in the affidavit as the applicant. Also, on the same day, the acting manager of the district land office addressed identical letters to Mr. Turner and to "Mr. William I. Moore (Assistant Secretary, Moore Sheep Co.)," allowing them 30 days within which to agree upon a division of the lands and stating that, in the absence of such agreement, the Bureau would make the division. Service of this letter was acknowledged

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by Mr. Turner and by "Moore Sheep Co. By Wm. I. Moore, Ass't Sec." Mr. Turner responded that no agreement could be reached, and asserted a preference right, as the owner of contiguous lands, to the $W\frac{1}{2}NE\frac{1}{4}$ and $S\frac{1}{2}NW\frac{1}{4}$ sec. 13, $E\frac{1}{2}NE\frac{1}{4}$ sec. 14, and the $N\frac{1}{2}NE\frac{1}{4}$, $SE\frac{1}{4}NE\frac{1}{4}$ and $SE\frac{1}{4}$ sec. 25. A response was also received from Leroy Moore on behalf of Moore Sheep Company, who asserted a preference right to all the land involved in the controversy,² and stated with respect to the lands in secs. 13 and 14:

At one time these lands were included in a homestead held by William I. Moore, an officer and stockholder of Moore Sheep Company and soon after the said homestead was cancelled, the said William I. Moore made application to purchase said lands as an isolated tract and bid on said lands at the public sale for and in behalf of Moore Sheep Company.

The Director of the Bureau of Land Management awarded the $SW\frac{1}{4}NW\frac{1}{4}$ sec. 13 and the $E\frac{1}{2}NE\frac{1}{4}$ sec. 14 to Mr. Turner. The remainder of the lands in controversy in sec. 13 were awarded to the Moore Sheep Company, on the ground that the division thus made was equitable as between these contiguous landowners. The lands in sec. 25 were all awarded to the Company because it owns contiguous lands, while Mr. Turner's lands are merely cornering. (*George H. Snodgrass*, A-24038, October 3, 1945.) Mr. Turner and the Moore Sheep Company both appealed from this award.

Because the records in these two cases contained obvious inconsistencies with respect to the relationship of William I. Moore to the Moore Sheep Company, further information was requested from William I. Moore and from Leroy Moore. Counsel for William I. Moore responded that he had inadvertently erred in representing in the grazing-lease case that William I. Moore had no connection with the Company. He asserted that William I. Moore is a shareholder in the Company and acts as assistant secretary in order to take care of matters requiring a secretarial signature when the secretary of this family corporation is absent. William I. Moore's grazing operations, however, were represented by counsel as being separate and distinct from those of the Company.

With respect to the public-sale case, it was stated that the original application and affidavit of William I. Moore were true in stating that he filed the application on his own behalf and expected to buy the lands at a nominal amount. It was further stated that—

Just before the sale of the lands, he learned that there would be competitive bidding at the sale and took the matter up with his father and his father instructed him that if the bidding got too high for him, that he could and should

²This claim of preference right was filed on August 21, 1947, not on the day of the public sale, as stated in the Director's decision.

bid on the lands for Moore Sheep Co. Up to a certain point in the bidding, he was acting for William I. Moore. Beyond that point, he was acting for Moore Sheep Co.

The explanation is inadequate. The original application and affidavit of William I. Moore referred to lands which he claimed to own and which are contiguous to the lands that he requested the Department to place on sale. The record is now clear that the lands which William I. Moore claimed to own were actually owned by the Company. This, coupled with the representation as to the various capacities in which William I. Moore bid on the lands at public sale, casts doubt upon the degree of his interest and of the corporation's interest in both the grazing lease and the public-sale cases. Where their interests separate and where they coalesce, where William I. Moore acts on his own behalf, and where he assumes the role of agent for the Company, are questions for which this Department is not obligated to discover true answers. It is enough that neither the United States nor other applicants for the public lands shall be prejudiced by the conduct of William I. Moore and the Company in causing confusion as to the relationship between them.

With respect to the grazing-lease case, the motion for rehearing presents no good reason for disturbing the decision of Under Secretary Chapman. Moreover, it appears that Mr. Taylor has greater necessity than has William I. Moore or Moore Sheep Company for these lands in order to permit proper use of Mr. Taylor's base lands.

With respect to the public-sale case, both Mr. Turner, on the one hand, and William I. Moore or the Moore Sheep Company, on the other hand, have asserted preference rights to the lands involved in secs. 13, 14, and 25. In order that Mr. Turner may not be prejudiced by the conduct of the Company and of William I. Moore in confusing the issue as to which is the actual applicant, the preference rights to secs. 13 and 14 are deemed to have been asserted by Mr. Turner and by William I. Moore personally. As Mr. Moore personally owns no contiguous lands, the Government lands in these two sections will be awarded to Mr. Turner.

With respect to the lands in sec. 25, Moore Sheep Company owns contiguous lands, while Mr. Turner's lands are only cornering. In this situation, Mr. Turner cannot prevail because the Company alone received the preference right accorded by law, and Mr. Turner was outbid at the sale. There is, accordingly, no reason to disturb the Director's decision with respect to the award of the lands in sec. 25.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the motion for rehearing in the case of William G. Taylor and William I. Moore, A-24484, is denied; the decision of the Director of the Bureau of

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Land Management in the case of William I. Moore, Leland G. Turner, and Moore Sheep Company, A-25288, is modified by awarding to Leland G. Turner all the lands in sec. 13 for which he applied; and case A-25288 is remanded to the Bureau of Land Management for further action in accordance with this decision.

MARTIN G. WHITE,
Solicitor.

ELBERT O. JENSEN

A-25352

Decided October 4, 1948

**Private Exchange of Land in National Forest for Land in Grazing Unit—
Taylor Grazing Act.**

Under section 8 (b) of the Taylor Grazing Act, land in a grazing district may be exchanged for privately owned land in a national forest where such exchange will be in the public interest.

The "public interests" to be benefited by exchanges under section 8 (b) of the Taylor Grazing Act may encompass interests outside the grazing district involved in the exchange.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Elbert O. Jensen has appealed from the decision dated November 12, 1947, of the Director of the Bureau of Land Management, which rejected his application to select certain land within Grazing District No. 10 in exchange for privately owned land within the boundaries of the Cache National Forest, under the provisions of section 8 (b) of the Taylor Grazing Act, as amended (49 Stat. 1976; 43 U. S. C., 1946 ed., sec. 315g). This section provides that—

When public interests will be benefited thereby the Secretary is authorized to accept on behalf of the United States title to any privately owned lands within or without the boundaries of a grazing district, and in exchange therefor to issue patent for not to exceed an equal value of surveyed grazing district land or of unreserved surveyed public land in the same State or within a distance of not more than fifty miles within the adjoining State nearest the base lands.

The reason assigned by the Director for rejecting the application was that, as the selected land would be taken out of a grazing district and the offered land could not be placed within the district, the resulting reduction in the acreage of the grazing district would not be beneficial to the "public interests," as required by section 8 (b) of the act.

Section 8 (b), however, does not impose any such limitation as that adopted by the Director of the Bureau of Land Management with respect to the nature of the "public interests" to be benefited by the exchanges authorized in that section. The "public interests" mentioned in section 8 (b) of the Taylor Grazing Act may encompass interests

outside the particular grazing district involved in the exchange. The prospect of improving the administration of a national forest might, for example, warrant a finding that the "public interests will be benefited" by an exchange under section 8 (b) of public land within a grazing district for privately owned land within the boundaries of the national forest.

The construction placed by the Director of the Bureau of Land Management upon section 8 (b) of the Taylor Grazing Act, as amended, was too narrow.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the case is remanded to the Bureau of Land Management for reconsideration and such action as may be appropriate in the light of this decision.

MASTIN G. WHITE,
Solicitor.

FOREST EXCHANGES

Delegation of Authority—Discretionary Functions—Personnel of Another Department.

The mere fact that a function vested in the Secretary of the Interior by law is discretionary rather than purely ministerial does not mean that the Secretary must personally perform such function and that he cannot properly delegate it to another official.

Delegations of authority by the head of an executive department must be kept within the framework of the particular department and can be made only to the officers and employees of that department, in the absence of an express authorization for the shifting of the responsibility elsewhere.

The functions that are vested in the Secretary of the Interior by section 1 of the act of March 20, 1922, with respect to forest exchanges cannot properly be delegated to personnel of the Forest Service, Department of Agriculture.

M-35078

OCTOBER 4, 1948.

TO ASSISTANT SECRETARY DAVIDSON.

This responds to your request for advice as to whether this Department could properly "pass over to the Forest Service all functions pertaining to exchanges of this class (involving only lands within the boundaries of National Forests), retaining in the Bureau of Land Management only the ministerial function of issuing patents."

Forest exchanges are authorized by section 1 of the act of March 20, 1922 (42 Stat. 465; 16 U. S. C., 1946 ed., sec. 485), which 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 the exterior boundaries of the national forests which, in the opinion of the Secretary of Agriculture, are chiefly valuable for national—

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forest purposes, and in exchange therefor may patent not to exceed an equal value of such national-forest land, in the same State, surveyed and nonmineral in character, or the Secretary of Agriculture may authorize the grantor to cut and remove an equal value of timber within the national forests of the same State; the values in each case to be determined by the Secretary of Agriculture. * * *

This language makes it abundantly clear that the functions vested in the Secretary of the Interior by the section are broader than the ministerial task of issuing patents. The opening phrase, "When the public interests will be benefited thereby," provides a broad discretionary standard and imposes upon the Secretary of the Interior the task of determining whether each exchange proposed for consummation under the section will or will not benefit "the public interests." This is emphasized by the statement that the acceptance by the Secretary of the Interior of offered lands is to be "in his discretion," and that he "may" patent Government lands in exchange for the offered lands.

However, the mere fact that the functions vested in the Secretary of the Interior by section 1 of the act of March 20, 1922, are discretionary in character and go beyond the mere ministerial task of issuing patents does not mean that the Secretary must personally perform such functions and that he cannot properly delegate them to another official. 35 Op. Atty. Gen. 15, 19; 39 Op. Atty. Gen. 541; Solicitor's opinion, March 18, 1947, 59 I. D. 453. The broad basis for the delegation by the head of an executive department of his statutory powers to other officials has been stated as follows:

The theory underlying the vesting in an executive officer of numerous duties, varying in importance, is not that he will personally perform all of them, but rather that he will see to it that they are performed, the responsibility being his and he being chargeable with the result. [39 Op. Atty. Gen. at p. 546.]

Moreover, Congress has specifically authorized the head of each executive department to make arrangements for "the distribution and performance" of the business of the department (Rev. Stat. sec. 161; 5 U. S. C., 1946 ed., sec. 22).

On the other hand, there seems to be implicit in the statutory provision cited in the concluding sentence of the preceding paragraph the limitation that the recipients of the powers delegated by the head of an executive department are to be members of such department. The full text of the section is as follows:

The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of *his* department, the conduct of *its* officers and clerks, the distribution and performance of *its* business, and the custody, use, and preservation of the records, papers, and property appertaining to *it*. [Italics supplied.]

Thus, it appears that the delegations of authority to be made by the head of an executive department under this section in distributing the

business of the department in order that it may be performed with reasonable expedition must be kept within the framework of the particular department and can be made only to the officers and employees of that department.

The same conclusion is reached if the problem is approached from the standpoint of theory. The head of an executive department in whom a particular governmental function has been vested by law cannot, so long as he remains in office, evade the responsibility that has been placed upon him for the proper performance of such function. There is no attempt at evasion of responsibility, however, when the head of the department delegates the function to a subordinate official or employee of his department. As the subordinate official or employee is subject to the supervision and control of the head of the department, and as the head of the department is responsible for whatever the subordinate official or employee may do in the exercise of the delegated function, the delegation of authority in such a situation does not effect any change in the responsibility of the head of the department. On the other hand, the head of one executive department has no power to supervise and direct the activities of the personnel of another department. He is not responsible for the results of such activities. Consequently, an attempt by the head of one department to delegate to personnel of another department a function vested in him by law would constitute an effort to shift the responsibility imposed upon him by law. In the absence of express authority for such a shift of responsibility, an action of that sort would be improper, in my opinion.

I conclude, therefore, that the Secretary of the Interior cannot properly delegate to personnel of the Forest Service, Department of Agriculture, any of the functions that are vested in the Secretary of the Interior by section 1 of the act of March 20, 1922.

However, the Secretary of the Interior is not limited in any way with respect to soliciting and giving consideration to recommendations from personnel of the Forest Service concerning the matters entrusted to the determination of the Secretary of the Interior by the statutory provision discussed in this memorandum.

MASTIN G. WHITE,
Solicitor.

ROY MONTGOMERY v. LEE GATES AND NORA E. GATES

A-24601

Decided October 6, 1948

Taylor Grazing Act—Grazing Leases—Preference-Right Applications.

One who seeks a reversal of a bureau determination apportioning, under section 15 of the Taylor Grazing Act, an area of public land between himself

October 6, 1948

and another preference-right applicant, and who asks that he be granted a lease on the entire area, has the burden of showing that he has a greater need than the opposing applicant for the portion of the land awarded to the other applicant.

A showing by a preference-right applicant for a lease of public land under section 15 of the Taylor Grazing Act that he has previously used such land for an extended period of time is not sufficient to demonstrate that he has a greater need for such land than another preference-right applicant who also desires to lease the same land.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Roy Montgomery filed a supplemental application (Buffalo 033628), under section 15 of the Taylor Grazing Act,¹ to lease 677.35 acres of land in T. 51 N., R. 75 W., 6th P. M., Wyoming. By a decision dated February 28, 1945, of the Assistant Commissioner of the General Land Office,² Roy Montgomery was offered a grazing lease (Buffalo 033628) for an 8-year term covering all the land sought by him, and the conflicting application of Lee and Nora Gates for the same land was rejected. Lee and Nora Gates filed an appeal from the rejection of their application. Action was then suspended on the Montgomery and the Gates applications pending a further field investigation. As it appeared that Mr. and Mrs. Gates, as well as Mr. Montgomery, were preference-right applicants, the Acting Assistant Director of the Bureau of Land Management, in a decision dated January 28, 1947, revoked the previous decision of February 28, 1945, and awarded to Mr. Montgomery a 10-year lease on 437.35 acres³ (Buffalo 033628-A), and awarded the remaining 240 acres, described as the W $\frac{1}{2}$ E $\frac{1}{2}$ and E $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 34, T. 51 N., R. 75 W., to Lee and Nora Gates (Buffalo 037229-A).

Mr. Montgomery has appealed from the decision dated January 28, 1947. The appellant's contention is that the award of 240 acres to Mr. and Mrs. Gates was erroneous because, for the past 30 years or more, the land awarded to them has been an integral part of the appellant's ranch holdings.

Both the application of Mr. Montgomery and the application of Mr. and Mrs. Gates are based upon the ownership of lands contiguous to the public land involved in the controversy, and under section 15 of the Taylor Grazing Act they are equally preferred to the extent that the land applied for is "necessary to permit proper use of such contiguous lands." *The Swan Co. v. Banzhaf*, 59 I. D. 262 (1946); *Albert Archibald*, A-24499, February 10, 1947 (unreported).

¹ Act of June 28, 1934 (48 Stat. 1269, 1275), as amended by sec. 5 of the act of June 26, 1936 (49 Stat. 1976, 1978; 43 U. S. C., 1946 ed., sec. 315m).

² The General Land Office and the Grazing Service were merged by section 403 of Reorganization Plan No. 3 of 1946 to form the Bureau of Land Management.

³ S $\frac{3}{4}$ SW $\frac{1}{4}$ sec. 27, SE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 28, lot 1, sec. 31, E $\frac{1}{2}$ E $\frac{1}{2}$ sec. 33, NW $\frac{1}{4}$ NW $\frac{1}{4}$ and the E $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 34, T. 51 N., R. 75 W., 6th P. M., Wyoming.

As the appellant seeking a reversal of a bureau determination apportioning, under section 15 of the Taylor Grazing Act, an area of public land between himself and another preference-right applicant, and asking that he be granted a lease on the entire area, Mr. Montgomery has the burden of showing that he has a greater need than the opposing applicant for the particular portion of the land awarded to the other applicant and, therefore, that the bureau determination was erroneous. Mr. Montgomery seeks to meet this burden merely by showing that the "said land now assigned to Lee and Nora E. Gates is and has for the past 30 years or more, been an integral part of the ranch holdings of your appealing claimant." The mere fact that Mr. Montgomery has used the 240 acres of land for approximately 30 years does not demonstrate that he has a greater need for this acreage than Mr. and Mrs. Gates. Consequently, there is no basis for disturbing the decision of the Acting Assistant Director of the Bureau of Land Management. *Z. W. Potter*, A-24430, December 27, 1946 (unreported); *Fred D. Williams*, A-25124, March 1, 1948 (unreported).

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the decision of the Acting Assistant Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

LUNA C. WOOTTON

A-25424

Decided October 8, 1948

Oil and Gas Leases—Assignment—Termination—Suspension of Operation.

Where an oil and gas lease has been divided by approved assignments, the several portions become for all purposes separate leases, and the discovery and production of oil or gas on one area does not inure to the benefit of any other area.

Absent the discovery and production of oil or gas on the assigned portion of a lease at the end of the primary term, and in the absence of a showing of diligent prosecution of drilling operations at that time, the lease of such assigned portion terminated and no application for the suspension of the lease requirements could thereafter be honored.

The provision in a lease for cancellation by judicial proceedings relates only to the cancellation of an existing lease for default or nonobservance of the terms and conditions of the lease and has no application where the term of the lease has come to an end by its own terms or by operation of law.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

In a decision dated October 13, 1947, the Director of the Bureau of Land Management ruled that an oil and gas lease on 80 acres of land held under an assignment from the original lessee by Mrs. Luna C.

October 8, 1948

Wootton had expired, in the absence of production of oil or gas, on December 31, 1946. For this reason, the Director further ruled that an application which had been filed by Mrs. Wootton on January 24, 1947, for the suspension of the drilling, producing, and rental requirements of the lease was properly rejected by the oil and gas supervisor. Mrs. Wootton has appealed from this decision.

The appellant contends that the lease did not terminate and that her application for suspension of the drilling, producing, and rental requirements should have been granted.

The original lease covered 2,398.20 acres near Big Piney, Wyoming, and was issued to Mrs. Melba Chipman Eldredge, effective on December 31, 1938. An area of 2,318.20 acres was segregated out of the lease by an assignment made on October 21, 1939, to the Wyoming Petroleum Corporation. The remaining 80-acre tract of land was assigned by Mrs. Eldredge to the appellant on December 27, 1943, and the assignment was approved by this Department on March 21, 1946.

The original term of the lease was for a period of 5 years from December 31, 1938, "and so long thereafter as oil or gas is produced in paying quantities." A valuable deposit of gas was discovered in July 1942 as a result of the drilling of a well on the portion of the original leasehold assigned to the Wyoming Petroleum Corporation. Drilling, producing, and rental requirements were suspended¹ on February 19, 1945, for 18 months from December 1, 1943, to May 31, 1945. Another suspension, which was granted on April 5, 1946, terminated on May 31, 1946. These suspensions covered all the land covered by the original lease. The lease had been in effect 4 years and 11 months at the time of the initial suspension on December 1, 1943. After the termination of the second suspension period, on May 31, 1946, the term of the lease had 1 month remaining, and it would have expired on June 30, 1946, but for the statutory extension to December 31, 1946, under the act of November 30, 1945 (59 Stat. 587).

The record shows that the 80-acre tract assigned to the appellant was not producing either oil or gas on December 31, 1946.

The Department has uniformly held that when a lease has been divided by assignment, the assignees hold segregated leases which, for all purposes, including the duration of their terms, are the same as though they had been separately issued.² Accordingly, the appellant cannot claim the benefit of discovery and production on that portion of the lease which was assigned to the Wyoming Petroleum Corporation. Moreover, in the absence of a showing that drilling operations were being diligently carried on at the expiration date,

¹ Act of February 9, 1933 (47 Stat. 798), amended by act of August 8, 1946, sec. 10 (80 Stat. 957; 30 U. S. C., 1946 ed., sec. 209).

² See *C. W. Grier and George Witz*, 58 I. D. 712 (1944).

she was not entitled to the 2-year extension provided for in the act of August 8, 1946 (60 Stat. 951; 30 U. S. C., 1946 ed., sec. 226).

The lease having terminated by operation of law on December 31, 1946, no application for the suspension of any of the lease requirements made after that date could be favorably considered.

The appellant contends that the decision of the Director of the Bureau of Land Management disregards a provision in the lease to the effect that "the lease may be canceled only by judicial proceedings in the manner provided in section 31 of the act of February 25, 1920 (41 Stat. 437), as amended." The provision to which the appellant refers³ relates only to the cancellation of existing leases for default in the performance or observance of the terms and conditions of the lease, and has no application where, as here, the term of the lease has expired.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the decision of the Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

AUTHORITY TO ISSUE OIL AND GAS LEASES FOR LANDS WITHIN THE OLYMPIC PUBLIC WORKS PROJECT

Oil and Gas Leases—Acquired Lands—Secretarial Discretion—National Parks and Monuments.

Lands acquired in connection with the public works program under the National Industrial Recovery Act may be leased by the Secretary of the Interior for the development of oil and gas pursuant to the Mineral Leasing Act for Acquired Lands, except for such areas as may presently fall within one of the categories of lands that are specifically excepted from the provisions of that act.

The determination whether lands which are within the scope of the Mineral Leasing Act for Acquired Lands shall be leased for the development of oil and gas is discretionary with the Secretary of the Interior.

The fact that lands are being administered by the National Park Service does not necessarily bring such lands within the category of "national parks or monuments."

M-35083

OCTOBER 11, 1948.

TO ASSISTANT SECRETARY DAVIDSON.

You have addressed two questions to this office concerning the issuance of oil and gas leases on certain lands in the Olympic Peninsula which were acquired by the United States in connection with the

³ Act of August 8, 1946, sec. 9 (60 Stat. 956; 30 U. S. C., 1946 ed., sec. 188).

October 11, 1948

Olympic Public Works project under section 202 of the National Industrial Recovery Act (40 U. S. C., 1946 ed., sec. 402).

It was apparently contemplated that the lands mentioned by you would ultimately become part of the Olympic National Park. However, this has not yet been accomplished. The lands are not part of any national park or monument. They are merely being administered by the National Park Service for "necessary protection." (Act of August 7, 1946, 60 Stat. 885.)

1. Your first question is whether such lands can be leased by the Secretary of the Interior for oil development.

In my opinion, oil and gas leases may be issued by the Secretary of the Interior for these lands under the Mineral Leasing Act for Acquired Lands. (61 Stat. 913; 30 U. S. C., 1946 ed., Supp. I, secs. 351-359.) As stated in section 2 of that act, it covers (with certain exceptions, as to which see the next succeeding paragraph of this memorandum) "all lands heretofore or hereafter acquired by the United States to which the 'mineral leasing laws' have not been extended"; and it places the leasing of all deposits of oil and gas (as well as certain other minerals) in such lands under the jurisdiction of the Secretary of the Interior. The "mineral leasing laws," as defined in section 2, had not been extended to these lands as of the time of the enactment of the Mineral Leasing Act for Acquired Lands.

The Mineral Leasing Act for Acquired Lands (section 3) specifically excepts from its provisions certain categories of lands which would otherwise come within the scope of the statute, as defined in section 2. The only excluded category which might conceivably include the lands now under consideration is that consisting of "lands * * * situated within * * * national parks or monuments." However, "national parks" and "monuments" are terms which have precise significations. The establishment of national parks since August 25, 1916, and the extension of the boundaries of previously existing national parks have required congressional enactments. (16 U. S. C., 1946 ed., sec. 2.) The creation or enlargement of a national monument requires an official proclamation by the President (16 U. S. C., 1946 ed., sec. 431) or an act of Congress. The mere fact that an area is being administered by the National Park Service does not necessarily make of such area a national park or a monument. Numerous areas which do not come within these categories are administered by the National Park Service.

The lands involved here are not situated within a national park or a national monument, and they are not excepted from the provisions of the Mineral Leasing Act for Acquired Lands.

2. Your second question is whether the power to lease, if it exists, is discretionary.

The Mineral Leasing Act for Acquired Lands uses language of discretion. Section 3 provides that the lands covered by the act "may be leased by the Secretary." The determination whether the power to lease shall be exercised is, therefore, clearly discretionary with the Secretary of the Interior. *United States ex rel. McLennan v. Wilbur*, 283 U. S. 414 (1931).

MASTIN G. WHITE,
Solicitor.

KEIL J. SCHARF

A-24629

Decided October 14, 1948

Patent—Effect of Issuance—Failure to Reserve Oil and Gas.

If no suit attacking a patent has been brought within 6 years after its issuance, subsequently discovered fraud is the only ground for attacking the patent after the expiration of the 6-year period.

An oil and gas lease application for land patented more than 6 years previously without an oil and gas reservation, despite a statutory requirement that such a reservation be made, cannot be granted.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Keil J. Scharf's application, Sacramento 035758, for an oil and gas lease was rejected as to the E $\frac{1}{2}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$, E $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 27, T. 11 N., R. 24 W., S. B. M., California, by the Acting Director of the Bureau of Land Management in a decision dated January 23, 1947, because these lands had been patented on July 28, 1920, to Jack Bray without a reservation of the oil and gas deposits to the United States.

Mr. Scharf has appealed. He contends that the oil and gas did not pass with the issuance of the patent because, even in the absence of an express reservation in the Bray patent, the oil and gas were reserved to the United States by the act of July 17, 1914 (38 Stat. 509).

It appears that, prior to the issuance of the patent to Jack Bray, the lands in question had been included within Petroleum Reserve No. 2 by the Executive order of July 2, 1910. Accordingly, section 2 of the act of July 17, 1914, *supra*, required that any patent issued with respect to such lands should contain a reservation to the United States of the petroleum deposits in the lands. The entry records show that the application filed by Jack Bray for a patent contained a notation "application made in accordance with and subject to the provisions and reservations of the act of July 17, 1914 (38 Stat. 509)." However, when the patent was issued to Mr. Bray on July 28, 1920,

October 14, 1948

there was a failure to comply with the statutory requirement by reserving the oil and gas deposits to the United States.

It is well settled that if no suit attacking a patent has been instituted by the Government within 6 years after the patent was granted, a subsequently discovered fraud is the Government's only ground for attacking the patent after the expiration of the 6-year period. Act of March 3, 1891 (26 Stat. 1099; 43 U. S. C., 1946 ed., sec. 1166); *United States v. Chandler-Dunbar Co.*, 209 U. S. 447, 450 (1908).

There is no evidence before the Department of any fraud in connection with the issuance of the patent to Jack Bray. Apparently, the failure to reserve the oil and gas deposits to the United States, as required by law, was due to carelessness on the part of Department personnel, rather than to fraud.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the decision dated January 23, 1947, of the Acting Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

UNITED STATES *v.* MINNILEE BAKER ET AL.

A-25434

Decided October 14, 1948

Mining Laws—Discovery—Condemnation Proceedings.

As only "valuable mineral deposits" may be located under the mining laws of the United States, no mining claim is valid until there has been a discovery of minerals within the limits of the claim which would justify a person of ordinary prudence in the further expenditure of time and money in an effort to develop a paying mine.

The authority of this Department to determine the validity of mining claims is not affected by the institution of proceedings by the United States to condemn the interests of the mineral claimants, or by the assumption of jurisdiction over the land by the Navy Department.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Adversary proceedings were instituted by the Department against unpatented mining claims¹ within the Inyokern Naval Base in Cali-

¹Mineral Contest 6-343 involved the Patsy Ann Nos. 1 and 2 Lodes; Contest 6-347 involved Big T Nos. 1, 3, and 4 Lodes; Contest 6-446 involved the Peacock No. 1 Lode; Contest 6-500 involved the Monica No. 1 Quartz, Monica No. 2 Lode, Monica No. 3 Placer, and Silver Cloud Lode; Contest 6-513 involved the Rovail Lode; Contest 6-546 involved the Margerite Lode; Contest 6-498 involved the Cliff and Crystal Lodes; Contest 6-525 involved the Casa and Robbie O Lodes; Contest 6-544 involved the Clarice Lode; Contest 6-612 involved the Red Rover Lode and the A. B. and Juniper Placer Claims. Action on Big T Nos. 1, 3, and 4 has been suspended, because the parties in interest were not served; and these claims are not involved in the present appeal.

ifornia. This is an appeal from a decision dated March 29, 1948, of the Assistant Director of the Bureau of Land Management, holding the claims invalid. That decision affirmed an earlier decision of the acting manager of the district land office at Sacramento. Both decisions exhaustively reviewed the evidence.

The Navy Department instituted, under the Second War Powers Act (56 Stat. 177), condemnation proceedings to acquire for the Inyokern Naval Base any outstanding private interests in the land embracing the claims under consideration, and the Navy Department took possession of the land during the pendency of the condemnation proceedings. However, neither the institution of such proceedings nor the assumption by the Navy Department of jurisdiction over the land terminated the authority of this Department to determine the validity of these mining claims. *Cameron v. United States*, 252 U. S. 450 (1920).

Numerous samples of ore were extracted and assayed for mineral content, and gold, silver, copper, gold-bearing quartz rock, scheelite, and other minerals were found. However, in cases of this kind, the question is whether the minerals found are sufficient to constitute the discovery of valuable mineral deposits within the meaning of the mining laws.²

The test to be applied is whether a person of ordinary prudence would be justified in the further expenditure of time and money in an effort to develop a paying mine.

A careful review of the evidence is convincing that, under the rules of law stated above, there has been no valid discovery on any of the claims involved in this appeal. Accordingly, I conclude that these claims were correctly held to be invalid.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the decision of the Assistant Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

**QUEEN INSURANCE COMPANY, SUBROGEE OF MRS. MARGUERITE
ATCHLEY**

Federal Tort Claims Act—Subrogee—Statute of Limitations.

The 1-year period in which a claim under the Federal Tort Claims Act could be filed by an insurer-subrogee began to run on the date when the claim of its insured against the United States accrued (or on August 2, 1946, whichever was later) and not on the date when it made payment to the insured.

² Rev. Stat. secs. 2319, 2329, 2331; 30 U. S. C., 1946 ed., secs. 22, 35.

M-34551

OCTOBER 20, 1948.

The Queen Insurance Company, San Francisco, California, through its counsel, filed a claim against the United States about February 9, 1948, in the amount of \$149.13 for compensation because of a payment which it had made to Mrs. Marguerite Atchley, 211 E. Poplar Street, Stockton, California, covering the damage that resulted from a collision between her automobile and a Government-owned Ford truck, Service No. I-4746, assigned to the Bureau of Indian Affairs and operated at the time of the collision by Perry Skenandore, an employee of that agency.

The question whether the claim should be paid under the Federal Tort Claims Act (28 U. S. C., 1946 ed., sec. 921 *et seq.*) has been submitted to me for determination.

The incident on which the claim is based occurred at about 8:30 a. m. on December 21, 1945, on 66th Avenue, Gallup, New Mexico. That avenue has two traffic lanes and is divided by a center line. The Government vehicle, while on official business, was traveling west in the right traffic lane, and the car of Mrs. Atchley was approaching it from the rear. The driver of Mrs. Atchley's car attempted to pass the Government vehicle on the left. While the two vehicles were in this position, the Government driver, without signaling his intention to do so, attempted to make a left turn from the right traffic lane, and the rear of the truck and the right front end of the private car collided.

Mrs. Atchley filed a claim against the United States on March 25, 1946, in the amount of \$149.13. However, it was stated in a letter dated May 2, 1947, from Mrs. Atchley to this Department that she had received in March a check from the Queen Insurance Company covering the amount of the damage to her car. Accordingly, Mrs. Atchley was informed by a letter dated May 12, 1947, from this office that, as she had been compensated for the damage to her car, "this Department will not consider your claim any further."

The letter of May 12, 1947, also informed Mrs. Atchley that, should the Insurance Company subsequently file a claim as subrogee, the claim would be considered at that time. Counsel for the Insurance Company, in a letter dated September 10, 1947, requested this Department to furnish the proper forms in order that a claim could be presented on behalf of the Company, and the forms were sent on September 18, 1947. The claim was filed by the Company about February 9, 1948.

The right of an insurer-subrogee that has paid off its insured (as has the present claimant) to file a claim under the Federal Tort Claims Act against the United States covering the amount of its payment seems to be clear: *Employers' Fire Ins. Co. v. United States*, 167 F.

(2d) 655 (C. C. A. 9th, 1948); *Old Colony Ins. Co. v. United States*, 168 F. (2d) 931 (C. C. A. 6th, 1948).

However, section 420 of the Federal Tort Claims Act provides:

Every claim against the United States cognizable under this title shall be forever barred, unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, it is presented in writing to the Federal agency out of whose activities it arises * * *

As the present claimant did not file its claim until about February 9, 1948, the question is presented whether, as against this claimant, the 1-year limitation prescribed in section 420 began to run on August 2, 1946 (the date of the enactment of the Federal Tort Claims Act, which was later than the date of the collision involved in this case), or on the date in March 1947 when the claimant paid Mrs. Atchley the amount due her under the insurance contract between them.

There is clear authority that the date of the incident resulting in an injury starts the running of the statute of limitations in favor of the defendant, irrespective of whether the plaintiff in subsequent litigation is the injured person himself or the insurer that has paid the claim and thus has become subrogated to the rights of the injured person. Accordingly, an insurer that has failed to institute suit within the period prescribed by law finds that its remedy has been barred.¹ Moreover, the fact that an action has been instituted within the statutory period by an injured person against the person responsible for the injury does not inure to the benefit of the injured person's subrogee in connection with a proceeding instituted by the subrogee after the expiration of the statutory period.

Thus, in *Wright v. Home Indemnity Co.*, 1 So. (2d) 709 (La. App., 1941), a Louisiana statute was involved that permitted a charity hospital in that State, which had treated an injured patient, to become subrogated to the extent of its unpaid bill to the rights of the patient against the tort-feasor whose negligence had caused the injury. A previous Louisiana decision had held that the cause of action granted by the statute to the hospital "was one ex delicto and that it was therefore barred by the prescription of one year."² In the *Wright* case, the patient instituted the action on May 23, 1940, against the insurer of the person whose negligence had caused the plaintiff's injury in an automobile collision that had occurred on May 23, 1939. On

¹ *Metropolitan Casualty Ins. Co. of New York v. Sloss-Sheffield Steel & Iron Co.*, 3 So. (2d) 306 (Ala., 1941); *Webster v. Clodfelter*, 76 App. D. C. 171, 130 F. (2d) 434 (1942); *Joseph Schlitz Brewing Co. v. Chicago Ry. Co.*, 307 Ill. 322, 138 N. E. 658 (1923); *Maryland Casualty Co. v. Ladd*, 121 Kans. 659, 249 Pac. 687 (1926); *Bay State Milling Co. v. Izak*, 310 Mich. 601, 17 N. W. (2d) 769 (1945); *Exchange Mutual Indemnity Ins. Co. v. Central Hudson Gas & Electric Co.*, 243 N. Y. 75, 152 N. E. 470 (1926); *Wright, Subrogation Under Workmen's Compensation Acts*, p. 18 (1948).

² *Pearl v. Rykoski, Inc.*, 195 So. 30 (La. App., 1940), affirmed 195 La. 931, 197 So. 605 (1940).

October 20, 1948

November 7, 1940, or approximately a year and 5 months after the collision, the hospital attempted to intervene in the proceedings on the theory that—

* * * since the Act of 1932 makes the hospital the legal subrogee of the injured person to the extent of the value of the services it renders to him, the filing of a suit by the injured party against the tort-feasor to recover compensatory damages has the effect of interrupting the running of prescription with respect to the hospital's claim.

The court refused to subscribe to this theory, and denied permission to the hospital to intervene, even though the patient's suit, which had been filed within the statutory period, was still pending.

In *Exchange Mutual Indemnity Insurance Co. v. Central Hudson Gas & Electric Co.*, 243 N. Y. 75, 152 N. E. 470 (1926), an insurer that had paid a claim under a workmen's compensation statute filed an action (as a statutory assignee of the claim) against the tort-feasor who had been responsible for the death of the workman. The action was commenced after the 2-year limitation prescribed in the statute had run. The claim had been paid to the dependents of the deceased employee. The dependents had instituted an action against the tort-feasor and then had abandoned it without the knowledge or consent of the insurer. In dismissing the complaint of the insurer, the Court of Appeals of New York observed:

* * * The court may not read into the statute an intention to create a new cause of action in favor of the insurance carrier or to wipe out limitation upon the bringing of a cause of action assigned to the carrier, even if there may be some occasions when award is made after dependents' cause of action or remedy has been lost by lapse of time.

In the light of these authorities, I conclude that the 1-year limitation contained in section 420 of the Federal Tort Claims Act began to run against the claimant on August 2, 1946, rather than on the date when it made payment to its insured. Accordingly, it must be determined that the claimant failed to present its claim to this Department within the period prescribed by the statute.

DETERMINATION

Therefore, in accordance with the provisions of the Federal Tort Claims Act and the authority delegated to me by the Secretary of the Interior (43 CFR 4.21; 13 F. R. 4694), I determine that—

1. The claim of the Queen Insurance Company was not presented in writing to the Department of the Interior within 1 year after it accrued or within 1 year after the date of the enactment of the Federal Tort Claims Act; and
2. The claim of the Queen Insurance Company must be denied.

MASTIN G. WHITE,
Solicitor.

EVERGLADES NATIONAL PARK

Condemnation—Secretarial Discretion—Park Boundaries.

When the Secretary of the Interior is authorized by statute to acquire lands for a national park by donation only, he cannot institute condemnation proceedings in order to acquire lands for such park, even though donated funds are available to pay condemnation awards.

The Secretary of the Interior has authority to enlarge the present boundaries of the Everglades National Park, subject to the limitations (a) that the boundaries cannot extend beyond the limits recommended in the Wilbur report of December 3, 1930, and (b) that title to a major portion of the lands within the park boundaries, as extended, must have vested in the United States.

The word "title" in the requirement of the legislation relating to the Everglades National Park that "title * * * to a major portion of the lands * * * shall have been vested in the United States" means either a fee simple absolute conveying all rights to the United States or a fee subject to mineral reservations approved by the Secretary of the Interior.

M-35044

OCTOBER 29, 1948.

TO THE DIRECTOR, NATIONAL PARK SERVICE.

You have requested my opinion on two questions relating to the acquisition of land for, and the enlargement of, the Everglades National Park, which was established and is administered pursuant to the act of May 30, 1934 (48 Stat. 816), as amended (50 Stat. 742), and the act of December 6, 1944 (58 Stat. 794; 16 U. S. C., 1946 ed., secs. 410-410d).

1. The first question is whether the Secretary of the Interior can acquire privately owned lands for the park by condemnation, using donated funds to pay the condemnation awards.

Section 257 of Title 40, United States Code, 1946 ed., provides general authority for the institution by Government officers of condemnation proceedings in order to acquire privately owned lands for public use. It states that—

In every case in which * * * any * * * officer of the Government has been or shall be, authorized to procure real estate for * * * public uses he shall be authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so. * * *

However, section 1 of the 1934 statute, providing for the establishment of the Everglades National Park, declares in a proviso that—

* * * the United States shall not purchase, by appropriation of public moneys any land within the aforesaid area, but such lands shall be secured by the United States only by public or private donation.

The first clause of this proviso, forbidding "purchase by appropriation of public moneys," does not, of course, forbid a purchase of land, or an acquisition of land by condemnation, through the use of funds

October 29, 1948

derived from a source other than a congressional appropriation.¹ However, it will be noted that the second clause of the proviso commands that "such lands shall be secured by the United States only by public or private donation." Whenever land is condemned by the Government, the land is acquired by virtue of an act of sovereignty and without regard to the owner's wishes or consent. The acquisition of land by Federal condemnation, therefore, is the opposite of acquisition by donation, and this is so irrespective of whether the funds with which to pay a condemnation award have been appropriated from the Federal Treasury by Congress or have been donated to the United States. As this clause, which expressly limits the authority of the Secretary of the Interior with respect to the acquisition of land for the Everglades National Park and states that such land may be "secured * * * only by * * * donation," appears to be inconsistent with the concept of acquiring land for the park by Federal condemnation, it necessarily prevents the application to the land acquisition program for the Everglades National Park of the general authority contained in section 257 of Title 40 of the United States Code for the use of condemnation proceedings.²

This conclusion is reinforced by the proviso in the 1944 Everglades statute to the effect that—

* * * in the event the park is not established within ten years from the date of the approval of this Act, or upon the abandonment of the park at any time after its establishment, title to any lands accepted pursuant to the provisions of this Act shall thereupon automatically revert in the * * * grantors of such property to the United States.

This provision for reversion is consistent with the previous authorization in the 1934 act for the acquisition of land for the park only by donation. On the other hand, it is quite inconsistent with an interpretation of the 1934 act which would permit land to be acquired for the park by Federal condemnation proceedings if donated funds were available to pay the condemnation awards, because, the reversion provision being silent with respect to the return of condemnation awards, a person whose land had been condemned would, upon the automatic revesting of title, have both the award and the land.

Furthermore, the legislative history of the Everglades statutes contains no indication that Congress contemplated that the United States would acquire any lands by condemnation, but, instead, indicates a congressional belief that the lands for the park would be "given" to the United States.³

¹ Cf. *In re Manderson*, 51 Fed. 501, 505 (C. C. A. 3d, 1892).

² *In re Manderson*, 51 Fed. 501 (C. C. A. 3d, 1892); *United States v. Graham & Irvine*, 250 Fed. 499, 502 (W. D. Va., 1917).

³ H. Rept. 1842, 78th Cong., 2d sess. (Sept. 5, 1944); S. Rept. 1192, 78th Cong., 2d sess. (Nov. 24, 1944); 90 Cong. Rec. 8459 (Nov. 27, 1944); statement of Congressman Peterson of Florida); 78 Cong. Rec. 9507 (May 24, 1934); statement of Congressman Willford of Florida).

Accordingly, it is my opinion that, under the statutes relating to the Everglades National Park, the Secretary of the Interior is not authorized to condemn lands for the park, even though donated funds are available to pay condemnation awards. ⁴

2. The second question is whether the Secretary of the Interior can enlarge the Everglades National Park by the addition to it of lands which are outside the present park boundaries but are within the exterior limits of the area of 2,000 square miles mentioned in the statutes relating to the park.

Pursuant to the act of March 1, 1929 (45 Stat. 1443), directing the Secretary of the Interior to report to Congress on the desirability and practicability of establishing a national park in the Everglades of Dade, Monroe, and Collier Counties, Florida, Secretary Wilbur recommended to the Congress, in his report of December 3, 1930 (H. Doc. 654, 71st Cong., 3d sess.), the establishment of such a park within an area of approximately 2,000 square miles, as outlined on a map attached to his report.

The Congress thereafter provided in the act of May 30, 1934, for the establishment of the park. Section 1 of that act declared:

That when title to all the lands within boundaries to be determined by the Secretary of the Interior within the area of approximately two thousand square miles in the region of the Everglades of Dade, Monroe, and Collier Counties, in the State of Florida, recommended by said Secretary, in his report to Congress of December 3, 1930, pursuant to the Act of March 1, 1929 * * *, shall have been vested in the United States, said lands shall be, and are hereby, established, dedicated, and set apart as a public park for the benefit and enjoyment of the people and shall be known as the Everglades National Park * * *.

Pursuant to the 1934 act, the Secretary of the Interior, on April 3, 1935, notified the Governor of Florida that—

* * * I have designated and will accept the area of two thousand square miles, more or less, for general development as a national park, should the same be tendered with sufficient title. This area as outlined in the attached report of the Secretary of the Interior dated December 3, 1930, * * * is more definitely delineated on the accompanying large scale map * * *.

It is obvious that in a project of this size and complexity some minor adjustments of the boundary line will become necessary. Consequently it is understood that such adjustments can be made in the future upon agreement between the authorities of the State of Florida and the National Park Service, upon approval of the Secretary of the Interior.

The original purpose of this park project was the perpetuation of all the values of this choice area. It was apparent during the study of these boundary lines that the area is none too large to accomplish that purpose. * * *

On August 13, 1937, the Acting Secretary notified the Governor of the State of Florida that he had made certain relatively minor revi-

⁴Two bills (H. R. 3378 and S. 1212) which would have conferred this power were introduced in the 80th Congress. Hearings were held, but neither bill was enacted.

October 29, 1948

sions in the boundary lines of the proposed park area, and said: "As a result of this all-inclusive study, we are convinced that the area indicated by the blue line on the attached map comprises the minimum area that can be acceptable for a national park."

For several years the requirement in the 1934 act with respect to the vesting in the United States of title to "all the lands" within the prospective park boundaries, as determined by the Secretary, before the park could be established was a major obstacle to the establishment of the park. This difficulty was alleviated by the 1944 act. That statute, after referring to the 2,000-square-mile area recommended by Secretary Wilbur and authorized in the 1934 act for the Everglades National Park, provided (among other things) that the Secretary of the Interior could proceed with the establishment of the park when "title * * * to a *major portion* of the lands, to be selected by him, within the aforesaid recommended area shall have been vested in the United States." [Italics supplied.]

Officials of the State of Florida urged the Secretary, after the enactment of the 1944 statute, to announce the formal establishment of the park. The files of the Department indicate that in December 1944, shortly after the passage of the act of December 6, 1944, the Secretary designated a "Revised Tentative Boundary" for the proposed park, encompassing a minimum area of approximately 850,000 acres which would be accepted immediately for protection pending the clearing of title, and that the State of Florida thereupon conveyed to the United States all the lands owned by the State within the outer boundaries of the area designated by the Secretary.

At the continued insistence of State officials for the establishment of the park, the Secretary on April 2, 1947, sent a telegram to the Governor of Florida, setting forth the conditions upon which a "minimum area of approximately 706 square miles" (or approximately 53 percent of the area within the "Revised Tentative Boundary" of December 1944) would be established by the Secretary as the Everglades National Park. A map showing the 706-square-mile area, within the larger area of the December 1944 "Revised Tentative Boundary," was approved by the Secretary on April 2, 1947. The conditions prescribed in the Secretary's telegram were accepted by the officials of the State of Florida. Accordingly, on June 20, 1947, the Secretary issued Order No. 2338 (12 F. R. 4189) establishing the Everglades National Park, with boundaries as previously fixed by the Secretary in his decision of April 2, 1947. The order recited that—

Whereas, satisfactory title to a major portion of the lands in the State of Florida * * * which were selected by the Secretary of the Interior on April 2, 1947, for establishment as the Everglades National Park * * * has been vested in the United States * * *: The Everglades National Park is hereby established * * *.

It will be noted from the foregoing discussion that the 1934 and 1944 Everglades statutes authorized the Secretary of the Interior to determine the prospective boundaries of the Everglades National Park and to accept donations of land for the park, subject to the limitation that the park could not extend beyond the area outlined in the Wilbur report of December 3, 1930. The differences between the two statutes, as to this particular point, were that the 1934 act made the formal establishment of the Everglades National Park contingent upon the acquisition of "title to all the lands" within the park boundaries, as determined by the Secretary, whereas the 1944 act relaxed this requirement and permitted the park to be officially established upon the acquisition of "title * * * to a major portion of the lands"; and that the 1944 act expressly authorized the Secretary to accept lands "subject to such reservations of * * * mineral rights as the Secretary may approve * * *."

Thus, the Secretary of the Interior was authorized by law to establish the Everglades National Park at any time up to December 6, 1954.⁵ As of the time of the establishment of the park, the Secretary's discretion was restricted in two respects, (a) in fixing the park boundaries he could not go beyond the limits recommended in the Wilbur report; and (b) title to a major portion of the lands within the park boundaries fixed by the Secretary must have vested in the United States. Order No. 2338 constituted an exercise of the discretion which had been conferred upon the Secretary of the Interior by law. The park, as thus officially established by the Secretary, comprised an area approximately 35 percent as large as the prospective park area envisioned in the Wilbur report of December 3, 1930, and in the Secretary's determinations of April 3, 1935, and August 13, 1937, and approximately 53 percent as large as the area within the "Revised Tentative Boundary" designated by the Secretary in December 1944.

The problem, therefore, is whether the issuance of Order No. 2338 exhausted the discretion which was vested in the Secretary of the Interior by law with respect to the fixing of the boundaries of the Everglades National Park. As to this point, I do not find in the 1934 or 1944 Everglades legislation any provision which, either expressly or by necessary implication, prohibits the Secretary from adjusting the boundaries of the Everglades National Park subsequent to its official establishment. Consequently, it is my view that the power of the Secretary in this respect is similar to that of the President with respect to adjusting the boundaries of national monuments. General statutory authority has been conferred upon the President to establish and fix the boundaries of national monuments.

⁵ This time limitation was imposed in the provision of the act of December 6, 1944, for the reversion of donated lands to the grantors "in the event the park is not established within ten years from the date of the approval of this Act * * *."

October 29, 1948

(16 U. S. C., 1946 ed., sec. 431.) This statutory provision has, for many years, been construed as vesting in the President the incidental power to change the boundaries of national monuments subsequent to their establishment. (*Cf.* 39 Op. Atty. Gen. 185.) In the Everglades legislation, Congress conferred upon the Secretary of the Interior discretionary power with respect to the establishment and the fixing of the boundaries of the Everglades National Park. I believe that this carries with it, as a necessary incident, the authority to extend the boundaries of the park after its establishment.

Of course, the authority to extend the park boundaries is subject to the limitations previously noted, i. e., (a) the boundaries of the Everglades National Park cannot be extended by any order or series of orders beyond the exterior limits of the 2,000-square-mile area recommended for the park in the Wilbur report of December 3, 1930, and (b) title to a major portion of the lands within the park boundaries, as extended, must have vested in the United States as of the time of the issuance of an order extending the boundaries. In addition, it may be (although it is not necessary to pass upon the question at the present time) that this power will automatically expire at the end of 10 years from December 6, 1944.

You have asked a subsidiary question as to whether the word "title" in the statutory requirement that "title * * * to a major portion of the lands * * * shall have been vested in the United States" necessarily means a fee simple absolute.

Section 2 of the 1934 Everglades statute authorized the Secretary of the Interior "to accept * * * title to the lands" within the prospective park area. I understand that this phrase was construed by officials of the National Park Service as authorizing only the acceptance of a fee simple absolute conveying all rights to the United States and unburdened by any sort of leasehold interest. As many of the tracts within the 2,000-square-mile area were subject to outstanding mineral leases, and as numerous lessees and landowners were unwilling to surrender their mineral rights to the United States, the construction of the statutory provision as requiring the acquisition by the United States of all rights in the donated lands threatened to delay the establishment of the park for many years.

The 1944 act was designed to remove this difficulty. It authorized the Secretary "to accept * * * any land * * * subject to such reservations of * * * mineral rights as the Secretary may approve * * *." In the same subsection it also, as we have previously noted, authorized the official establishment of the park whenever "title satisfactory to the Secretary to a major portion of the lands * * * shall have been vested in the United States." The express authorization in the 1944 act to accept lands

that are subject to reservations of mineral rights necessarily affects the meaning of the word "title" in the same subsection of the statute.

I conclude, therefore, that the word "title" in the statutory requirement that "title * * * to a major portion of the lands * * * shall have been vested in the United States" means either a fee simple absolute conveying all rights to the United States or a fee subject to mineral reservations approved by the Secretary of the Interior.

MASTIN G. WHITE,
Solicitor.

CLAIM OF FRED WOODLAND

Tort Claim—Bailee—Skidding on Icy Road.

The bailee of an automobile, who is responsible to the bailor for all damage under \$100 done to the vehicle during the period of the bailment, may properly file a claim against the United States under the Federal Tort Claims Act for compensation because of damage in the amount of \$69.15 to the bailed automobile allegedly as a result of a negligent or wrongful act or omission on the part of a Government employee acting within the scope of his employment.

Skidding on an icy street or road does not, as a matter of law, establish that the driver of the skidding motor vehicle was guilty of a negligent or otherwise wrongful act or omission in the operation of the vehicle.

A mere showing by a claimant that his automobile was damaged when a Government motor vehicle skidded on a slick, icy road and sideswiped the claimant's automobile does not meet the test prescribed by Congress for the making of awards under the Federal Tort Claims Act.

T-128

DECEMBER 2, 1948.

Fred Woodland, Gates Hotel, 6th and Figueroa Streets, Los Angeles, California, filed a claim about January 10, 1948, in the sum of \$69.15 against the United States for compensation because of damage to a Chevrolet coupe resulting from a collision with a Government-owned Ford truck, Service No. I-4744, assigned to the Bureau of Indian Affairs and operated by Ned Cleveland, an employee of that agency. Mr. Woodland at the time of the collision was "driving the car through" for its owners, the Drive-Ur-Self Company, Kansas City, and he "was responsible for all damages under \$100.00" which might occur to the car while in transit, according to his statement dated September 20, 1948.

The question whether the claim should be paid under the Federal Tort Claims Act (28 U. S. C., 1946 ed., sec. 921 *et seq.*) has been submitted to me for determination. That act authorizes the settlement

December 2, 1948

of any claim against the United States on account of damage to property caused by a negligent or wrongful act or omission of an employee of the Government while acting within the scope of his employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage in accordance with the law of the place where the act or omission occurred.

At the outset, the question arises as to whether a bailee of property, such as the present claimant, may properly file a claim against the United States under the statute for compensation because of damage to the property while in the bailee's possession. The right of a bailee to sue a third party because of damage to the bailed property has long been recognized. *The Winkfield*, 71 L. J. P. 21 (Court of Appeal, 1901); *Albert M. Howard v. The United States*, 101 Ct. Cl. 823 (1944); *United Fruit Co. v. United States*, 33 F. (2d) 664 (C. C. A. 5th, 1929). Accordingly, I conclude that it was proper for the claimant to file this claim under the Federal Tort Claims Act, in view of his legal duty to reimburse the owner for any damage which might occur to the property during the period of the bailment.

The record before me shows that the collision occurred at about 10 a. m. on either December 29 or 30, 1947, about 2 miles west of Navajo, Arizona, on U. S. Highway 66. It was snowing and the road was covered with ice and snow. Both vehicles were proceeding west. The claimant was accompanied by his mother and his aunt. The driver of the Government vehicle was alone in the truck.

The record contains statements from the driver of the Government vehicle and from the claimant. These statements are contradictory.

The claimant stated in a letter dated February 11, 1948, that just before he reached the place of the collision, he applied his brakes and, because of the slippery condition of the road, the car skidded completely off the road. He maintained that some minutes later, while he and his passengers were sitting in the car, the Government truck left the highway and sideswiped the car. In a subsequent statement received by this Department on September 24, 1948, the claimant stated that both vehicles were traveling west at the time of the collision, and that he did not see the truck until it sideswiped his car.

In his report of the incident to the Department on December 30, 1947, the Government driver stated:

Private car passed in face of oncoming traffic and speeding up caused his car to skid in front of Government truck.

This report shows that, after the collision, the claimant's car was headed east, that the Government truck was headed west, and that the

claimant's car was standing at some distance east of the truck. In a sworn statement dated January 30, 1948, the Government driver stated:

This is how the accident happened, he passed me but his car started skidding and turned completely around and came back on my right side causing a damage to my right fender, radiator grill and running board supports, also damaging the right side of his car, at the present time it was snowing, the highway was covered with snow, about two inches of snow on the highway.

I was driving the truck about 25 miles an hour, when that happened we both went off the highway. * * *

The record shows that each vehicle was damaged on its right-hand side, which supports the contention of the Government driver that the claimant's car had turned around prior to the collision and that the vehicles were facing each other when the impact occurred. It also indicates that one vehicle, at least, was on the wrong side of the road at the time of the collision.

The available evidence fails to establish that the claimant's damage was caused by a negligent or wrongful act or omission upon the part of the operator of the Government truck. Assuming that the claimant's account of the incident is accurate, the collision appears to have occurred because the Government truck (which was traveling at 25 miles per hour, according to the Government driver) skidded on a slick, icy road and sideswiped the claimant's car. Skidding on an icy street or road does not, as a matter of law, establish that the driver of the skidding motor vehicle was guilty of a negligent or otherwise wrongful act or omission in the operation of the vehicle. See *Tente v. Jaglowicz*, 241 Ky. 720, 44 S. W. (2d) 845 (1932); *Linden v. Miller*, 172 Wis. 20, 177 N. W. 909 (1920).

Accordingly, the claim must be denied because it does not meet the test prescribed by Congress for the making of awards under the Federal Tort Claims Act.

DETERMINATION

Therefore, in accordance with the provision of the Federal Tort Claims Act and the authority delegated to me by the Secretary of the Interior (43 CFR 4.21; 13 F. R. 4694), I determine that—

- (a) The damage to the property of Fred Woodland, on which this claim is based, did not result from a negligent or wrongful act or omission of an employee of the United States Department of the Interior; and
- (b) The claim of Fred Woodland must be denied.

MASTIN G. WHITE,
Solicitor.

LEO ZAGER ET AL.¹A-25471 to *Decided December 13, 1948*

A-25515, incl.

Private Exchange — Small-Tract Applications — Joshua Tree National Monument.

Where a private exchange under section 8 of the Taylor Grazing Act would permit the consolidation under Government ownership of lands within the Joshua Tree National Monument, and the interests of potential small-tract applicants have been taken into account by leaving available in the vicinity of the selected lands a substantial acreage of land suitable for small tracts, it is in the public interest to reject small-tract applications which conflict with the exchange application and which, if approved, would disrupt the orderly processing of the consolidation of lands within the monument.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Leo Zager and 44 other persons have appealed from decisions of the Director of the Bureau of Land Management which rejected their small-tract applications.² The Director's action was taken in order to permit the consummation of a private exchange application (Los Angeles 068303) filed by Dick Curtis, whereby the Government would acquire ownership of a large area of privately owned land within the Joshua Tree National Monument.

The Joshua Tree National Monument contains within its exterior boundaries approximately 135,000 acres of land owned by the Southern Pacific Railway Company. This land consists largely of alternate odd-numbered sections which the company received under Federal grants prior to the establishment of the monument. These railroad lands comprise the bulk of the non-Federal lands within the monument. The company also owns many thousands of acres of railroad-grant land outside but near the monument. The railroad desires to dispose of its lands in the area, both inside and outside the monument. Conversely, this Department desires to consolidate under Government ownership the lands within the monument.

Congress has not appropriated funds for the purchase or condemnation of the privately owned lands within the Joshua Tree National Monument. However, the United States can acquire these lands by exchanging public lands outside for private lands within the monument, pursuant to the authority of section 8 of the Taylor Grazing Act of June 28, 1934, as amended (43 U. S. C., 1946 ed.,

¹ Together with 44 other appellants whose names have been omitted for purposes of brevity. [Editor.]

² Filed under Small-Tract Act of June 1, 1938, as amended (43 U. S. C., 1946 ed., sec. 682a).

sec. 315g). In this connection, the railroad refuses to enter into such exchanges because of its desire to dispose of all its landholdings in this area. Accordingly, a proposed arrangement has been made whereby the railroad company would sell its land inside and outside the monument to a number of individuals, who would then enter into exchanges with the United States, offering the railroad lands within the monument in exchange for public lands which are intermingled with the railroad lands outside the monument.

The Curtis exchange application is one of several exchanges designed to effectuate this arrangement. It appears that the negotiations with Mr. Curtis on this exchange were begun about April 8, 1946, and that he filed an informal exchange application on December 20, 1946. If consummated, this exchange would enable the Government to obtain ownership of more than 18,000 acres of privately owned land within the Joshua Tree National Monument.

All the small-tract applications involved in this proceeding were filed after the initiation of negotiations for the Curtis exchange. All of them conflict with the proposed Curtis exchange. Upon consideration of these conflicts, Assistant Secretary Davidson, on May 9, 1947, authorized the rejection of all conflicting small-tract applications which would disrupt the orderly processing of the land exchanges for the consolidation under Government ownership of the lands within the monument. On May 12, 1948, Assistant Secretary Davidson conditionally approved the Curtis exchange by directing the publication of notice of the proposed exchange.

The small-tract applicants urge a wide variety of reasons in support of their contention that they should be preferred over the exchange applicant. They contend (1) that the Department lacks the authority to allow the proposed exchange; (2) that it is improper to classify the selected lands for the exchange because Mr. Curtis intends to use the selected lands for commercial purposes or for speculative and profitable sale, whereas Congress intended these lands to be used only for small-tract purposes; (3) that the offered lands are not equal in value to the selected lands; (4) that Mr. Curtis' exchange application is void because he did not have a perfect title to the offered lands at the time when his application was filed; (5) that some of the small-tract applicants had filed their applications before Mr. Curtis filed his application and therefore have a legal priority over the exchange application; and (6) that the allowance of the exchange application and the rejection of the small-tract applications would violate the Veterans' Preference Act of September 27, 1944, as amended (43 U. S. C., 1946 ed., sec. 279).

These contentions may be briefly answered as follows: (1) Section 7 of the Taylor Grazing Act (43 U. S. C., 1946 ed., sec. 315f) grants to the Department discretionary authority to classify and dispose of

December 13, 1948

these lands either under the Small-Tract Act or under the exchange provisions of section 8 of the Taylor Grazing Act; (2) the fact that Mr. Curtis might, if the exchange is approved, use the selected lands for commercial purposes or for speculative and profitable sale does not necessarily require that the lands be classified as not proper for exchange; (3) the record shows that the Government, if the exchange is consummated, will receive from Mr. Curtis lands equal in value to the Government lands selected by him; (4) the fact that Mr. Curtis did not have perfect title to the offered lands at the time when his application was filed does not invalidate his application. An exchange under section 8 requires only that the applicant convey to the United States, at the time of the consummation of the exchange, satisfactory title to the offered lands; (5) none of the small-tract applicants has acquired, merely by virtue of the filing of an application under the Small-Tract Act, any legal priority over the exchange applicant. Until a particular area has been classified for disposal in the form of small tracts, no rights as to the area can be acquired by small-tract applicants; (6) the Veterans' Preference Act, which grants to veterans of World War II certain preferences in applying for homestead and desert-land entries and for small tracts, is not applicable until particular public lands have been classified by the Department for disposal under the homestead laws, the Desert-Land Act, or the Small-Tract Act, as the case may be. Here, the land sought by the appellants for small-tract purposes and by Mr. Curtis have not been classified for disposal as small tracts. Hence, no veterans' preference can attach to the lands in favor of small-tract applicants.

Much of the public land in the area where Mr. Curtis made his selection appears to be generally suitable for small-tract purposes. Accordingly, the development of such land under the Small-Tract Act would normally be in the public interest. The filing of applications under that act by a large number of individuals for small tracts indicates that there is considerable interest in the development of small-tract sites on the public domain in this general area. However, there is a conflicting public interest in the utilization of these public lands for exchange purposes in order to eliminate private ownership of lands within the Joshua Tree National Monument, and thus consolidate the Federal holdings within the monument and promote the effective administration and protection of the monument.

It appears that there are large areas of public land in this general area which are not involved in the present and other proposed exchanges and which would be suitable for small-tract utilization. The record in this exchange also indicates that the interests of potential small-tract applicants have been taken into account by leaving available a substantial acreage of suitable small-tract lands in the vicinity

of the selected lands. Thus, the disadvantage that is inherent in this proposed exchange of the possible blocking under one person's control of too large an area of public land will be minimized.

In the light of the important public interest in the consolidation under Federal ownership of lands within the Joshua Tree National Monument, and the fact that adjustments have been made and will continue to be made to achieve an optimum balance between the interests of exchange applicants, on the one hand, and of the numerous small-tract applicants, on the other hand, I conclude that it would be more in the public interest to consummate the Curtis exchange than to approve all these small-tract applications and thereby prevent the consummation of the exchange.

Each proceeding which involves a controversy between small-tract applicants, on the one hand, and an exchange applicant, on the other hand, over an area of public land, is apt to involve factors which are different from the factors involved in other controversies between these classes of applicants. Each case of this sort must be decided on the basis of its own facts. Consequently, the decision in the present proceeding does not provide a precedent for the future determination of cases in which different factors require consideration.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the decisions of the Director of the Bureau of Land Management are affirmed.

MASTIN G. WHITE,
Solicitor.

STANOLIND OIL AND GAS COMPANY

A-25516

Decided December 16, 1948

Oil and Gas Unit Agreement—Enlargement of Participating Area—Elk Basin Unit, Wyoming.

Where an oil and gas unit agreement specifies that the effective date of the enlargement of a participating area shall be computed from the time that the well which demonstrates the propriety of the enlargement is "completed" by being "equipped and successfully tested for production," the time when merely core and drill stem tests are completed is not to be regarded as such an effective date of enlargement.

APPEAL FROM THE GEOLOGICAL SURVEY

The Stanolind Oil and Gas Company, as the Operator for the Elk Basin Unit in Park County, Wyoming, has appealed from a decision of May 5, 1948, by the Acting Director of the Geological Survey. In that decision the Acting Director ruled that the enlarge-

December 16, 1948

ment of the Embar-Tensleep Participating Area¹ of the Elk Basin Unit as of January 1, 1948, to cover an additional 50 acres of unitized land "is regarded as premature and inappropriate."

The question involved is whether the fixing of the effective date of the enlargement of the participating area complies with section 16 D of the unit agreement. Section 16 D provides as follows:

The effective date of any such enlargement shall be the first day of the month next following the month in which the well is completed which demonstrates the propriety of the enlargement, and any unitized substances theretofore produced from such well shall be allocated to the lease on which the well is drilled. A well shall be deemed completed when equipped and successfully tested for production, all of which shall be done diligently.

The facts are asserted by the appellant to be as follows: Sometime in December 1947, the Carter Oil Company, a Working Interest Owner in the Elk Basin Unit, drilled the Johnson-Watson well No. 8 to the base of the Tensleep sand outside the boundary of the Embar-Tensleep Participating Area. Although core and drill stem tests of the Tensleep sands during the drilling period showed this formation to be oil-saturated and water-free, the well was not immediately completed and equipped for production. Instead, drilling was continued into the deeper Madison formation to test its productive possibilities. When drill stem tests at the 7,115-7,233 feet interval indicated the Madison formation to be nonproductive at that location, the well was plugged back to 6,152 feet in the Tensleep formation. After swabbing tests through tubing early in March 1948 resulted in the recovery of 90 barrels of oil in 16 hours, the well was designated as a "pumping well" on March 4, 1948. Surface pumping installation was completed at a later time (the date when such equipment was installed is not stated in the appeal nor does it appear anywhere in the record); 393 barrels of oil were produced during March and 3,451 barrels of oil during April. On December 16, 1947, the Embar-Tensleep Operating Committee² "recognized the test of the Embar-Tensleep as made by the Carter Oil Company in its Johnson-Watson well No. 8 as conclusive of commercial production, and that the well be given 50 acres * * * effective as of January 1, 1948, and the Operator is instructed to file an enlargement of the Embar-Tensleep Participating Area with the United States Geological Survey." Pursuant to this direction of the Operating Committee, Stanolind executed the appropriate documents

¹ The Embar-Tensleep Participating Area consists of certain lands described in the unit agreement, which covers the formations below the top of the Sundance formation, and applies to the sands below the top of the Embar formation and above the base of the Tensleep formation.

² This committee consists of representatives of Working Interest Owners and was set up under section 7 of the unit agreement.

on February 5, 1948, and filed them with a request for approval of the enlargement.

Stanolind admits that the well was not completed either upon reaching the base of the Tensleep sands or at any time before January 1, 1948, and that such completion was postponed until after drilling to the deeper Madison formation provided a test of its oil possibilities. It is said that economic considerations and the desire to test the capabilities of the Madison formation in that area dictated the continuance of drilling to the Madison formation. Stanolind also states that the tests of the well in the Tensleep formation "conclusively determined this well to be capable of commercial production without the necessity of waiting to determine this fact after the well had been completed and equipped." Hence, Stanolind contends that there has been compliance with the purpose of section 16 D, i. e., to insure that a drilling well outside of the Participating Area would not serve to enlarge the Participating Area until it was definitely determined commercially productive.

The difficulty with Stanolind's contention lies in the clear and unequivocal language of section 16 D. That section fixes the effective date of the enlargement as the first day of the month next following the month "in which the well is completed which demonstrates the propriety of the enlargement." Moreover, it goes on to provide specifically that "A well shall be deemed completed when equipped and successfully tested for production." It is obvious that the core and drill stem tests of the Tensleep formation did not fulfill the requirements of section 16 D. Until the well was "equipped and successfully tested for production," it was not a "completed" well "which demonstrates the propriety of the enlargement." On the basis of the clear language of the contract, it is plain that the effective date of an otherwise proper enlargement could not be fixed at a date earlier than such a completion.

Therefore, the decision of the Acting Director of the Geological Survey that the enlargement of the Participating Area as of January 1, 1948, is "premature" is affirmed.

C. GIRARD DAVIDSON,
Assistant Secretary.

OIL AND GAS LEASE

Oil and Gas Leases—Duration—Act of July 29, 1942, as Amended—Mineral Leasing Act—Production in Paying Quantities.

Nominal production of gas, under an oil and gas lease issued pursuant to the Mineral Leasing Act, as amended, is not sufficient to extend the lease beyond its primary term.

December 20, 1948

Section 1 of the act of July 29, 1942, as amended (56 Stat. 726, 57 Stat. 608, 58 Stat. 755, 59 Stat. 587), extended until December 31, 1946, an oil and gas lease on which a discovery of gas had been made insofar as the lease covered lands which were, on the expiration of the primary term of the lease, within the known geologic structure of a producing oil or gas field.

A leaseholder who made timely application for a new lease under section 1 of the act of July 29, 1942, is entitled to have his application acted upon.

M-35048

DECEMBER 20, 1948.

TO THE SECRETARY.

This responds to Assistant Secretary Davidson's request that I render an opinion regarding an oil and gas lease that was issued to Fred W. Stebbins (Las Cruces 029012).

The Stebbins lease was issued as of January 1, 1940, pursuant to the Mineral Leasing Act of February 25, 1920, as amended by the act of August 21, 1935 (41 Stat. 437; 49 Stat. 674).¹ It covered 2,544.15 acres of land, none of which was within the known geological structure of any producing oil or gas field. Section 1 of the lease and section 17 of the 1920 act, as amended in 1935, both provided that the term of the lease should be 5 years and "so long thereafter as oil or gas is produced in paying quantities."

On August 23, 1944, the Geological Survey reported to the General Land Office that a valuable deposit of gas had been discovered on or about July 8, 1944, in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 29, T. 20 S., R. 29 E., N. M. P. M., New Mexico, which was included within the Stebbins lease, and that the geological limits of the field discovered by the well drilled on this tract were indeterminate at that time.

On December 22, 1944, prior to the expiration of the 5-year term of the lease, Mr. Stebbins, the lessee, reported to the Department the discovery of gas by means of the well located on the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of sec. 29, and he made an application under section 1 of the act of July 29, 1942, as amended (56 Stat. 726, 57 Stat. 608, 58 Stat. 755), for a new preference-right lease on the entire acreage covered by the existing lease, in the event that the Department should rule that the gas well was not a valuable discovery. No action appears to have been taken on this preference-right application. However, on January 31, 1945, the Commissioner of the General Land Office,² in a decision requiring an additional showing with respect to operating agreements covering the lease, stated:

* * * Because of a valuable discovery on or about July 8, 1944, of natural gas in a well drilled on the SW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 29, T. 20 S., R. 29 E., embraced in

¹ The current provisions of the act are found in 30 U. S. C., 1946 ed., sec. 181 *et seq.*

² Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management, by Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

this lease, the life of the lease is extended beyond its initial 5-year term for so long as oil or gas is found in paying quantities.

Drilling operations on a second well within the area of the Stebbins lease, this one being located in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 30, were commenced on December 16, 1944, which was within the 5-year term of the lease. That well was completed on February 13, 1945, after the expiration of the 5-year term.

The known geological structure of the Scanlon field was defined on February 7, 1946, and, of the lands included in this lease, it embraces only the SW $\frac{1}{4}$ sec. 29 and the SE $\frac{1}{4}$ sec. 30.

It is understood that, except for some gas from the first well that was used in the drilling of the second well, both wells have been shut in since completion, pending the establishment of a market. Rental at the rate of \$1 per acre has been charged commencing on January 1, 1945.

On December 27, 1945, the drilling operator requested relief from the producing requirements of the lease, stating that he had been unable to market the gas for lack of a market. On April 1, 1946, the lessee requested that the annual rental be reduced from \$1 per acre per year to 25 cents per acre per year. In support of his request, he stated that there was no market for the gas due to its low B. t. u. content, and that the rock pressure of the gas wells is not sufficient to get the gas into pipe lines for distribution even if there were a demand for the gas. On December 23, 1947, the operator likewise requested that the rental under the lease be reduced from \$1 per acre to 25 cents per acre per year and that the relief be granted as of April 1, 1946. No action has been taken on any of the requests from the lessee or the operator for production or rental relief.

Section 1 of the 1942 act, under which the lessee applied on December 22, 1944, for a new preference-right lease, provided:

That upon the expiration of the five-year term of any noncompetitive oil and gas lease issued pursuant to the provisions of the Act of August 21, 1935 (49 Stat. 674), amending the Act of February 25, 1920, and maintained in accordance with the applicable statutory requirements and regulations, the record title holder shall be entitled to a preference right over others to a new lease for the same land pursuant to the provisions of section 17 of the Act of February 25, 1920, as amended, and under such rules and regulations as are then in force, if he shall file an application therefor within ninety days prior to the date of the expiration of the lease. The preference right herein granted shall not apply to lands which on the date of the expiration of a lease are within the known geologic structure of a producing oil or gas field.

The act of December 22, 1943 (57 Stat. 608), amended section 1 of the 1942 act by adding thereto the following sentence:

The term of any five-year lease expiring prior to December 31, 1944, maintained in accordance with the applicable statutory requirements and regulations and

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for which no preference right to a new lease is granted by this section, is hereby extended to December 31, 1944.

The final sentence of the section, as added in 1943, was amended by the acts of September 27, 1944 (58 Stat. 755), and November 30, 1945 (59 Stat. 587). The final amendment extended to December 31, 1946, leases expiring prior to that date. Section 1 of the 1942 act was repealed by section 14 of the act of August 8, 1946 (60 Stat. 950, 958).

1. The first question to be considered is whether, upon the expiration of the primary term of the lease on December 31, 1944, oil or gas was being "produced in paying quantities." If so, then by reason of the provisions of the lease and of section 17 of the 1920 act, as amended, the lease was continued in force after December 31, 1944, for whatever period of time the production of oil or gas in paying quantities might continue, and section 1 of the 1942 act, as amended, was inapplicable to this lease during such continuance, inasmuch as section 1 was only applicable upon the expiration of oil and gas leases.

It appears that the only production from the leased lands during the 6-month period between discovery and December 31, 1944, the end of the primary 5-year term of the lease, was the gas from the first well that was used for the drilling of a second well on the same lands. It was estimated that this gas amounted to one million cubic feet and that it was worth about \$50.

The courts have defined "paying quantities" as such quantity of oil or gas as will pay a profit to the lessee over and above the cost of operating the well or wells and of marketing the product. *Benedum-Trees Oil Co. v. Davis*, 107 F. (2d) 981, cert. denied 310 U. S. 634 (1940); Summers, *Oil and Gas* (perm. ed.), sec. 306. A mere semblance of production is not enough. *Kyle v. Wadley*, 24 F. Supp. 884, 887 (1938).

The amount of gas produced under the Stebbins lease before December 31, 1944, was so nominal, and its use was of such a nature, that it cannot be regarded as production in paying quantities, as that term has been defined by the courts.

The mere fact that a well on the leased lands was capable of producing gas at the end of the primary term did not satisfy the requirement that there must be production of oil or gas "in paying quantities" in order to extend that term. (See letter from Acting Secretary Chapman to Neil F. Stull, Esq., dated November 7, 1946, relative to the Stanolind Oil and Gas Co. leases, Cheyenne 039725, 071513.) The quoted phrase obviously refers to actual, not potential, production.

The letter of Assistant Secretary Chapman to Peter Q. Nyce, Esq., dated December 6, 1944, relative to the McLaughlin leases, Denver 032675, 044860, is not to the contrary. There, the lessee had asked

whether the lease would be extended beyond the primary term if, during the term, it should be established that the well then being drilled was capable of producing oil or gas in paying quantities but, due to further test drilling in the lower portions of the productive horizon, there should be no actual production at the end of the primary term. In response, the Assistant Secretary said, in part:

If the operator has established production on the lease in paying quantities prior to December 31, 1944, and, in the interest of good engineering practices, desires to carry on additional testing in the Weber formation, the Department will offer no objections, provided that additional testing is diligently prosecuted. If, after such testing, it is determined that the well is then incapable of production in any part of the Weber formation the lease shall be deemed to expire in accordance with applicable law. Production must be adequately demonstrated to exist in paying quantities under such conditions as the supervisor of oil and gas operations determines necessary on or prior to December 31, 1944.

In effect, this was merely a decision that, in the event production of oil or gas in paying quantities were to be established prior to the end of the primary term, the Department would consent to a cessation of production while the test was being made. The statement in the McLaughlin case is not controlling in the present case, because there was never any production of oil or gas in paying quantities under the Stebbins lease prior to the expiration of the primary term of the lease.

It follows that, unless the term of the Stebbins lease was extended by section 1 of the 1942 act, as amended, it ended on December 31, 1944.

2. The next question to be determined, therefore, is whether the term of the Stebbins lease was extended by section 1 of the 1942 act, as amended.

The first sentence of that section, in substance, granted to any holder of a noncompetitive oil and gas lease in effect during the period between July 29, 1942, and August 8, 1946 (the date on which the section was repealed), an option to assert a preference right over other persons to a new lease covering the same land. This preference right was not applicable, however, "to lands which on the date of the expiration of a lease are within the known geologic structure of a producing oil or gas field." As to lands in the latter category, the term of any 5-year noncompetitive lease expiring prior to December 31, 1946, was automatically extended by the last sentence of section 1, as amended, to December 31, 1946, if the lease was in good standing on the expiration date.

Under the plain language of section 1 of the 1942 act, as amended, the Stebbins lease, insofar as it covered lands which were, on December 31, 1944 (the date of the expiration of the primary term of the lease), "within the known geologic structure of a producing oil or gas field," was automatically extended to December 31, 1946.

The legislative history of the several amendments to section 1 of

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the 1942 act³ indicates that the purpose of providing for the automatic extension of noncompetitive leases with respect to lands which were, on the expiration dates of such leases, "within the known geologic structure of a producing oil or gas field" was to protect the holders of noncompetitive leases whose leased lands had been found, by virtue of explorations conducted on nearby lands, to contain producing structures, and who had been unable, because of the shortage of drilling equipment or other wartime conditions, to bring their lands into production as of the expiration dates of their respective leases. The Stebbins case is outside that category, because a well capable of producing gas was in existence on the leased lands at the end of the primary term of the lease. However, the language used by Congress did not limit the benefits of such automatic extensions to leaseholders who had been unable because of wartime conditions to drill wells in order to tap deposits found to underlie their leased lands. Instead, Congress used broad language extending to December 31, 1946, all noncompetitive 5-year leases (if in good standing) on "lands which on the date of the expiration of a lease are within the known geologic structure of a producing oil or gas field," thus clearly including that part of the Stebbins lease covering lands "within the known geologic structure of" the Scanlon gas field as of December 31, 1944, notwithstanding the fact that the field was discovered by virtue of operations conducted under the Stebbins lease and the failure to market gas from the leased lands was due to a voluntary choice. As giving effect to the plain language of section 1 of the 1942 act, as amended, in this respect would not produce an absurd or patently unjust result, there is no basis for departing from the plain language of the statute because the legislative history indicates that the congressional purpose in enacting the part of the section covering automatic extensions was less broad than the language actually used.

With regard to that part of the total area covered by the Stebbins lease which was not "within the known geologic structure of a producing oil or gas field" on December 31, 1944, the leaseholder was entitled, under the first sentence of section 1 of the 1942 act, to obtain a new lease upon filing "an application therefor within ninety days prior to the date of the expiration of the lease." A timely application for a new lease was made by the lessee on December 22, 1944. The failure of the Department to act upon the application cannot deprive the applicant of a legal right granted by statute. Consequently, a new lease should now be issued retroactively, with the approval of the

³ See letter dated December 9, 1943, from this Department to Hon. Carl A. Hatch, Chairman, Committee on Public Lands and Surveys, United States Senate, on S. 1576, 78th Cong.; H. Rept. 949, 78th Cong.; S. Rept. 1085, 78th Cong.; S. Rept. 671, 79th Cong.; H. Rept. 1187, 79th Cong.

Secretary, to the lessee as of January 1, 1945, under the first sentence of section 1 of the 1942 act, covering those lands under the original lease which were not, as of December 31, 1944, "within the known geologic structure of a producing oil or gas field." Although, as previously indicated, section 1 of the 1942 act has been repealed in the meantime by section 14 of the act of August 8, 1946, a saving clause in section 15 of the latter act preserved rights which had theretofore accrued under section 1 of the 1942 act.

The Department should also consider the requests which have been filed for relief from the production and rental requirements of the lease, insofar as those requests relate to that portion of the lease which was extended to December 31, 1946.

MASTIN G. WHITE,
Solicitor.

DAVID B. MORGAN,
ASSIGNEE OF SOLDIERS' ADDITIONAL HOMESTEAD RIGHTS

A-24551

Decided December 24, 1948

Soldiers' Additional Homestead Rights—Nature of—Land Subject to.

A soldier's additional homestead right under section 2306, Revised Statutes, is a property right and is subject to assignment.

Only such lands as are available for an original homestead entry under section 2304, Revised Statutes, may be made the subject of a soldier's additional homestead entry under section 2306, Revised Statutes.

Land must be "subject to entry under the homestead laws of the United States" before it can be successfully sought under section 2306, Revised Statutes. Land subject to homestead entry includes land presently tillable and land which can be rendered suitable in a broad sense for some farming use, but not land which is unsuitable for an agricultural use.

Land must be "unappropriated" if it is to be obtained under section 2306, Revised Statutes.

As the public lands in Arizona have been withdrawn, reserved, and appropriated to the uses of the Taylor Grazing Act and of the Executive orders designated in section 7 of that act, no such land is subject to entry in satisfaction of soldiers' additional homestead rights until it has been classified under section 7 as suitable, and made available, for disposal under the homestead laws.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

David B. Morgan, assignee of certain soldiers' additional homestead rights formerly held by John Hickman, Austin Ritter, David H. Miles, and Martin Toohey, Civil War veterans, has appealed from a decision of the Acting Director of the Bureau of Land Management rejecting the soldiers' additional homestead application submitted by Mr. Morgan for 160 acres of land described as the NE $\frac{1}{4}$ sec. 22, T. 6 S., R. 6 E., G. & S. R. M., Arizona.

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With his application, Mr. Morgan filed a nonmineral affidavit in which he stated—

* * * That said land is essentially nonmineral land, and that the application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes * * *

Mr. Morgan also filed with the application a petition signed by John D. Singh, his apparent principal, for classification of this land as subject to entry under section 7 of the Taylor Grazing Act, as amended (43 U. S. C., 1946 ed., sec. 315f), for the purpose of satisfying soldiers' additional homestead rights. This petition stated, among other things—

* * * that said selected land is more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants; * * * and the said selected land is *proper for acquisition in satisfaction of the outstanding soldier's additional homestead rights as herein used* * * *

Mr. Singh described the land as desert in character and as more or less level, with a spare, spotty cover of mesquite, water grass, chemise brush, and sage brush, inadequate for forage. He said that, although the tract had been entered several times in the past, no serious attempt had ever been made to reclaim it, but that he wishes to cultivate it in connection with his adjacent holdings, which, under irrigation, have been producing cotton, alfalfa, and barley for several years. In particular, according to Mr. Singh, he wishes to plant it to barley during the period from September 20 to March 15, because in that period he can irrigate the tract from a well which would otherwise be idle at that time. He asserted that, in addition, certain waste water could be utilized for the irrigation of the tract involved in the application.

The Acting Director found that the land sought in the Morgan application lies in the Casa Grande Valley; that the soils of the tract are among the inferior soils of the region and are relatively unfavorable for agriculture; that in this valley the area of good soils suitable for cultivation far exceeds the area that can be irrigated by the limited quantity of underground water at present available; and that such water as is available should be utilized on the good rather than on the poor soils. Furthermore, the Acting Director found that the use of water from the well mentioned by Mr. Singh, in quantities sufficient to irrigate this tract, would tend to increase the drawdown of the well and to lower the water level in the surrounding area to such a degree as to jeopardize the water supply for the better agricultural lands already under irrigation. The Acting Director concluded, therefore, that the tract was not proper for acquisition in satisfaction of soldiers'

additional homestead rights or for any other form of disposal, and denied the petition for the classification of the tract for the purposes stated.

In his brief on appeal, the principal points made by Mr. Morgan amount, in substance, to the contention that the Department must, as a matter of law, approve the application and cannot reject it on the ground that the tract applied for in satisfaction of the soldiers' additional homestead rights is unsuitable for agriculture.

The soldiers' additional homestead rights involved in this proceeding are asserted under section 2306 of the Revised Statutes, which provides that—

Every person entitled, under the provisions of section twenty-three hundred and four, to enter a homestead who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres.¹

Section 2304 of the Revised Statutes, to which reference is made in section 2306, provided at the time of the enactment of the latter section that any veteran of the Army, Navy, or Marine Corps, who had served for 90 days during the Civil War, who had been honorably discharged, and who had remained loyal to the Government, should "be entitled to enter upon and receive patents for a quantity of public lands not exceeding one hundred and sixty acres, or one quarter-section, to be taken in compact form, according to legal subdivisions, including the alternate reserved sections of public lands along the line of any railroad or other public work, not otherwise reserved or appropriated, and other lands subject to entry under the homestead laws of the United States," the lands to be nonmineral.²

It has been settled since 1896 that a soldier's additional homestead right under section 2306 of the Revised Statutes is a valuable property right, subject to barter, sale, and assignment.³ Since 1925 it has been settled that this right is subject to distribution and devise.⁴ No settlement or cultivation was made a condition precedent to the entry of the additional land, the right being "an unfettered gift in the nature of compensation for past services," that is, "services he had already rendered as a soldier in suppressing the Rebellion, and as a farmer in establishing his home upon, cultivating, and occupying that portion of the public domain he had already entered as his homestead," the

¹ This section was a reenactment of section 2 of the act of June 8, 1872 (17 Stat. 333), as amended by the act of March 3, 1873 (17 Stat. 605). The word "heretofore" originally meant "prior to June 8, 1872," but it should now be construed to mean "prior to June 22, 1874," the date of the enactment of the Revised Statutes. The provisions of the section are now set out in 43 U. S. C., 1946 ed., sec. 274.

² This section was a reenactment of section 1 of the act of June 8, 1872 (17 Stat. 333). The provisions of section 2304, as subsequently amended, are set out in 43 U. S. C., 1946 ed., secs. 271 and 201.

³ *Webster v. Luther*, 163 U. S. 331 (1896).

⁴ *Anderson v. Clune*, 269 U. S. 140 (1925).

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right to be satisfied by acquisition of a "portion of the vast public domain described in the act."⁵ [Italics supplied.]

When section 2306 of the Revised Statutes is read in connection with section 2304, it becomes obvious at once that only such lands as are available for an original homestead entry under section 2304 may be made the subject of an additional homestead entry under section 2306. The purpose of the latter section was to enable a Civil War veteran who had already entered a homestead, but who had taken up less than 160 acres, to expand his entry up to a maximum of 160 acres on the same basis as that on which other veterans might make original homestead entries under section 2304.

The choice of lands under section 2306 of the Revised Statutes is subject to the recognized general principle that—

Wherever, by act of Congress, provision is made for the disposal by selection, entry, and patent, of portions of the public lands of a designated class and character, * * * it is the duty of the land department to ascertain and determine whether lands sought to be acquired under the act are of the class and character thereby made subject to disposal. Until such determination has been made and the lands found to be such as the act describes, entry thereof cannot be lawfully allowed. The evidence to enable this to be done, when such evidence does not, and could not from the conditions to be inquired into, appear from the land office records, must of necessity be furnished by those who seek title under the act. The land officers are not required, and from the nature of things could not be required, to take judicial cognizance of the physical condition of lands with respect to which, in the discharge of their duties, they are called upon to act.⁶

Applying this principle in a specific ruling on June 4, 1880, the Commissioner of the General Land Office said:

The right of additional homestead entry under the act of June 8, 1872, and the amendatory act of March 3, 1873 (Sec. 2306, R. S.), may be exercised *only to obtain title to the class of lands subject to entry under the original homestead act of May 20, 1862* * * *. There is no provision of law under which a different class of lands may be entered by claimants under the statutes for the benefit of soldiers and sailors.⁷ [Italics supplied.]

Therefore, the Department consistently has required under section 2306 not only proof establishing the material facts necessary to the existence of the additional right in the claimant, but also proof that the character of the land which the claimant seeks is that described in the act.

Thus, before land can successfully be sought under section 2306 of the Revised Statutes, it must be "subject to entry under the homestead laws of the United States." This phrase relates to the physical character of the land. In the light of the purpose of the homestead laws to people and develop the public domain, and in the light of the statutory homestead requirements of residence, improvement, and culti-

⁵ *Barnes v. Poirier*, 64 Fed. 14, 18 (C. C. A. 8th, 1894).

⁶ *Kern Oil Co. et al. v. Clarke*, 31 L. D. 288 (1902).

⁷ *Alexander Mead*, June 4, 1880, CPLE (1882 ed.), pp. 492-493.

vation, the phrase quoted imports the idea of lands suitable for these ends, and has been liberally interpreted to include not only lands which are presently tillable but lands which can be rendered suitable in a broad sense for some farming use. Lands unadapted to any such use have been held to be lands not subject to homestead entry.⁸ Although the beneficiary of the right granted by section 2306 is relieved of the necessity of settling the additional land and putting it to an agricultural use, the Secretary is not relieved of the duty of seeing to it that the land chosen in the exercise of the right is of the statutory character.⁹ Hence, the requirement ensures that the land chosen shall be of the proper character in the event that, as in the present case, the possessor of the right desires to put it to an agricultural use and settlement.

Also, land must be "unappropriated" if it is to be obtained under section 2306 of the Revised Statutes. The land chosen in the exercise of such a right cannot be land which in some lawful manner is claimed by another person and so has become appropriated to his use. Neither may it be land that has been reserved or withdrawn by the Government for some public use or purpose, because such land is regarded in law as segregated from the mass of public lands and appropriated to such use or purpose until it is restored to the public domain.¹⁰ Today, the public lands in 24 States, including Arizona, are withdrawn, reserved, and appropriated to the uses of the Taylor Grazing Act (43 U. S. C., 1946 ed., sec. 315 *et seq.*) and of the two Executive orders designated in section 7 of the act.¹¹ Not until the lands in these States are restored to the public domain pursuant to section 7 of that act do they become unappropriated lands, subject to entry under the disposal statute applicable to the classification assigned to them. Nor, in the past, has the opening of an area for a particular type of disposal in furtherance of an indicated policy been considered an opening of the area for other types of disposition under the general land laws.¹²

Furthermore, it is not to be overlooked that allowance of an additional entry under section 2306, without attention to the character of

⁸ *George Hathaway*, 38 L. D. 33 (1909); *Davis v. Gibson*, 38 L. D. 265 (1909); *Finley v. Ness*, 38 L. D. 394 (1910); *Winningshoff v. Ryan*, 40 L. D. 342 (1912); *United States v. Northern-Pacific Ry. Co.*, 311 U. S. 317, 361 (1940), 61 Sup. Ct. 264; *Allison and Johnson*, 58 L. D. 227, 236-238 (1943); *George L. Ramsey*, 58 L. D. 272, 278 (1942).

⁹ *William E. Moses*, 31 L. D. 320, 322 (1902); *Cornelius J. MacNamara*, 33 L. D. 520; 524 (1905); *Duncan McNee*, 40 L. D. 494, 495 (1912).

¹⁰ *Wilcox v. Jackson*, 13 Pet. 498 (1839).

¹¹ Executive Orders Nos. 6910 of November 26, 1934, and 6964 of February 5, 1935; 43 CFR 297.11, 297.12, 297.14, 297.15, 297.16, 297.17, 297.18; *J. C. Aldrich*, 59 L. D. 176 (1946).

¹² See *R. M. Snyder*, 27 L. D. 82 (1898); *W. D. Harrigan*, 29 L. D. 153, 154 (1899); *William C. Quintan*, 30 L. D. 268, 270 (1900); *State of Utah*, 30 L. D. 301, 303, 304 (1900); *Joseph S. White*, 30 L. D. 536 (1901); *Webb McCaslin*, 31 L. D. 243, 246 (1902); *Hiram M. Hamilton*, 32 L. D. 119, 120 (1903); *James Page*, 32 L. D. 536 (1904); *Charles Ziegler*, 34 L. D. 296, 297, 298 (1905); *Kinney-Coastal Oil Company v. Kieffer*, 277 U. S. 488 (1928).

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the land sought and without a finding that the land is adapted to an agricultural use and is, therefore, subject to homestead entry, might result in defeating the purpose of another land-disposal statute. This is illustrated by the present case. Departmental records show that during the period since 1892 this tract of land has been the subject of four desert-land entries, and that all of them were unsuccessful, in part because of the critical water situation. A fifth application for desert-land entry of the same quarter section was rejected by a departmental decision of March 13, 1944,¹³ after field examination and extensive study of its soil and of the water situation in the area where this land lies. Therefore, where desert entry of this same land has been four times unsuccessful and has been denied on a fifth occasion, the approval of an application for an additional entry under section 2306 to effectuate the same reclamation purposes would evade the desert-land act and the agricultural classification required of land before it is subject to entry under that act. As the First Assistant Secretary wrote to the Commissioner of the General Land Office in 1908, "Conceding the utmost liberty in the disposal of this 'unfettered gift,' it is still the duty of the Department to provide means for preventing its use in a manner evasive of other statutes relating to the disposal of public lands."¹⁴

However, section 7 of the Taylor Act, as amended, authorizes the Secretary of the Interior, in his discretion, to lift the reservation under which the tract sought in the present case is presently held, to restore the land to the public domain, and to open it to entry, selection, or location, if the tract can be classified as valuable, suitable, or proper for a particular type of disposal authorized by the public-land laws. To determine whether the type of disposal sought here on the basis of soldiers' additional homestead rights is proper, it must be ascertained whether the land meets the requirements of the legislation creating the rights. Also, in view of the conservation aims of the Taylor Grazing Act and of the withdrawals made in aid of that statute, inquiry must also be made as to whether disposal for the purpose indicated in the application would be compatible with the several purposes for which the land has been reserved.

The findings of the Acting Director of the Bureau of Land Management, which are supported by the data in the record, show not only that the land involved in this proceeding is unsuitable for agricultural uses and, therefore, is not subject to classification for disposal in satisfaction of soldiers' additional homestead rights, but also, in

¹³ *Thomas W. Wright*, A-23760, Phoenix 079141 (unreported).

¹⁴ *George P. Wiley*, 36 L. D. 305, 307 (1908). Also see *William C. Carrington*, 32 L. D. 203, 204, 205 (1903); *George E. Lemmon*, 36 L. D. 417, 420 (1908); *id.*, On Review, 37 L. D. 28, 29, 31 (1908); Instructions, Cir. 648, June 24, 1919, 47 L. D. 205; *Cornelius J. MacNamara*, 33 L. D. 520, 524 (1905); *William M. Wooldridge*, 33 L. D. 525 (1905).

effect, that its alienation to private ownership would be contrary to the public interest. In the absence of Federal or State control of the use of the land and of the practices thereon after alienation, private ownership might result in such depletion of the underground water supply, an exhaustible natural resource already inadequate, as to work irreparable injury to the agricultural interests of the area. Accordingly, the rejection of the application by the Acting Director was proper.

Therefore, in pursuance of the authority delegated to the Solicitor by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the decision of the Acting Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

JOHN WHITE, ROSE WHITE, VERA WHITE FERNELIUS, AND
FRANK C. BOSLER AND ESTATE OF ELIZABETH S. BOSLER

A-24642

Decided December 31, 1948

Taylor Grazing Act—Section 15. Grazing Leases—Rights and Equities of Cornering Applicants—Trespass.

The act of June 26, 1936 (49 Stat. 1976; 43 U. S. C., 1946 ed., sec. 315m), revising the grazing leasing system provided in section 15 of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269), was designed to give to owners or other lawful occupants of lands cornering upon unappropriated public lands, in particular to lawful occupants of even-numbered sections in checkerboarded railroad-grant areas, the same 90-day-preference rights to grazing leases as the 1934 act conferred solely upon owners of contiguous or odd-numbered sections, as the legislative history of the amendment shows.

The 1936 act does not condition the exercise of the right of the cornering applicant upon his noncommission of trespass upon privately owned contiguous lands at common-section corners. Aware of the implications of the checkerboard-land pattern, the Congress did not make such potential trespass a matter of Federal concern, but a matter for the parties or the competent local authorities to adjust.

Where cornering and contiguous competitors leave their disagreements to the Federal administrative process, the Department decides between them in accordance with the equities of the parties.

Given proper use of the range, an urgent need of certain lands to maintain a small stockman's ranch and livelihood will prevail over minor benefits which the same lands might confer upon a large-scale operator.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

John White, Rose White, his wife, and Vera White Fernelius, his daughter, all of Rock River, Wyoming, have appealed from a decision of the Director of the Bureau of Land Management. This denied their petition of August 12, 1946, for renewal of their section 15 grazing lease, Cheyenne 058869, running from September 18, 1944, to Septem-

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ber 18, 1946. The decision offered a 10-year lease of the lands to Mr. Frank C. Bosler and the estate of his mother, Mrs. Elizabeth S. Bosler; who, on September 14, 1944, had filed supplemental grazing lease application, Cheyenne 068176. This application had been held suspended during the 1944-1946 lease to the Whites. The lands in conflict are disconnected sections, aggregating 1,917.85 acres, and are described as follows:

- T. 19 N., R. 77 W., 6th P. M., Wyoming, sec. 2;
- T. 20 N., R. 76 W., secs. 28 and 32.

In his decision, the Director showed that the desired lands are covered by the exception clause of the proviso of section 15 of the Taylor Grazing Act.¹ He stated that the lands in conflict are even-numbered sections within the limits of railroad-grant lands; that they are isolated or disconnected tracts of less than 760 acres; that the Whites own lands cornering the tracts, and the Boslers, lands contiguous to them; that the Whites and the Boslers have equal legal rights to lease the tracts; that in such circumstances the award of a lease is made on the basis of two factors, demonstrated need and good range management; and that disputes should preferably be settled by neighborly agreement upon a reasonable allocation of the range in the light of proper management. Finding that the parties here had not made any agreement and saying that the Whites could not use the desired lands without trespassing on the deeded lands of the Boslers, the Director decided on the offer to the Boslers "in the light of practical utilization and good range management."

Although the Whites' application for the 1944-1946 lease was filed on July 12, 1944, field examination and report were not made until November 16 and 28, 1945, respectively. Decision was made only on June 5, 1946, and the lease itself, although stated to be for 2 years, running from September 18, 1944, to September 18, 1946, was actually not executed until June 17, 1946, only 3 months before it was to expire. The examiner's report recommended a lease offer to the Boslers but, because the Whites' existing lease contained a contractual preference-right clause, the decision of June 5, 1946, did not follow the examiner's

¹ Act of June 28, 1934 (48 Stat. 1269), as amended June 26, 1936 (49 Stat. 1976; 43 U. S. C., 1946 ed., sec. 315m) :

"SEC. 15. 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."

recommendation but offered to the Whites a 2-year lease without a preference-right clause. Furthermore, instead of rejecting the Boslers' supplemental application, mentioned above as filed on September 14, 1944, the Director suspended the application for renewed consideration upon expiry of the Whites' lease in September 1946.

The Whites' application, here under consideration, for 10-year renewal of the 1944-1946 lease, was filed on August 12, 1946. On August 19, 1946, the examiner, apparently on the basis of the information obtained in the previous year, renewed his 1945 recommendation of an offer to the Boslers—

* * * primarily for the reasons that a lease to Bosler was in line with the practical range use and that White could not use the Government lands without trespassing on the Bosler deeded holdings.

The Whites' 1944-1946 lease having been written without a contractual renewal preference-right clause, the Director, on April 29, 1947, adopted the recommendation of the examiner's two reports and offered a 10-year lease to the Boslers in response to their suspended application of September 14, 1944.

In denying the Whites' application, the Director did not refer to the factor of "demonstrated need" mentioned in the rule which he had stated as governing an award. He said nothing of the need of either party for more range, nor did he show that the tracts sought by both were necessary either in whole or in part to the proper use of either party's base; nor did the examiner discuss the question of need, except to say that it would "undoubtedly work a hardship on White to lose the lease of the Government land." Instead, he stated his view that "the proper use to be made of the Government land is in connection with the contiguous deeded lands owned or controlled by Bosler."

On appeal, the Whites take up the question of necessity, saying that their need for these lands is so urgent that if they cannot lease them they will not have enough range for their stock and will be unable to maintain their ranch. They say that access to the desired lands can be had at the tangent corners of their deeded lands with but little more trespass on the contiguous sections (than, by implication, now occurs) as there are main traveled roads going through their deeded lands and every section of the leased lands; that in the presence of Government field examiners the Whites have offered to fence at the corners and have suggested several methods of accommodation with the contiguous landowners, but that none of these suggestions have been accepted.

The Whites' asserted need for more range and for these particular lands is borne out by the record. This shows that for a number of years the Whites, together, have owned, leased, or otherwise controlled a ranch set-up comprising only 4,000 acres and supporting only 350

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cattle and 50 horses. They have been using the three sections here in question for 38 years, in the early years as open range, and since passage of the Taylor Grazing Act as lease lands under an unbroken succession of section 15 leases for terms of from 1 to 5 years, dating from December 29, 1936.

Of the base lands which the Whites have offered for these section 15 leases, some have been cornering lands which the Whites owned,² and others have been contiguous railroad lands which they controlled by leases from private owners or by trade agreements with them. In August 1944, however, when the Whites were applying to renew for 10 years their two Government leases, one for 2 years, the other for 5 years, both about to expire on September 18, 1944, the private owners refused to renew their previous private leases and trade agreements. It resulted that the Whites had no contiguous land in their control and could offer as base only their cornering sections. In September 1946, the situation as to contiguous lands had not changed and, on the basis of the field recommendations, the lands were denied to the Whites. Obviously, the loss of the 1,917.85 acres here sought, constituting nearly half of their whole ranch set-up, could not fail seriously to curtail the Whites' operations and affect their livelihood adversely.

Concerning the Boslers, on the other hand, the record shows a ranch set-up of large proportions. It appears that for a generation the Boslers have owned extensive ranch properties of 65,000 acres or more in Albany County. Grazing from 7,000 to 10,000 cattle, they operated for a long time as the Diamond Cattle Company, of which Mrs. Bosler was president, manager, and majority stockholder. After the death of her husband, Mrs. Bosler, in order to liquidate ranch debts, sold the cattle, reduced somewhat the acreage owned, and made a business of leasing not only practically all her remaining deeded lands but even lands leased to the Company by both the Federal Government and the State.³ During a period of 10 or 12 years, she leased lands to as many as 25 different companies and individuals, running no cattle at all herself.

About 1939, however, Mrs. Bosler resumed stock-raising activities in association with her 22-year-old son, at that time just graduated from college. Their applications of May 10 and October 16, 1943

² In T. 20 N., R. 76 W., the Whites own secs. 20 and 30 which corner, respectively, on the desired sections 28 and 32. In T. 20 N., R. 77 W., they own sec. 34, which corners on sec. 2, the desired land in T. 19.

³ One of these section 15 Federal leases contained as much as 4,600 acres of land. Executed as of January 4, 1938, for a 5-year term in favor of the Company, in Cheyenne 058915-060681-061792, this lease was canceled on October 27, 1939, as to most of the lands because, in violation of the lease provisions, the Government lands had been sublet, without the knowledge or consent of the Secretary of the Interior, in part to Mr. Lloyd E. Dixon, in part to Mr. David West.

(Cheyenne 068176 and 068176, supplemental), for more section 15 leases, stated the livestock then owned as 2,200 cattle and 50 horses and the acreage holdings as 65,000 acres. In May 1944, Mrs. Bosler passed away, and from that time her son has continued the Bosler ranch operations, acting both as an individual and as administrator for his mother's estate. On September 14, 1944, Mr. Bosler applied for the lands here involved, again stating his holdings as 65,000 acres, 2,250 cattle and 50 horses.

The record further indicates, however, that since the filing of his application of September 14, 1944, Mr. Bosler has been selling considerable land to meet inheritance taxes, and that more than 2 years before the Director's decision of April 29, 1947, Mr. Bosler sold to Mr. Herman Kruger a block of land containing the odd-numbered Bosler sections contiguous to sec. 2 in T. 19 N., R. 77 W.⁴ Accordingly, if these contiguous sections were indeed sold to Mr. Kruger, the preference right to a lease of sec. 2 passed from Mr. Bosler to Mr. Kruger with that ownership.

It appears that Mr. Bosler has Mr. Kruger's consent to run the Bosler cattle on these lands. But neither the field report nor Mr. Bosler offers any evidence that this consent amounts to a lease. As a sufferance only, such a consent does not operate to return to Mr. Bosler the preference right to a lease which a sale of the contiguous lands would have shifted to Mr. Kruger. It seems, therefore, that when the Whites' lease expired on September 18, 1946, and renewed consideration was being given to Mr. Bosler's suspended application of September 14, 1944, Mr. Bosler may have had no preference right to lease sec. 2 and that the preference right of the Whites was the only right to be respected, there being no other competitor claiming an equal preferred right.

Mr. Bosler's preference right to a lease of secs. 28 and 32 in T. 20 N., R. 76 W., also seems to be in question. The Whites' appeal of May 20, 1947, states that Mr. Bosler was not using for his own stock the base contiguous to these sections⁵ but had been leasing it to Mr. David West for the pasturing of the West stock. The appeal also reports Mr. David West as widely stating that in the fall of 1946 he had bought from Mr. Bosler a large block of lands, including the contiguous sections here strategic. If either of these transactions occurred, whether lease or sale, the Department would have to find that the preference right to a lease of secs. 28 and 32 passed from Mr. Bosler to Mr. West and that, in the absence of a competing grazing-lease application by

⁴ Sections contiguous to sec. 2 are secs. 1, 11, and 3, in T. 19 N., R. 77 W., and sec. 35 in T. 20 N., R. 77 W., 6th P. M.

⁵ Secs. 21, 27, 33, and 29, are contiguous to sec. 28; secs. 29, 33, and 31, are contiguous to sec. 32, all in T. 20 N., R. 76 W., 6th P. M. Mr. Bosler's application does not claim ownership of the fourth section contiguous to sec. 32, namely, sec. 5 in T. 19 N., R. 76 W., 6th P. M., Wyoming.

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Mr. West, the Whites would be the sole preferred applicants and therefore entitled to the lands.

Upon further investigation, the inferences that Mr. Bosler has lost his preference right to lease the three sections in question might prove unjustified. But, even if Mr. Bosler could be shown to have retained that right and to have remained on the same preference plane as the Whites, there are considerations, overlooked by the field examiner and the Director, which definitely preclude the award of these lands to Mr. Bosler.

Chief among these is the intention of the Congress with respect to cornering owners, as shown by the legislative history of the 1936 amendment of section 15 of the Taylor Grazing Act. As originally enacted in 1934, this section provided for leases only of very large tracts, isolated or disconnected tracts of a 640-acre section or more, and only to *owners of contiguous lands*. In this form, the provision was soon found to be inadequate and unfair, and its revision was urged. In a letter of January 3, 1935, the Secretary of the Interior wrote to the Chairman of the House Public Lands Committee, in part, as follows:

* * * The aggregate acreage of tracts of public land comprising less than 640 acres is considerable, and it would seem proper that its use for grazing should be regulated by lease. *Our brief experience with this section has also demonstrated that in many instances the persons who have the greatest need for such isolated tracts, while living in the immediate vicinity, are ineligible to lease them because of the contiguous requirements.*⁶ [Italics supplied.]

On August 20, 1935, the Congress passed a bill amending the Taylor Grazing Act and containing numerous provisions which the Department found objectionable. One of these affected section 15. It met part of the Secretary's criticism quoted above by extending the leasing provision to isolated or disconnected tracts of less than a 760-acre section,⁷ but it continued the contiguity requirement, although authorizing leases to "homesteaders, lessees, or other lawful occupants of contiguous lands," instead of simply to owners thereof. On August 26, 1935, in a comprehensive memorandum criticizing all the objectionable features, the Secretary urged the President to withhold his approval.⁸ On September 5, 1935, the President vetoed the bill, appending the Secretary's memorandum to his veto message.

With respect to the proposed leasing provision, the Secretary commented on the incidents of the checkerboard-land pattern in railroad-

⁶ See Secretary's file 2-147, part 10, 74th Cong., 1st sess., H. R. 3019, H. R. 10094, General Land Office, Grazing on Public Lands, General—Legislation.

⁷ The figure 760 was used because some sections of the public domain have been surveyed to include as much as 120 acres more than the standard section of 640 acres. See explanation by Senator O'Mahoney to the Senate on July 31, 1935, 79 Cong. Rec. 12177, column 2.

⁸ See footnote 6.

grant areas such as that here involved. Emphasizing the unfair effects of the mandatory character of the contiguity requirement, he said:

* * * Consider the effect in an area such as that in which odd-numbered sections have been granted to a railroad and even-numbered sections remain largely in public ownership. These public lands are all in the category of "isolated and disconnected tracts," while the contiguous sections are railroad lands. It is common knowledge that vast areas of these railroad lands have been sold or leased to large and powerful stock-raising interests. Under the terms of the act under consideration the occupant of the railroad lands and no one else would be entitled to lease the intervening even-numbered sections. Thus this provision patently would operate for the benefit of the large holder.

The small stockman who has taken a stock-raising homestead on an even-numbered section in such a region would find himself in a sad plight for the reason that no homestead is contiguous to checkerboarded public lands. He would be deprived of all right or opportunity to acquire by lease or otherwise any other even-numbered section in the region. It is the wise intent of the grazing act of 1934 that, commensurate with proper use, the small owner shall be given at least an equal opportunity with his more powerful neighbor to enjoy the benefits of regulated grazing on the public lands. This will not be possible if this act becomes law. [Italics supplied.]

In addition, the Secretary declared that the proposed leasing provision would help defeat the fundamental objectives of the Grazing Act, and, again, that he was unwilling to set the stage for the abandonment of homesteads by small owners under the pressure from livestock interests which would follow the signing of the act.

During the next year, the Public Lands Committees of the Congress reconsidered their position. They dropped the objectionable features of the vetoed bill, and they met fully the Secretary's objection to the mandatory contiguity requirement of section 15. In the exception clause of the proviso, they extended the leasing system to "owners, homesteaders, lessees, or other lawful occupants" of *cornering* as well as *contiguous* lands, giving cornering holders as well as contiguous holders a 90-day-preference right to lease the whole disconnected tract, and thus protecting holders of even-numbered sections, of whom homesteaders and homestead patentees are perhaps the most numerous class. The new proposals were passed by the Congress and approved by the President on June 26, 1936, section 15 being in the form quoted above on page 273.

In taking this action, the Congress recognized fully the implications of the checkerboard-land pattern in railroad-grant areas and the inequities of the 1934 leasing system. It also expressed its clear intent to remedy these injustices and to protect the owner or lawful occupant of even-numbered, cornering sections against checkerboard disadvantages by placing him on an equal lease footing with the owner or lawful occupant of odd-numbered, contiguous sections. The

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fact that exercise of the leasing right by a cornering applicant might involve his trespass on contiguous lands at a common-section corner neither deterred the Congress from conferring the right nor caused it to make such trespass a matter of Federal concern. The Congress did not condition the right upon no trespass in its exercise. As the Department has previously said, "any question of trespass on privately owned lands in traveling to exercise the use of Federal range is a matter to be settled between the parties or in the local courts, not in this Department. * * * Nor can such possibility affect the right of this Department to lease such checkerboard public lands."⁹

In addition, the Department has said that where competitors do not come to an understanding but leave their disagreements to the administrative process, this Department must render its decision in accordance with the legal rights and the equities of the parties.¹⁰ Among such equities, the Department has found the urgent need of the cornering applicant for the lands in conflict, and has held that the Department may lawfully and equitably grant him a lease, despite the contiguous owner's complaint about trespass.¹¹ Furthermore, in cases where lands in conflict are urgently needed by one of two preference-right claimants but would confer only insignificant benefits upon the second who already has extensive holdings, the Department has said that there is no requirement under any statute or departmental policy which would warrant breaking up the former's long-established grazing operations and destroying his livelihood in order to bestow only comparatively minor benefits upon the second, whose legal rights were not superior but only equal.¹²

From the exposition of the facts and the law given above, it is obvious that the Whites fall in the class of small stock operators owning even-numbered sections in a checkerboard area whose interests in Federal grazing leases the Secretary of the Interior called upon the Congress to protect by revision of the leasing system of 1934. It is obvious that by the revision of 1936 the Congress has placed the Whites as cornering applicants for section 15 leases upon an equal footing with contiguous applicants for the same lands, and that, the legal rights being equal, the Department must award the lands in accordance with

⁹ *Henry Mitchell v. Sawyer-Otondo Sheep Co.*, A-24380 (Phoenix 079399, 080236), January 23, 1947 (unreported); *Jess W. Corn—Florence C. McKnight, Intervener*, A-24308, October 25, 1946 (unreported).

¹⁰ *The Swan Company v. Alfred and Harold Banzhaf*, 59 I. D. 262 (1946).

¹¹ *The Swan Company v. William E. Dover*, A-21404 (Cheyenne 059000), May 16, 1938 (unreported); *The Swan Company and Ray H. Thompson*, A-21514 (Cheyenne 058417, 062275), November 4, 1938 (unreported).

¹² *F. N. Bard v. Antonia Morales Granillo*, A-24314 (Phoenix 077312, 076482), September 12, 1946 (unreported).

the equities found. Here, there is no question but that the lands are essential to the maintenance of the Whites' operations and livelihood, but of only insignificant advantage to the Boslers, if indeed the latter still own the contiguous lands.

The offer of a 10-year lease to the Boslers was based on the theory that "the proper use to be made of the Government land is in connection with the contiguous deeded lands owned or controlled by Bosler."¹³ To hold thus would be to ignore the purpose and the effect of the 1936 revision of the leasing system, to disregard the equal rights of the Whites as cornering applicants, to give no weight to the equities involved, in particular the urgent need of the Whites for the lands, and to allow the possibility of trespass at the common section corners to affect the lease rights of both the cornering applicants and the Government itself with a limitation not contemplated by the Congress. In these circumstances, the offer of a 10-year lease to the Boslers should be withdrawn, and the Whites' application for renewal of their lease for a period of 10 years from September 18, 1946, should be granted.

Accordingly, in pursuance of the authority delegated to the Solicitor by the Secretary of the Interior (43 CFR 4.23; 12 F. R. 8423), the decision of the Director of the Bureau of Land Management is reversed.

W. H. FLANERY,
Acting Solicitor.

UNITED STATES v. M. W. MOUAT ET AL.

A-25527

Decided January 27, 1949

Mining Claim—Interest of Locators—Valuable Mineral Deposits.

An amended location of a mining claim made by a person who purports to act as agent for the original locators was invalid where the evidence shows that the original locators had theretofore wholly divested themselves of their interests in the claim and there is no indication that they authorized the putative agent to act in their behalf.

The establishment of a valid placer mining claim on public land is contingent upon the discovery of valuable mineral deposits in a form other than a vein or lode.

In determining whether mineral deposits discovered on public land are valuable, the test to be applied is whether they are "such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine."

Where the evidence in the record of an adversary proceeding brought by the Government to cancel a mining claim is inconclusive on the question whether the minerals within the boundaries of the claim constitute valuable mineral deposits, the case will be remanded for a further hearing on this issue.

¹³ *Supra*, p. 275.

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APPEAL FROM THE BUREAU OF LAND MANAGEMENT

I

This is an adversary proceeding which was instituted on behalf of the United States to cancel the Lake Placer mining claim in sec. 20, T. 5 S., R. 15 E., P. M., Montana.

A hearing was held on June 24, 25, and 26, 1947, before the acting manager of the district land office at Billings, Montana. On November 5, 1947, the acting manager rendered a decision favorable to the United States. The defendants appealed to the Director of the Bureau of Land Management and, in a decision dated July 8, 1948, the Assistant Director of the Bureau of Land Management affirmed the decision previously rendered by the acting manager of the district land office. The defendants thereupon took an appeal to the head of the Department. A printed brief was submitted and an oral argument was made in support of this appeal.

The original Certificate of Location relating to the Lake Placer claim, comprising 160 acres, was filed with the clerk and recorder of Stillwater County, Montana, by Paul A. De Lannoy, Margaret De Lannoy, Susie C. Rohder, Charles L. Buck, E. A. Rowe, J. G. Link, H. E. Duba, and R. L. Duba, on July 16, 1940. It referred to the claim as "being valuable for gold, serpentine and associated minerals."

On June 16, 1941, an Amended Certificate of Placer Location was filed by the original locators. This certificate made certain adjustments in the boundaries of the claim, and asserted that gold had been discovered on each 20-acre tract of the claim.

On April 17, 1946, a Second Amended Certificate of Lake Placer Mine Location was filed by M. W. Mouat, purporting to act as agent on behalf of the original locators. It made further changes in the boundaries of the claim, and stated that "this said Lake Placer is valuable for gold, serpentine and associated minerals."

II

With regard to the second amended location, the Government alleged in its pleadings that—

The purported second amended location of the claim is void and of no effect because made by persons who, at the time of such attempted amendment, had no right or title to the claim.

In support of this allegation, the Government introduced at the hearing—

(a) A certified copy of a conveyance dated November 4, 1941, by which, among other things, P. A. de Lannoy, Margaret de Lannoy, and Susie C. Rohder quitclaimed to May Paula Mouat their interests in the Lake Placer mining claim.

(b) A certified copy of a conveyance dated October 30, 1941, by which, among other things, J. G. Link, H. E. Duba, and R. L. Duba, quitclaimed to May Paula Mouat their interests in the Lake Placer mining claim.

(c) A certified copy of a conveyance dated October 30, 1941, by which, among other things, Charles L. Buck and E. A. Rowe quitclaimed to May Paula Mouat their interests in the Lake Placer mining claim.

(d) A certified copy of a conveyance dated February 2, 1942, by which Charles L. Buck again quitclaimed his interest in the Lake Placer mining claim, this time to M. W. Mouat; and

(e) Testimony from Charles Buck to the effect that he was one of the original locators of the Lake Placer claim, that prior to the date of the second amended location he had conveyed his entire interest in the claim for a consideration of \$25, and that he had no recollection of having authorized the use of his name in connection with the second amended location of the claim.

The Government's case on this point was not counterbalanced by any clear evidence on the part of the defendants showing that, notwithstanding the conveyances mentioned above, the persons named in the Second Amended Certificate of Lake Placer Mine Location actually were possessed of interests in the claim as of April 17, 1946, the date on which the certificate was executed and filed, and that they had authorized M. W. Mouat to act as their agent in executing and filing the certificate.

It perhaps should be noted in this connection that when the defendant May Paula Mouat was asked by defendants' counsel the leading question, "And you were a trustee for the various owners?" she responded, "Yes sir" (Tr. 169); and that the Government's witness Charles Buck indicated on cross-examination that, at the time of the execution of his quitclaim deed in favor of M. W. Mouat, he "understood" that he "would have an interest coming back" (Tr. 66), the nature of the "interest" and the time when it would be "coming back" not being specified. Fragmentary and vague evidence of this sort does not, however, have sufficient probative value to overcome the plain language in the quitclaim deeds indicating that the original locators had wholly divested themselves of their interests in the claim prior to the date of the execution and filing of the Second Amended Certificate of Lake Placer Mine Location by Mr. Mouat, purporting to act as their agent.

The preponderance of the evidence clearly supports a finding that the persons on whose behalf Mr. Mouat purported to act as agent in executing and filing the Second Amended Certificate of Lake Placer Mine Location did not have any interest in the claim at the time of the execution and filing of this certificate.

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Moreover, the evidence indicates (but with less than complete clarity) that at least a substantial portion of the land which the Second Amended Certificate of Lake Placer Mine Location sought to bring within the claim for the first time was already being devoted by a Government agency to a public use under proper authority.

Accordingly, the decision of the Assistant Director of the Bureau of Land Management should be affirmed insofar as it holds the second amended location of the Lake Placer claim to be invalid.

III

With respect to that part of the Lake Placer claim which is based upon the original location and the first amended location, the Government's allegation of invalidity in its pleadings is based upon the contention that minerals have not been found within the limits of the claim "in sufficient quantities to constitute a valid discovery."

The establishment of a valid placer mining claim on public land is contingent upon the discovery of "valuable mineral deposits"¹ in a form other than a vein or lode.² In determining whether mineral deposits discovered on public land are "valuable," the test to be applied is whether they are "such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine."³

The evidence in this case shows that there are, within the limits of the Lake Placer claim under the Amended Certificate of Placer Location, great quantities of loose rocks containing olivine, serpentine, and pyroxene, and also some loose fragments of chromite.

In attempting to show that these minerals do not constitute "valuable mineral deposits," as that phrase is used in the mining laws, the Government at the hearing elicited from its witness Walter H. Koch, a field examiner of the Bureau of Land Management, the statement that the rocks on this claim, containing olivine, serpentine, and pyroxene, "didn't contain any valuable mineral" (Tr. 12); the view that "it has not been demonstrated that a market exists for this type of material" (Tr. 57), based on the circumstance that no use had been made by the Government during World War II, when the need for minerals was acute, of large quantities of crushed olivine and serpentine available in this area as a byproduct of the processing of chromite from lode claims in the vicinity; and the opinion that "the showings thereon [i. e., on the Lake Placer claim] would not justify a prudent man to invest further money and spend additional time in developing same" (Tr. 13). The Government also elicited from its witness Hugh G.

¹ 30 U. S. C., 1946 ed., sec. 22.

² 30 U. S. C., 1946 ed., sec. 35.

³ *Cameron et al. v. United States*, 252 U. S. 450, 459 (1920).

Nicely, a mining engineer, a negative answer to the question whether "a prudent man would be justified in spending time and money and effort on the Lake Placer mining claim in the hope of developing a paying mine on it" (Tr. 77); and the information that a Government-owned mill, which was operated for a time during World War II within the limits of this claim for the processing of chromite taken from lode claims in the vicinity of the Lake Placer claim, had been closed by the Government before the end of the war (this testimony was apparently adduced in order to furnish a basis for an inference that the chromite in this area is of such inferior quality or unfavorable location that the extraction of chromium from it was impracticable, even under the spur of wartime need).

The more persuasive items of the defendants' evidence concerning the value of the mineral deposits on the Lake Placer claim consisted of general information with respect to the usefulness of olivine as a refractory material and the marketing of olivine for that purpose in another part of the United States, and the development by the Tennessee Valley Authority of a process for the fusing of olivine and rock phosphate in the production of fertilizer (there is a large phosphoria formation in the vicinity of the Lake Placer claim and its olivine). These data hint—although they do not show—that there is a reasonable prospect of developing a profitable operation out of the olivine (and perhaps the serpentine, an altered form of olivine) on the Lake Placer claim.

The material in the record pertaining to the value of the mineral deposits on the Lake Placer claim under the first amended location is indecisive. The conclusions expressed by the Government's witnesses on this issue are not buttressed by adequate factual data in the record showing clearly a lack of economic value in these minerals because of their nature, quality, quantity, or location, or because of other factors. Accordingly, the Government's evidence on this point lacks the degree of completeness which would warrant an unequivocal finding that the Government has established that the minerals on the claim do not constitute "valuable mineral deposits." Conversely, the defendants' evidence is insufficient to establish affirmatively that the mineral deposits on the Lake Placer claim are "such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine" out of this particular claim.

Accordingly, it appears that this case, insofar as it relates to the validity of the claim based upon the original location and the first amended location, should be remanded to the Bureau of Land Management for a further hearing on the question whether the minerals on the claim constitute "valuable mineral deposits," as that phrase is used in the mining laws.

February 14, 1949

IV

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Assistant Director of the Bureau of Land Management is affirmed insofar as it holds the second amended location of the Lake Placer claim to be invalid, and the case is remanded to the Bureau of Land Management for a further hearing upon the question whether the minerals on the claim, as described in the Amended Certificate of Placer Location which was filed on June 16, 1941, constitute valuable mineral deposits, and for such action as may appear to be appropriate in the light of the information developed as a result of such hearing.

MASTIN G. WHITE,
Solicitor.

UNITED STATES *v.* R. G. CROCKER ET AL.

A-24666

Decided February 14, 1949

Mining Claims in National Forests—Administrative Sites Established by Forest Service.

Although the administration of the national forests is vested in the Secretary of Agriculture, the Secretary of the Interior has the responsibility of determining the validity of mining claims in national forests.

The Secretary of Agriculture is not expressly or impliedly authorized to withdraw unimproved national forest lands from mining location.

The submission of a proposal by a Forest Supervisor that an area in a national forest be established as an administrative site, the surveying of the area, and the filing of the survey notes and the proposal in the regional office of the Forest Service were insufficient to effect the withdrawal of unimproved land within the area from mining location.

The construction and use by the Forest Service of a cabin, barn, and other structures on a portion of the area proposed by a Forest Supervisor for an administrative site might be sufficient to effect an appropriation of that particular portion of the land to Government use, so as to preclude any mining location on the land occupied by such structures, but this would not constitute an appropriation of the unimproved portion of the proposed site.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

R. G. Crocker, Ellen B. Crocker, and Ethel S. Welliever filed an application for mineral patent on seven placer mining claims in the Payette National Forest,¹ based upon mining locations which had been made on September 20, 1918. The Regional Forester, Inter-Mountain Region, Forest Service, Department of Agriculture, filed a protest

¹ The placer mining claims are known as Spokane group Nos. 1 through 7, inclusive, and are in secs. 10, 11, 14, 15, 23, and 26, T. 22 N., R. 5 E., B. M., Idaho, in the Warren Mining District, Idaho County.

against the patenting of these claims. The protest was based on two principal grounds, (1) that some of the claims are in conflict with the Secesh Administrative Site of the Forest Service; and (2) that telephone lines and a road constructed by the Forest Service run through the land covered by the claims.

The Director of the Bureau of Land Management dismissed the protest, except as to the telephone lines and the road, which, he stated, would be excepted from the patent, if issued. (See Instructions, 44 L. D. 359 (1915).) The Forest Service has appealed.

Prior to February 1, 1905, the national forests were administered by the Department of the Interior. The act of that date (33 Stat. 628; 16 U. S. C., 1946 ed., sec. 472) charged the Secretary of Agriculture with the duty of executing all laws affecting the national forests, "excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any of such lands." The administration of the laws included within the exception remained the responsibility of the Secretary of the Interior. Under these laws, the Secretary of the Interior is authorized to determine the validity of mining claims in national forests. See *Letters of Secretaries of Interior and Agriculture*, 33 L. D. 609 (1905); *H. H. Yard*, 38 L. D. 59 (1909); *Alaska Copper Company*, 43 L. D. 257 (1914); *J. B. Nichols and Cy Smith*, 46 L. D. 20 (1917); Solicitor's opinion, M-31021, pp. 12-22 (February 20, 1941); 29 Op. Atty. Gen. 303, 305, 306 (1912); 30 Op. Atty. Gen. 263, 269 (1914).

The land involved in this proceeding was included in the Payette Forest Reserve (now the Payette National Forest) by the President's proclamation of June 3, 1905 (34 Stat., part 3, p. 3067), pursuant to the authority of section 24 of the act of March 3, 1891 (26 Stat. 1103; 16 U. S. C., 1946 ed., sec. 471).

The Forest Service purportedly established the Secesh Administrative Site in September 1909 by taking the following actions: First, a local officer of the Forest Service, having the title of Forest Supervisor, surveyed the tract on September 7, 1909.² The survey notes were filed in the regional office of the Forest Service, where entries reflecting the

² The survey notes indicate that a rough boulder, 7' by 12' by 20', located about 53 feet from the edge of a wagon road which then crossed a portion of the tract, was established as the survey monument, the letters FSM being inscribed on one side of the rock and a chaining cross being chiseled on the top. Based on this monument, lines were run to form a rectangular area enclosing about 92 acres. At corner number 1, a rock inscribed on one side "R" ₁ was placed completely below the ground level and was covered with a mound of earth. The rock at corner number 2 was marked "R" ₂ and was buried in the ground, apparently without a distinctive mound of earth over it. The rock placed at corner number 3, if one is to judge by recent photographs and the inadequate description of the surveyor, bore an inscription "R" ₃ on one side and was placed so as to project 2 inches above the level of the ground. At the fourth corner, the top of the rock was placed flush with the ground. This rock was inscribed "R" ₄ on one side, according to recent photographs. A witness tree was blazed in the vicinity of each corner.

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survey of the site were made on various records of the office; second, on September 24, 1909, the local official who had made the survey prepared a report entitled "Report on Proposed Administrative Site" and relating to the proposed establishment of the "Secesh Ranger Station." This report was also filed in the regional office of the Forest Service.

An affidavit dated August 25, 1944, by the same person who made the 1909 survey and report, states that "My recommendations for withdrawal of the Secesh Site were approved September 24, 1909." However, there is no indication on the report itself, and nothing in the record other than the quoted statement (based upon recollection extending back approximately 35 years), tending to show that the proposal for the establishment of the administrative site was ever approved by any higher official, either on September 24, 1909, or later. The Forest Service did not request this Department or the President to issue an order withdrawing the land from mineral location. The records of this Department, which is the agency charged with the duty of administering the laws governing mining entries on Government-owned lands, including the lands in national forests, have never indicated that the land involved in this proceeding was withdrawn from mining location.

No buildings or other improvements were constructed on this site for several years after September 24, 1909. During the fiscal years 1914 and 1915, a two-room log cabin, 16 by 20 feet, was constructed at one end of the surveyed tract. During the ensuing 2 or 3 fiscal years, more work apparently was done on the cabin; a barn, 16 by 24 feet, and a small corral were built; and a rough wooden fence was constructed to enclose the cabin, the barn, the corral, and a small garden plot adjacent to the cabin. The expenditures for these improvements were relatively small. The Forest Service records show construction expenditures of \$165.06 for materials and \$570.73 for the time of Forest Service employees, or a total of \$735.79, plus \$56.62 for additional maintenance costs during the years 1915-1918. These structures were used by Forest Service employees from time to time prior to 1931, but the record is bare as to any official use after 1931. Photographs made in 1930 show that the cabin was still in a condition suitable for human occupancy, and that the fence was in good repair. Photographs made in 1944 show only the barn, with its roof caved in, and a feed rack. Both were in a state of complete disrepair as of that time. An affidavit by the Acting Forest Supervisor dated May 17, 1948, states: "Ten or more years ago the cabin and fences were destroyed and have not been rebuilt. At the present time, as well as at the beginning of this case, the only remaining improvements on the administrative site are the old barn and the corral."

None of the improvements constructed by the Forest Service on

the site was inside the limits of the mining claims upon which the present application for mineral patent is based.

For many years after 1909, numerous individuals prospected for minerals on the unimproved portion of the land proposed for the Secesh Administrative Site and on surrounding lands, without objection upon the part of the Forest Service. However, signs indicating Government use were posted by the Forest Service on the buildings and at points where the boundary of the proposed site was crossed by a road and a trail. During some of the time between 1909 and 1930, the boundary of the proposed site was also posted with signs stating that the area was closed to sheep grazing.

Most of the area of the proposed site is meadowland, which was used to pasture the horses of Forest Service employees when they stayed in the area, a use not distinguishable from the pasturing of livestock on other meadowland in the forest.

The only pertinent issue to be disposed of in this proceeding is whether, when these mining claims were allegedly located, there had been an effective withdrawal from mining location of the land covered by the claims.

In connection with this point, it should be noted that the act of June 4, 1897, which provides for the protection and control of forest reservations, states that "it is not the purpose or intent of these provisions, or of the Act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes" (30 Stat. 35; 16 U. S. C., 1946 ed., sec. 475); that nothing in the act shall "prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof" (30 Stat. 36; 16 U. S. C., 1946 ed., sec. 478); and that "any mineral lands in any forest reservation * * * subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry" (30 Stat. 36; 16 U. S. C., 1946 ed., sec. 482). See 38 Op. Atty. Gen. 192, 193 (1935).

Hence, although lands reserved for national forests are withheld under the national forest legislation from most forms of appropriation by private persons, such lands are specifically kept open to mining location to the same extent as the public lands generally. There is no statute expressly authorizing the Secretary of Agriculture to withdraw unimproved national forest lands from mining location. Moreover, he cannot be regarded as impliedly authorized to exercise the power of the President to withdraw such lands from mining location (*cf. Wilcox v. Jackson*, 13 Pet. 498, 501-502, 513 (1839)), since it is the Secretary of the Interior, rather than the Secretary of Agriculture, who is authorized to administer the laws relating to

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"prospecting, locating, appropriating, entering" national forest lands. In addition, neither the Secretary of Agriculture nor any other official of the Department of Agriculture on behalf of the Secretary promulgated any document which purported expressly to withdraw from mining location the area proposed for the Secesh Administrative Site in the report dated September 24, 1909.

At most, it might be concluded that the construction and use by the Forest Service of the cabin, barn, and other structures on a portion of the area of the proposed administrative site, so firmly appropriated that particular portion of the land to Government use as to preclude any mining location on the land occupied by those structures. However, it is clear that such construction and use of those facilities did not effect an appropriation to public use of all 92 acres within the proposed administrative site, so as to withdraw the whole area from mining location. In this connection, it has been previously noted that none of the improvements constructed by the Forest Service on the site was within the limits of the mining claims upon which the present application for mineral patent is based. It appears that the land involved in these claims was unfenced and unimproved, was open to frequent prospecting for minerals without objection, was not plainly delineated so as to bar all use thereof by others without Government authority, was marked only by buried or unobtrusive rocks and signs inadequate to effect a withdrawal of unimproved land from mining location, and was not exclusively and continuously occupied by Government structures or personnel. Consequently, this unimproved land was not withdrawn from mining location by virtue of any use by the Forest Service as part of the Secesh Administrative Site. Cf. *Northern Pacific Ry. Co. v. Wismer*, 246 U. S. 283, 288-290 (1918); *Scott v. Carew*, 196 U. S. 100 (1905). See, also, *United States v. Tedford*, Civil No. 891, United States District Court for the District of New Mexico (November 5, 1945; unreported), in which it was held that the establishment by the Forest Service of an administrative site in the Cibola National Forest did not preclude mining locations on that site.

The protest of the Forest Service against the issuance of a mineral patent was properly rejected, insofar as it was based on the purported establishment of the Secesh Administrative Site.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Director of the Bureau of Land Management is affirmed.³

MASTEN G. WHITE,

Solicitor.

³ The Director of the Bureau of Land Management has not yet considered the merits of the application for mineral patent submitted by *R. G. Crocker et al.* Consequently, this decision does not relate to the question whether the applicants have discovered valuable mineral deposits on the land applied for and are otherwise entitled to a mineral patent under the mining laws.

EARL C. PRESLEY, DAVID ESPLIN ET AL., INTERVENERS

A-24377

*Decided February 18, 1949***Grazing Permits—Base Property—Water—Cancellation.**

Administrative officers of the Department can review, reconsider, and vacate a prior decision with respect to the public land, so long as the land remains under the jurisdiction of the Department, upon discovery that the prior decision was erroneous.

A grazing permit based upon a showing which was accepted at the time as sufficient to satisfy the requirements of the Federal Range Code, and upon which grazing privileges have been granted over a period of years, will not be canceled unless there is convincing evidence that the base property upon which such privileges were predicated was not qualified and that the action in granting the permit was clearly erroneous.

It is proper to cancel a 10-year grazing permit upon discovery that the permit was issued on the erroneous assumption that the waters controlled by the permittee were full-time waters, it being established that the permittee has no valid claim to other waters that qualify as full-time or prior waters.

APPEAL FROM THE GRAZING SERVICE¹

The district grazier informed Earl C. Presley that his 10-year grazing permit, dated May 28, 1941, for 50 goats and 8 horses, 61 percent on Federal range in Mr. Presley's individual allotment, was held for cancellation because "you have not provided full-time water, which in your case is year-round, nor have you made a substantial use of your base property in connection with your livestock operation * * *." Mr. Presley responded with a claim to adequate water rights in Clay Hole Wash, Black Pockets, the Pointer Pond, and the Carroll Pond, as well as two ponds on his own homestead. The district grazier subsequently held that Mr. Presley's base property, which was water, was not yearlong and that Mr. Presley had not shown ownership or legal control of the base properties which he claimed, other than the two ponds on his own property.

Mr. Presley appealed, and the matter was brought on for hearing before an examiner of the Grazing Service. The issue at the hearing was whether Mr. Presley has ownership or control of full-time water to serve as a base for his 10-year permit and adequate to service his individual allotment, as increased by a range-line agreement of November 6, 1942. It was stipulated, among other things, that the two ponds on the Presley homestead are not year-round, dependable sources of water.

The examiner found as a matter of fact that Mr. Presley has no right to the use of the Carroll Pond or the Pointer Pond; that Mr. Presley does not hold a certificate from the State of Arizona covering

¹ Effective July 16, 1946, the Grazing Service and the General Land Office were abolished and their functions were transferred to the Bureau of Land Management by section 403, Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

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Black Pockets or the water in Clay Hole Wash; and that his random use of these asserted water facilities is not such as to establish any recognizable claim to the use or control of these facilities. The examiner also found as a matter of fact that the two ponds on the Presley homestead were presumed by the Grazing Service on May 28, 1941, when the permit was issued, and again on November 6, 1942, when the individual allotment of Mr. Presley was increased through a range-line agreement, to provide adequate water for the stock allowed on the Federal range under that permit and agreement, but that such is not the case. He found that it has been necessary year after year for Mr. Presley to obtain supplemental water supplies from the Carroll Pond and other sources of water in the vicinity of the homestead to care for his livestock.

The examiner concluded that Mr. Presley's permit had been improperly issued, and that at all times since May 28, 1941, Mr. Presley's waters have failed to meet the qualifications of full-time water under section 2 (k) of the Federal Range Code.² The permit was held for cancellation.

Mr. Presley appealed to the head of the Department. He contends on appeal that he and others developed water at Clay Hole Wash and Black Pockets during the priority period, and that they have used these waters every year since that time.

A careful examination of the entire record reveals nothing which would warrant a reversal of the decision of the examiner.

The area covered by the Presley permit is range which has been classified as suitable for year-round use, and the only base property recognized in that area is full-time water.

Full-time water is defined in section 2 (k) of the Federal Range Code as—

* * * water which is suitable for consumption by livestock and available, accessible, and adequate for a certain number of livestock during those months in the year for which the range is classified as suitable for use. Such water may be from one source or may be the aggregate amount available from several sources.

Prior water is defined in section 2 (l) of the Federal Range Code³ as—

* * * water which, during all or a substantial part of the five-year period immediately preceding June 28, 1934 (hereinafter referred to as the "priority period"), was used to service certain public range within the service area of the water for a livestock operation that was established, permanent, and continuing, and which, during the period of such use, normally involved the grazing of

² This section was then incorporated in the Code of Federal Regulations as 43 CFR, Cum. Supp., 501.2 (k). Later, Part 501 of Title 43, Code of Federal Regulations, was redesignated as Part 161 (11 F. R. 14496).

³ 43 CFR, Cum. Supp., 501.2 (l). See footnote 2.

livestock on the same areas of public land for a certain period or periods of each year * * *.

In Arizona Grazing District No. 1, licenses and permits are issued in the following manner and order:

(1) To qualified applicants who own or control full-time prior water, to the extent of the priority of such water; (2) to qualified applicants owning or controlling full-time water; and (3) to other applicants for the number of livestock for which range is available and which can be properly grazed without detriment to the operations on the range of applicants owning or controlling base properties in classes (1) and (2).⁴

It is clear from the record that the water which may have been obtained during the priority period at Clay Hole Wash and at Black Pockets by Mr. Presley and his associates would not have serviced an established, permanent, and continuing livestock operation. Therefore, these waters cannot be considered as prior waters within the meaning of section 2 (l) of the Federal Range Code.

Mr. Presley has established his claim only as to the two ponds located on his own land. As these ponds are admittedly not full-time waters within the meaning of section 2 (k) of the Federal Range Code, they will not support his grazing permit. In the absence of a showing of ownership or control of other waters which meet the requirements of that section or of section 2 (l) of the Code, it follows that his permit must be canceled.

The error of the Grazing Service in issuing the permit in the first instance, while regrettable, cannot estop the Department from taking corrective action. *Kern Oil Co. v. Clarke*, 31 L. D. 288, 302 (1902). It is well established that administrative officers of the Department can, within their respective areas of authority, review, reconsider, and vacate a prior decision with respect to the public land, so long as the land remains under the jurisdiction of the Department, upon discovery that the prior decision was erroneous. *State of California, Standard Oil Company of California, Transferees*, 51 L. D. 141, 144 (1925); *Art L. Murry*, A-24259, April 15, 1946 (unreported). In fact, section 9 (d) of the Federal Range Code⁵ provides for the cancellation of permits improperly issued.

A grazing permit, based upon a showing which was accepted at the time as sufficient to satisfy the requirements of the Federal Range Code, and upon which grazing privileges have been granted over a period of years, will not be canceled unless there is convincing evidence that the base property upon which such privileges were predicated was not qualified and that the action in granting the permit was clearly

⁴ 43 CFR, Cum. Supp., 501.6 (b). See footnote 2.

⁵ 43 CFR, Cum. Supp., 501.9 (d). See footnote 2.

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erroneous. *John D. Assuras, Martin T. Magnuson et al., Inter-veners*, A-24268, May 24, 1946 (unreported). In the present case, however, it is clear that Mr. Presley's base property (the two ponds on his homestead) is not qualified and that the action of the Grazing Service in issuing a permit based on that property was erroneous.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the examiner is affirmed.

MASTIN G. WHITE,

Solicitor.

WALTER W. STOLL

A-24487

Decided February 24, 1949

Coal Leases—Alaska Coal Lands.

The issuance of leases on the unreserved coal lands and coal deposits in Alaska is within the discretion of the Secretary of the Interior.

In the absence of such a showing of a need for coking and blacksmithing coal as would justify the expenditures incident to the opening and equipping of a new mine in Alaska, it was proper to reject an application for a coal lease.

APPEAL FROM THE GENERAL LAND OFFICE¹

The Commissioner of the General Land Office rejected the application of Walter W. Stoll to lease certain coal land in Alaska pursuant to section 3 of the act of October 20, 1914, as amended (48 U. S. C., 1946 ed., sec. 434). The rejection was based on a report of the Geological Survey which stated, among other things, that the land contains coal deposits suitable for coking and blacksmithing; that there was a critical shortage of mine labor in Alaska; and that the need for coal had decreased to the point where the supply exceeded the demand. The report indicated that the Geological Survey favored the withholding of the land from leasing until such time as the demand for coking coal for civilian or military use should become evident.

On appeal, Mr. Stoll contends that since the land for which he applied is unreserved coal land, it cannot be withheld from leasing upon the mere recommendation of the Geological Survey.² Mr. Stoll also disputes the statements in the report relating to the shortage of mine labor and the lack of a market for coking and blacksmithing coal.

¹ Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management by section 403, Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

² Mr. Stoll's application is for the E $\frac{1}{2}$ SW $\frac{1}{4}$ and the W $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 31, T. 20 N., R. 6 E., S. M., Alaska. He refers to this land as Leasing Unit No. 14. As a matter of fact, the land for which application is made is not Leasing Unit No. 14 but is unreserved land adjacent thereto. Leasing Unit No. 14 has been reserved from leasing under section 2 of the act of October 20, 1914 (48 U. S. C., 1946 ed., sec. 433).

After the receipt of Mr. Stoll's appeal, a further report was obtained from the Geological Survey respecting the conditions affecting the production and marketing of coking and blacksmithing coal in Alaska and the feasibility of leasing the land involved in this proceeding. The substance of that report was made available to Mr. Stoll, and he was given an opportunity to make a further showing in support of his application. In response, Mr. Stoll submitted additional data in an attempt to justify the issuance of the lease to him on the basis of current and future needs for coking and blacksmithing coal.

Consideration must first be given to the legal question raised by Mr. Stoll as to the authority of the Department to withhold the land from leasing.

Section 3 of the act of October 20, 1914, as amended, provides:

That the unreserved coal lands and coal deposits shall be divided by the Secretary of the Interior into leasing blocks or tracts of forty acres each, or multiples thereof, and in such form as in the opinion of the Secretary will permit the most economical mining of the coal in such blocks, but in no case exceeding two thousand five hundred and sixty acres in any one leasing block or tract; and thereafter, the Secretary shall offer such blocks or tracts and the coal, lignite, and associated minerals therein for leasing, and may award leases thereof through advertisement, competitive bidding, or such other methods as he may by general regulations adopt * * *.

Although the Secretary is directed, in mandatory language, to divide the unreserved coal lands and coal deposits into leasing blocks and to offer those blocks for leasing, his authority to award leases is couched in permissive language, i. e., the Secretary "*may* award leases thereof." [Italics supplied.]

That the Congress designedly left to the discretion of the Secretary the question whether to lease or not to lease is evident from the legislative history of the section. This particular section of the act took various forms during its passage through the Congress. As introduced, section 3 of H. R. 14233, 63d Cong., 2d sess., stated that—

* * * the Secretary of the Interior shall, from time to time upon the request of any qualified applicant or on his own motion, offer such lands or deposits of coal for leasing, and * * * shall award leases thereof * * *.

As passed by the House of Representatives, the section declared that—

* * * the Secretary of the Interior shall, in his discretion, from time to time * * * offer such lands or deposits of coal for leasing, and award leases thereof * * *.

As passed by the Senate, the section provided that—

* * * the Secretary shall offer such blocks or tracts * * * for leasing, and shall award leases thereof * * *.

However, the entire bill was rewritten in conference, and section 3 was enacted as rewritten in conference. In explanation of the change

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made in the versions of the section passed by the House of Representatives and by the Senate, the conference committee said:

In section 3, page 14, line 13, the word "shall" was changed to "may," so that instead of making it mandatory on the Secretary to award leases to those who should not have them, it was left to his discretion, in order that the public interest might be subserved and no ill-advised leases made.³

It is apparent, therefore, that the unreserved coal land involved in this proceeding may be withheld from leasing if it appears that the leasing of the land would not be in the public interest. Cf. *United States ex rel. Roughton v. Ickes*, 101 F. (2d) 248 (1938); *Dunn v. Ickes*, 115 F. (2d) 36 (1940), cert. denied 311 U. S. 698; *United States ex rel. Jordan v. Ickes*, 143 F. (2d) 152 (1944), cert. denied 320 U. S. 801.

Having determined that the issuance of a lease is discretionary, the next question is whether the circumstances surrounding this particular case justified the action of the Commissioner in denying Mr. Stoll's application.

The land in question was formerly held by one Ross Heckey under prospecting permits, Anchorage 06024, 06912, and 07864. In connection with these permits, Mr. Heckey had a right-of-way through reserved land adjacent to the land held under permit and the use of a portion thereof for a camp site. The portal of the Heckey mine was located on the reserved land. At the time of the Heckey mining operations, Mr. Heckey was able to deliver his coal to the Chickaloon branch of the Alaska Railroad at a point close to the mine opening. The railroad has now been replaced by a highway, and it would be necessary for Mr. Stoll to provide trucking facilities for delivery of the coal to the present railway yards at Sutton or Palmer, approximately 17 and 30 miles distant, in addition to making a new mine opening.

Mr. Stoll contends that there is a need in the Territory of Alaska for the particular kind of coal which this land will furnish; that a considerable amount of such coal is imported into the Territory annually, for which the residents pay inordinately high prices; that ample mine labor is available; and that there is a vast market for metallurgical coke in the Pacific Northwest which might be supplied with the coal from this land.

Against these contentions are the reports of the Geological Survey, which show that, although Mr. Stoll has cited particular instances to refute the findings of the Geological Survey as to the annual consumption of such coal in Alaska and as to the average price paid for

³ H. Rept. No. 1178, p. 15, 63d Cong., 2d sess. (1914).

such coal, the shipments and sales which he has reported reflect abnormal conditions which prevailed in Alaska in 1946, during a period of extensive military construction, and that the instances which he reports would not be repeated in normal times. In addition, the Geological Survey points to the fact that, although there is a substantial market for metallurgical coke in the Pacific Northwest, Mr. Stoll has presented nothing to show that he could successfully compete in that market with coal from the highly mechanized mines in the Western States.

From a review of the entire record, I conclude that it fails to show such a need for coking and blacksmithing coal in Alaska, or such a probability of coal from this land being able to compete successfully in the market of the Pacific Northwest as would justify the opening of a new mine. The decision of the Commissioner, accordingly, was correct and should be affirmed. However, it is possible that the situation may have changed substantially since the compilation of the record in this proceeding was completed. If so, there would be no objection to the submission of a new application for a lease covering the land involved in this proceeding.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Commissioner of the General Land Office is affirmed, but the affirmance is without prejudice to the right of Mr. Stoll to file a new application for the same land, if he so desires, and if he believes that the situation has changed substantially since the time of the most recent submission of data regarding this matter.

MASTIN G. WHITE,
Solicitor.

THOMAS OWEN WESTBROOK

A-24233

Decided February 28, 1949

Homestead Entry—Economic Sufficiency of Entry—Entry for Less Than a Legal Subdivision.

- A homestead entry is properly rejected for land in the floodway of a river which is not suitable for crop production because of annual floods on the land.
- A homestead entry can properly be allowed for a tract of land which, considered by itself, is not a self-sufficient economic unit but which, when its use in conjunction with other available lands is considered, does constitute a self-sufficient unit.
- A homestead entry will not be permitted for less than a legal subdivision, but in special circumstances, where the public interest is not prejudiced, a segregative survey of an area less than a legal subdivision will be directed in order to permit the entry to be made.

February 28, 1949

APPEAL FROM THE GENERAL LAND OFFICE¹

Thomas Owen Westbrook wrote the General Land Office on March 27, 1940, that he wished to make a homestead entry on certain land and requested application blanks. The forms were sent to him on December 15, 1941, and he returned them, completed, on January 26, 1942. On November 4, 1944, the Assistant Commissioner of the General Land Office rejected the application for the reason that most of the land applied for (lots 8, 9, 10, sec. 19, and lot 1, sec. 30, T. 16 N., R. 7 E., 5th P. M., Arkansas) is within the floodway of the St. Francis River, lying east of the west levee of the river, and is unsuitable for crop production because of annual inundation of the land by floods. The Assistant Commissioner observed that approximately 20 acres of the land applied for lies west of the levee and is suitable for crops, but that this acreage is too small for a self-sustaining farm unit.

Because Mr. Westbrook had entered the military service, an appeal was filed by his attorney. At the latter's request, action on the appeal was suspended until Mr. Westbrook's discharge from the military service and from hospitalization for injuries sustained in the service, which left him seriously disabled.

On appeal, it is asserted that Mr. Westbrook went on the land in July 1940; that he built a two-room house on the 20-acre tract west of the levee; that he cleared and cultivated 14 acres of that tract, growing corn and cotton on it; and that he cut the underbrush from the land lying in the floodway, using that land for grazing purposes. It is also stated that Mr. Westbrook was in partnership with his father, who owned the land adjoining the 20-acre tract, and that they operated a successful livestock business, which depended upon use of the land in the floodway for summer pasturage. It is admitted that the floodway land is not suitable for crop production, but it is contended that the floodway land can be used in conjunction with the 20-acre tract to comprise an ideal stock-raising unit, as sufficient corn for feed can be raised on the 20-acre tract.

In view of the admitted fact that the land in the floodway is not suitable for the production of agricultural crops, the Assistant Commissioner was correct in rejecting the application as to that land. Other applications for homestead entries in the floodway of the St. Francis River have been uniformly rejected. *John Pinkney Colbert*, A-24229, February 27, 1946; *Everett Harvey Elder*, A-24111, March 4, 1946 (both unreported).

As for the 20 acres west of the levee, it seems undisputed that the land is suitable for crop production. The only point at issue is

¹ Effective July 16, 1946, the Grazing Service and the General Land Office were abolished and their functions were transferred to the Bureau of Land Management by section 403, Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876 : 7776).

whether the tract is a self-sustaining unit. Considered by itself, the tract may not be a self-sufficient unit. However, the facts in this case indicate that the 20-acre tract has been successfully used by Mr. Westbrook in conjunction with his father's land and the floodway land to furnish him an adequate livelihood.² It is not improper to couple the floodway land with the 20-acre tract in determining the economic sufficiency of the latter, because an entryman on the tract would acquire a preference right to a grazing lease on the adjoining floodway land (43 U. S. C., 1946 ed., sec. 315m). Moreover, there is no requirement in the homestead law that an entry must be entirely self-sufficient, although the economic sufficiency of a tract is an important element to consider in determining whether land should be classified as suitable for homestead entry.

The public interest requires that the floodway land remain indefinitely in Federal ownership for flood-control purposes. The small acreage west of the levee, however, is not needed for that purpose or for any other public purpose. If there is any reasonable prospect that the land can be successfully homesteaded, there seems to be no adequate justification for refusing an entry on the land. Particularly is that true in this case, where the applicant has been seriously disabled as the result of his war service and is anxious to resume an economic pursuit which proved to be successful in the past. It is the recognized policy of the Government to assist and encourage veterans in re-establishing themselves in civilian life, and every reasonable effort should be made to foster that policy.

The Assistant Commissioner of the General Land Office recognized the propriety of disposing of the land west of the levee and suggested that a public-sale application or an additional farm-entry application should be filed for the land. Mr. Westbrook cannot make an additional farm entry because he does not own the adjoining land (43 U. S. C., 1946 ed., sec. 161). He objects to the public-sale procedure on the ground of its possible high cost to him. In view of the fact that the highest use of the tract seems to be for the production of agricultural crops, it appears that disposal to Mr. Westbrook under the homestead laws should be allowed in the circumstances of this case.

Mr. Westbrook's entry, of course, cannot be allowed for the 20 acres at this time because the land consists of only part of a legal subdivision, and entry cannot be made for less than a minimum legal subdivision

² The work performed by the appellant on the land in 1940 is not considered as establishing any equities in his favor. The land had been withdrawn from entry under the general withdrawal order of February 5, 1935 (Executive Order No. 6964), and was not subject to occupation. The appellant, therefore, was occupying the land without authority of law when he cleared and cultivated it and built a cabin on it.

March 1, 1949

(40-acre tract) or a fractional lot. In special circumstances, however, a segregative survey will be ordered where adherence to the general rule would not serve any public interest. *Luckey v. Huseman*, 56 I. D. 31 (1936); *State of Arizona*, 53 I. D. 149 (1930); *Rubert Ray Spencer*, 60 I. D. 198 (1948). Such circumstances exist in this case.

In conjunction with his homestead entry, Mr. Westbrook will be afforded the opportunity to apply for a grazing lease on the land in the floodway.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Assistant Commissioner is affirmed insofar as it relates to the land in the floodway, but is reversed insofar as it relates to the land west of the levee, and the case is remanded to the Bureau of Land Management with instructions to allow the entry as to the land west of the levee after a segregative survey of the land shall have been made.

M^{AS}TIN G. WHITE,
Solicitor.

EL MIRADOR HOTEL COMPANY

A-25287

Decided March 1, 1949

Gerard Scrip—Acquired Land—Status of Reconveyed Public Land.

The term "public lands" generally does not include lands acquired by the United States from private ownership.

Public land which has been properly patented and has passed into private ownership does not regain its status as public land upon being acquired subsequently by the United States through purchase or condemnation.

Gerard scrip cannot be located on land acquired by the United States from private ownership, because such land does not constitute public land within the meaning of the scrip act.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The El Mirador Hotel Company filed a Gerard scrip application for four tracts of land in the city of Palm Springs, California. The acting manager of the district land office rejected the application on the ground that the land had been patented and that there was no record of a reconveyance to the United States. The Director of the Bureau of Land Management affirmed this action. The applicant appealed to the head of the Department.

On April 22, 1948, I issued an interim order allowing the applicant 30 days in which to submit evidence in support of its application and appeal and to show cause why its application should not be rejected for noncompliance with 43 CFR 296.4.

The appellant has submitted a supplementary showing, which includes a copy of the decree entered as of June 22, 1942, on declaration of taking No. 2271-H in the District Court of the United States for the Southern District of California, Central Division, whereby the United States acquired title to these tracts of land for military purposes. This evidence and a supplementary investigation establish that the United States was the owner of the land when the scrip application was filed on June 5, 1947, and is still the owner of the land.

However, under the Gerard Scrip Act (10 Stat. 849), the scrip can only be used in applying for "public lands." The term "public lands" generally does not include lands acquired by the United States from private ownership. See, for example, 40 Op. Atty. Gen. 9 (January 3, 1941).

To hold that acquired lands are "public lands" would lead to absurd consequences. A tract of private land is usually purchased by the Federal Government for a particular purpose. If it became "public land" upon acquisition by the Government, it would immediately be subject to entry, selection, location, and other disposition under the public-land laws, despite the fact that it was acquired for a specific governmental purpose. A construction of the law permitting such a fantastic result would obviously be untenable.

The appellant claims that the acquired land in this case is "public land" because it was public land before it passed into private ownership. *Northern-Pacific Railway Co. v. McComas*, 250 U. S. 387 (1919), upon which the appellant relies, does not support its contention. In that case, patents were erroneously issued to a railroad for place lands to which a claim had previously attached. The railroad-grant act specifically granted to the company only place lands which were free from claims. In recognition of the error, the railroad reconveyed the land to the United States. The Supreme Court stated that this operated to restore the land to its prior status as public land. The Court stressed the fact, however, that the patents had passed only the naked legal title to the land and that the United States in equity remained the true owner and was entitled to a reconveyance.

The land for which the appellant has applied occupies an entirely different status. It was not erroneously patented; the full legal and equitable title passed to the patentees; and the United States at no time was entitled to a reconveyance. The original status of the land as public land furnishes no logical basis for distinguishing it from other land which has been acquired by the United States from private ownership.

March 4, 1949

Consequently, it must be concluded that the land in question is not "public land" within the meaning of the Gerard Scrip Act.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

O. R. WILLIAMS

A-25442

Decided March 4, 1949

Resurveys—Reestablishment of Township Corner.

The Federal Government lacks power to affect, by means of a second survey, the property rights acquired by private persons under an official survey. Where the reestablishment of a township corner on a second survey is supported by substantial evidence, a protest accompanied by affidavits of conflicting evidence does not necessarily warrant a further survey or investigation of the township corner.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

In 1941 and 1942, Assistant Cadastral Engineer Walsh of the General Land Office¹ made a dependent resurvey of T. 20 S., R. 6 E., Huntsville Meridian, Alabama, at the request of the United States Forest Service. Shortly after the field work was completed, O. R. Williams filed a protest against the resurvey insofar as it reestablished the southeast corner of the township. Mr. Williams urges that the true corner is marked by a large white rock, which is 51 feet west and 12 feet south of the corner as reestablished by Mr. Walsh's resurvey.

The south and east boundaries of the township were surveyed in 1832 by Deputy Surveyor LeRoy May, and the plat of survey was approved on February 26, 1834.

In making his resurvey, Mr. Walsh did not find the wooden stake with which Mr. May had marked the southeast corner. Mr. Walsh's field notes indicate that he reestablished the southeast corner of the township on the basis of secondary evidence, as follows: Bennett M. Horn, county surveyor of Talladega County, Alabama, and until recently also county surveyor of Clay County, Alabama, pointed out the southeast corner to Mr. Walsh. Mr. Horn said that he was familiar with the corner because he had reestablished it in 1918 from the stump hole of the original northwest bearing tree, a chinquapin. Mr. Horn stated to Mr. Walsh that the stump hole had been identified for him at

¹ Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management by section 403, Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

that time by nearby residents, who knew with certainty the location of this particular tree. In addition, Anse Williams, who for many years had operated a blacksmith shop nearby, informed Mr. Walsh regarding the location of the northeast bearing tree, an oak, and the northwest bearing tree, which he said he remembered very well. Mr. Walsh then located the southeast corner from these two positions, and found that it checked very closely with the corner as located by Mr. Horn. The point thus determined was 92 links S. $0^{\circ} 14'$ W. of a large red oak tree with old blazes, apparently marked to determine the line between sec. 36, T. 20 S., R. 6 E., and sec. 31, T. 20 S., R. 7 E. That corner was found by Mr. Walsh to be 150 links (the record distance in Mr. May's survey) south of a branch, or creek, whose course is southwest and which had been noted in the May survey. To verify the position of the southeast corner of the township, Walsh then went eastward and found, at a distance of 40.06 chains and at a bearing of S. $89^{\circ} 26'$ E., the local quarter-section corner for sec. 31, T. 20 S., R. 7 E., and sec. 6, T. 21 S., R. 7 E. The record distance of this quarter-section corner noted in the May survey was 40.00 chains.

On the basis of the evidence outlined above, corroborated by the close and regular relationship of the courses and distances from the bearing trees, the branch, and the eastward local quarter-section corner, Mr. Walsh concluded that he had found the point for the original southeast corner established by Mr. May, and he thereupon marked the corner with a standard Government corner post.

Upon O. R. Williams' insistence that the southeast corner, as thus reestablished, was erroneous, Mr. Walsh returned to the land twice for further investigations. In his supplemental reports, he concluded that his corner was a proper reestablishment of the May corner.

The Director of the Bureau of Land Management accepted the resurvey on May 14, 1947, and, by a decision dated December 8, 1947, dismissed O. R. Williams' protest.

O. R. Williams has filed an appeal, accompanied by a number of affidavits of local residents, including Anse Williams. In substance, they state that the large stone lying on the surface of the ground 51 feet west and 12 feet south of the Walsh corner has always been recognized as the proper southeast corner.

There is a sharp conflict between the evidence relied upon by Mr. Walsh and the data in the affidavits submitted by O. R. Williams. In some respects, this conflict is irreconcilable. If it appeared that the Walsh resurvey would have a material effect upon the ownership of the land near the southeast corner, this Department probably would order a new investigation of the matter, despite the additional expense involved.

The fact is, however, that the Walsh resurvey will have no effect upon the private ownership of land near this corner. All the land in

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section 36 was patented long ago, and all of it is still privately owned, except the NW $\frac{1}{4}$ SW $\frac{1}{4}$, which was repurchased by the United States for the Forest Service. The Walsh resurvey cannot establish the boundaries or survey lines of the privately owned land in the vicinity of the corner. The Federal Government is without power to affect, by means of a second survey, the property rights acquired by private persons under an official survey.² Indeed, the Secretary of the Interior, who administers the public-land laws of the United States, has no jurisdiction over land for which a patent has issued.³ Any conflicts that may develop among private landowners over the true location of the southeast corner of the township can be resolved by the Alabama courts.

Insofar as the Government's land is concerned, the adoption of the southeast corner fixed by Mr. Walsh, instead of the point urged by O. R. Williams, involves an area of about $\frac{23}{100}$ of an acre. The land has only nominal value. None of it is claimed by O. R. Williams or by any of the affiants who support his protest.

In the light of these considerations, and as the Walsh corner can be reasonably substantiated on the basis of the evidence in the record, I conclude that O. R. Williams' protest does not warrant another investigation of the southeast corner of the township.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 23, Order 2509; 14 F. R. 307), the decision of the Director of the Bureau of Land Management dismissing O. R. Williams' protest is affirmed.

MASTIN G. WHITE,
Solicitor.

FEDERAL ACQUISITION OF LAND IN CALIFORNIA

State Consent—Transfer of Jurisdiction.

The power of the United States to acquire land within a State for use in connection with the performance of its functions cannot be denied or hampered by State law.

Although the consent of a State is not essential to the acquisition of title to land within the State by the United States, such consent is necessary for the acquisition by the Federal Government of jurisdiction over the land.

² Act of March 3, 1909 (35 Stat. 845; 43 U. S. C., 1946 ed., sec. 772); *Lindsey v. Hawes*, 2 Black (67 U. S.) 554 (1862); *Gleason v. White*, 199 U. S. 54 (1905); *Gazzam v. Lessee of Elam Phillips*, 20 How. (61 U. S.) 372 (1857), overruling *Brown's Lessee v. Clements*, 3 How. (44 U. S.) 650 (1845); *Cragin v. Powell*, 128 U. S. 691, 698 (1888); *Greene v. United States*, 274 Fed. 145 (C. C. A. 5th, 1921), *aff'd* 260 U. S. 662 (1923); *Frank P. Ryan*, 13 L. D. 219 (1891); *Carlos C. Burr*, 15 L. D. 395 (1892); *Hiram Brown*, 13 L. D. 392 (1891); *Edward N. Marsh*, 5 L. D. 96 (1886); *State of New Mexico*, 50 L. D. 147 (1923); *Emily W. Thurston*, 28 L. D. 264 (1899).

³ *Barden v. Northern Pacific R. R. Co.*, 154 U. S. 288, 331 (1894); *West v. Standard Oil Co.*, 278 U. S. 200 (1929); *Love v. Flahive*, 205 U. S. 195, 199 (1907); *United States v. Schurz*, 102 U. S. 378 (1880); *Burke v. Southern Pacific R. R. Co.*, 234 U. S. 669 (1914).

A proffered cession by a State of jurisdiction over land within the State does not *ipso facto* transfer jurisdiction to the United States. There must, in addition, be an acceptance of jurisdiction by the United States through the giving of an appropriate notification to the State.

Section 126 of the California Government Code is applicable only to acquisitions of land by the United States in California where the Federal Government seeks to obtain from the State a cession of jurisdiction, either exclusive or partial, over the land.

M-35067

MARCH 4, 1949.

TO THE SECRETARY.

This responds to the request for an opinion on the question whether the United States, in acquiring land within the State of California, must necessarily comply with the conditions prescribed in section 126 of the California Government Code, as amended (Calif. Stats. 1947, ch. 1532). That section reads, in part, as follows:

Notwithstanding any other provision of law, general or special, the Legislature of California consents to the acquisition by the United States of land within this State upon and subject to each and all of the following express conditions and reservations; in addition to any other conditions or reservations prescribed by law:

(a) The acquisition must be for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, or other public purpose within the purview of Clause 17 of Section 8 of Article I of the Constitution of the United States, or for the establishment, consolidation and extension of national forests under the provisions of the act of Congress approved March 1, 1911 (36 Stat. 961), known as the "Weeks Act";

(b) The acquisition must be pursuant to and in compliance with the laws of the United States;

(c) The United States must in writing have assented to acceptance of jurisdiction over the land upon and subject to each and all of the conditions and reservations in this section prescribed;

(d) The conditions prescribed in subdivisions (a), (b), and (c) of this section must have been found and declared to have occurred and to exist, by the State Lands Commission, and the commission must have found and declared that such acquisition is in the interest of the State, certified copies of its orders or resolutions making such findings and declarations to be filed in the office of the Secretary of State and recorded in the office of the county recorder of each county in which any part of the land is situate; * * *

It will be noted that section 126 does not purport to forbid the United States to acquire land in the State of California except with the consent of the State and subject to the conditions prescribed in the section. If so construed, the section would probably be unconstitutional, for it has long been established that the power of the United States to acquire land within a State for use in connection with the performance of its functions cannot be denied or hampered by State law. The authority of the United States to make such acquisitions is inherent in its sovereignty. *Kohl v. United States*, 91 U. S. 367 (1875); *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525 (1885); *Chappell v. United*

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States, 160 U. S. 499 (1896); *James v. Dravo Contracting Co.*, 302 U. S. 134 (1937).

The acquisition by the United States of title to land, however, is to be distinguished from the acquisition by the United States of jurisdiction over the land. Ownership and use by the United States of land in a State do not necessarily withdraw the land from the jurisdiction of the State. *James v. Dravo Contracting Co.*, *supra*. Although the consent of a State is not essential to the acquisition of title to land within the State by the United States, such consent is necessary for the acquisition by the Federal Government of jurisdiction over the land. Article I, Section 8, Clause 17, of the United States Constitution, grants to Congress power "To exercise exclusive Legislation * * * over all Places purchased *by the Consent of the Legislature of the State* in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." [Italics supplied.] It is to give the consent of the State, as contemplated by this provision of the Constitution, and thus to make possible a transfer to the United States of jurisdiction over land acquired by the Federal Government within the State, that State statutory provisions such as section 126 of the California Government Code are enacted.

A proffered cession by a State of jurisdiction over land within the State, however, does not *ipso facto* transfer jurisdiction to the United States. The United States is not compelled to accept jurisdiction, and may decline it. *Silas Mason Co. v. Tax Commission of Washington*, 302 U. S. 186, 207 (1937). In order to establish a definite procedure for accepting transfers of jurisdiction, Congress amended section 355 of the Revised Statutes on February 1, 1940 (40 U. S. C., 1946 ed., sec. 255), so as to provide that, until notification is given a State of the acceptance by the United States of exclusive or partial jurisdiction over an area of land, it shall be conclusively presumed that no such jurisdiction has been accepted by the United States. *Adams v. United States*, 319 U. S. 312 (1943).

From this discussion, it is clear that a Federal agency, in acquiring land within California, need not follow the procedure prescribed in section 126 of the California Government Code unless it desires to obtain from the State a cession of jurisdiction, either exclusive or partial, over the land. If only an acquisition of title is sought, without a transfer of jurisdiction, the Federal agency is not "violating" the State law when it fails to proceed in accordance with section 126. As that section has no application to acquisitions of land by the United States where no transfer of jurisdiction is sought, it imposes no requirement on a Federal agency that is merely acquiring title to land.

MASTIN G. WHITE,
Solicitor.

ROYALTY REDUCTION

Cooperative Agreement—New Deposit—Discovery.

Under clause (3) of section 12 of the act of August 8, 1946, a reduction of royalty on a lease subject to a unit or cooperative agreement may be allowed on production from a new oil and gas deposit discovered after May 27, 1941, only if the discovery was made on land committed to the agreement.

Land operated by the Standard Oil Company of California in the Coalinga-Guijarral Hills unit area pursuant to its collateral agreement of July 15, 1938, with the parties to the cooperative agreement of the same date for the development and operation of the Coalinga-Guijarral Hills unit area was not committed to the latter agreement, within the meaning of clause (3) of section 12 of the act of August 8, 1946.

M-35073

MARCH 24, 1949.

TO THE SECRETARY.

My opinion has been requested as to whether the holders of oil and gas lease, Sacramento 023382 (b), are entitled to the royalty-reduction benefits provided by clause (3) of section 12 of the act of August 8, 1946 (30 U. S. C., 1946 ed., sec. 226c). An application for such benefits has been filed by the present colessees, Los Nietos Company, Seaboard Oil Company of Delaware, Honolulu Oil Corporation, and Carrie Estelle Doheny.

Lease, Sacramento 023382 (b), was issued on July 2, 1938. It provides for the payment to the United States of royalty on a sliding-scale basis, ranging from 12½ to 33⅓ percent.

Section 12 of the act of August 8, 1946, provides, in part, as follows:

From and after the effective date of this Act, the royalty obligation to the United States under all leases requiring payment of royalty in excess of 12½ per centum, except leases issued or to be issued upon competitive bidding, is reduced to 12½ per centum in amount or value of production removed or sold from said leases as to * * * (3) any production on or allocated to a lease pursuant to an approved unit or cooperative agreement from an oil or gas deposit which was discovered after May 27, 1941, *on land committed to such agreement*, and which is determined by the Secretary to be a new deposit, where such lease was included in such agreement at the time of discovery, or was included in a duly executed and filed application for the approval of such agreement at the time of discovery. [Italics supplied.]

On July 15, 1938, Petroleum Securities Company, Seaboard, and Honolulu, which were then the colessees under lease, Sacramento 023382 (b), entered into a cooperative agreement (I-Sec. No. 296) for the development of the Coalinga-Guijarral Hills unit area, pursuant to sections 27 and 17 of the Mineral Leasing Act, as amended by the acts of March 4, 1931 (46 Stat. 1524), and August 21, 1935 (49 Stat. 676), respectively. The agreement was approved by Acting Secretary Slattery on October 17, 1938. The unit area outlined in the agreement comprised about 8,850 acres, of which 2,300 acres

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(or 26 percent) were Federal land. The three parties to the agreement owned or controlled approximately 1,850 acres of the Federal land, including the land subject to lease, Sacramento 023382 (b), and 1,350 acres of privately owned land, or 36 percent of the unit area. The Standard Oil Company of California owned or controlled about 3,850 acres, or 44 percent of the unit area, all of this acreage being privately owned.

Standard was not a party to the cooperative agreement. However, it executed a collateral agreement on July 15, 1938, with Petroleum Securities, Seaboard, and Honolulu, whereby Standard agreed to observe certain provisions of the cooperative agreement with respect to its operations on its land in the unit area.

On February 17, 1943, Standard completed on its land in the unit area a well to an oil and gas deposit known as the Pleasant Valley Pool. A number of other wells were later drilled in the pool, including three wells drilled under lease, Sacramento 023382 (b).

The applicants assert that the Pleasant Valley Pool constitutes a new oil and gas deposit, within the meaning of clause (3) of section 12 of the act of August 8, 1946, and that they are therefore entitled to have the royalty rate under their lease reduced to a flat 12½ percent.

The Director of the Geological Survey concurs in the view that the Pleasant Valley Pool is a new deposit. As the discovery was made after May 27, 1941, and as the applicants' lease was included in an approved cooperative agreement at the time of the discovery, the only question presented is whether the discovery was made "on land committed to such agreement," within the meaning of clause (3) of section 12 of the act of August 8, 1946.

As Standard was not a party to the cooperative agreement, its land on which the discovery was made could have been committed to such agreement only by means of the collateral agreement. However, section 1 of the collateral agreement expressly recited that Standard's "lands are not and will not be subject to said Cooperative Agreement." Thus, the parties to the collateral agreement made it unmistakably clear that none of Standard's land was to be regarded as committed to the cooperative agreement.

Furthermore, an examination of the two agreements reveals that Standard did not agree unqualifiedly to observe any of the provisions of the cooperative agreement with respect to operations on its land.

Thus, in section 5 of the cooperative agreement the parties agreed to drill wells only at the locations designated on a well-spacing plat, except where surface conditions required a deviation, and to drill no more than one producing well during each calendar year to each 80 acres of land, except under certain conditions. Standard agreed in

section 3 of the collateral agreement to observe the well-spacing pattern, but other exceptions were provided for in addition to the exception noted in section 5 of the cooperative agreement. Still another exception to the spacing requirement was added as to a certain portion of Standard's land by an amendment to the collateral agreement on April 28, 1941. Moreover, Standard did not agree to observe the provision in section 5 of the cooperative agreement as to rate of drilling.

Section 6 (a) of the cooperative agreement provided that all operations, including drilling and producing, should be conducted without reasonably avoidable loss of reservoir energy and so as to provide for economical and efficient development of the unit area, and further provided that production should be without waste, and, unless necessary to prevent drainage, should be limited to such production as could be put to beneficial use with adequate realization of fuel values and should be limited by the beneficial demand for oil or gas. No such provision was included in the collateral agreement.

Section 6 (b) of the cooperative agreement provided that production by each operator should be in conformity with allocations of production under a schedule adopted by the holders of the operating rights, with the approval of the Secretary of the Interior, which schedule should establish the production to be had from each producing 20-acre tract in the unit area. Section 4 of the collateral agreement provided for production under a schedule which was not subject to the approval of the Secretary.

Besides these variances, the collateral agreement expressly provided (section 6) that nothing in it should be deemed to subject Standard's land or any operations thereon to any regulatory power which the Secretary of the Interior might exercise over lands of the United States or other lands included in and subject to the cooperative agreement. The collateral agreement also provided (section 5) that it was subordinate to the provisions of any lease, operating agreement, or other contract under which the parties operated the lands included in the agreement, whereas the cooperative agreement provided (section 16), in effect, that it was subordinate only to such lease and contract provisions as were required to be observed by the parties to the agreement in order to prevent the forfeiture or cancellation of their leases or contracts.

This comparison of the provisions of the collateral agreement and of the cooperative agreement clearly shows that Standard's land was not fully committed to the provisions in the cooperative agreement governing operations on the private lands which were subject to such agreement, and that the statement in the collateral agreement to the effect that Standard's land was not to be subject to the cooperative agreement was included with the full understanding of the parties that the statement correctly reflected the actual situation.

April 19, 1949

In view of these considerations, I do not believe that Standard's land was or is committed to the cooperative agreement, within the meaning of clause (3) of section 12 of the act of August 8, 1946.

Therefore, as the discovery in this case was made on land that was not committed to the cooperative agreement, it is my opinion that the application for royalty-reduction benefits on oil and gas lease, Sacramento 023382 (b), fails to meet one of the prerequisites for favorable action prescribed by Congress in the governing statutory provision, and, accordingly, that the Department must necessarily deny the application.

MASLIN G. WHITE,
Solicitor.

MINERVA L. JONES STARKS v. FRANK P. MACKEY
MINERVA L. JONES STARKS v. C. A. BLACK

A-25351

Decided April 19, 1949

A-25374

Mining Claims—Discovery—Contests.

Only those mining claims relating to oil and the other minerals named in section 37 of the Mineral Leasing Act on which a valid discovery had been made prior to the effective date of the act, or on which work leading to a discovery was being diligently prosecuted on the date of the act and was thereafter continued to a valid discovery, were preserved by the section.

A recital in a notice of location or in a validating certificate that a valid mineral discovery has been made by the locator is not evidence of a discovery.

Evidence that a 3-foot layer of oily, greasy shale was discovered 2 feet below the surface of a mining claim falls short of establishing that a discovery of oil sufficient to validate the claim was made.

A mining claimant who institutes a contest against the issuance of an oil and gas lease on land which includes the claim has the burden of proving the validity of the claim.

If a mining claimant fails in a contest initiated by the claimant to establish the validity of the claim and the claim is adjudged null and void, such adjudication is effective only as to the interests in the claim which are represented in the contest.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

On August 1, 1946, two noncompetitive oil and gas leases for two adjoining blocks of land in Wyoming were issued to Frank P. Mackey and C. A. Black, respectively. On March 31, 1947, Mrs. Minerva L. Jones Starks filed an affidavit of contest against each lease, asserting that prior to February 25, 1920, she and seven others had located and made a discovery of oil on four placer mining claims, Blue Bird Nos. 12, 15, 18, and 19, covering land included in the Mackey lease, and on one placer mining claim, Blue Bird No. 9, covering

land included in the Black lease. A hearing in each contest was held before the acting manager of the district land office. At the conclusion of the hearings, the acting manager held that no discovery of oil had been made on the claims, and he recommended that the contests be dismissed.

Mrs. Starks appealed to the Director of the Bureau of Land Management. The Director held that the evidence failed to show that any valid discovery of oil had been made. He accordingly affirmed the acting manager's decisions and declared the mining locations to be null and void.

Mrs. Starks thereupon appealed to the head of the Department. At her request, an opportunity for the presentation of oral argument was afforded the contestant. The other parties were duly notified in advance of the time and place fixed for the argument, but they did not appear.

Prior to February 25, 1920, public lands containing oil deposits were subject to location and entry under the mining laws. On the date mentioned, the Mineral Leasing Act (30 U. S. C., 1946 ed., sec. 181 *et seq.*) was enacted. Section 37 of the act provided that deposits of oil, oil shale, gas, coal, phosphate, and sodium should thereafter "be subject to disposition only in the form and manner provided in this Act, except as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery." (41 Stat. 451.)

The only mining claims saved by the exception stated in section 37 were (1) those on which a valid discovery had been made by February 25, 1920, and (2) those on which a discovery had not been made by that date but on which work leading to a discovery was being diligently prosecuted on that date and was thereafter diligently continued to a valid discovery. *McGee v. Wootton*, 48 L. D. 147 (1921); *Cochran v. Bonebrake*, 57 I. D. 105, 109 (1940). No contention has been made in this case that the Starks claims fall in the second category. The only issue presented, therefore, is whether a discovery had been made on each of these claims prior to February 25, 1920.

In her contest affidavits, Mrs. Starks states that each of the five claims was located on February 10, 1920, and that a discovery of oil was made the next day on each claim by means of a well drilled on each claim to a depth that varied among the different wells from 6 to 11 feet. At the hearings, she submitted copies of the notices of location and of the validating certificates for the claims. All the notices and certificates were signed by W. H. H. Ward as attorney in fact for the eight original locators of the claims, H. B. Diehl, V. C. Diehl, M. S. Ward, G. M. Ward, H. C. Ward, M. A. Lawrie,

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Thos. Lawrie, and Ina Lawrie. Each validating certificate recited that the locators completed a well on the claim on February 11 to a depth of so many feet and obtained oil in sufficient quantities to justify a man of ordinary prudence in the expenditure of further time and money in the reasonable expectation of ultimately finding oil in large and commercial quantities.

The general rule is that a recital of a mineral discovery in a recorded notice of location is not evidence of the discovery. Such a recital is merely an *ex parte*, self-serving declaration on the part of the locator, and the discovery must be proved by other evidence. *Cole v. Ralph*, 252 U. S. 286, 303 (1920); *United States v. C. E. Strauss*, 58 I. D. 567, 571 (1943). In that respect, the recitals in the validating certificates recorded by W. H. H. Ward are indistinguishable from recitals in location notices, and, therefore, they constitute no evidence of the discoveries alleged in them.

The testimony of several witnesses was presented by Mrs. Starks at the hearings. Bud Dollard, John Kirk, and Ray Schweitzer testified at the hearing on Blue Bird Nos. 12, 15, 18, and 19; Bud Dollard and John Kirk also testified at the hearing on Blue Bird No. 9; and Mrs. Starks gave testimony at both hearings.

Ray Schweitzer testified that he visited the general area in 1944 and in later years, but he gave no testimony concerning discoveries on the claims. John Kirk said that in August 1920 he constructed a road in the vicinity of the claims by dragging railroad irons through the brush, but that he saw no oil wells or holes or any evidence of oil in the vicinity. Mrs. Starks testified that she visited the claims in the summer of 1919 with W. H. H. Ward and that Mr. Ward made mining locations on about 21 sections of land for her. She admitted that she was not on these claims in 1920 and that she did not see any oil on the claims.

Bud Dollard testified that in February 1920 he worked with H. C. Ward in drilling validating holes on Blue Bird Nos. 12, 15, 18, and 19. According to his testimony on direct examination, eight holes were drilled by Mr. Ward on the claims with a hand drill and auger to depths of from 8 to 12 feet. Water was poured into the holes and sediment was bailed out. According to the witness, the sediment consisted of oily, greasy shale, which had a noticeable odor of oil, and the water that was bailed out seemed to have a scum of oil on it. This purported discovery was made in a half dozen of the holes. Mr. Dollard stated that he "most assuredly" knew what oil was, and that he thought there was sufficient oil-bearing mineral on the claims to justify a prudent person in going on to production. Upon cross-examination, Mr. Dollard testified that he had discovered no loose oil in the

holes, but only shale, and that he did not know positively whether the scum on the water was oil. On redirect examination, he said that the formation in the eight holes was practically the same, about 2 feet of sand, 3 feet of shale, and dirt underneath.

In his testimony on Blue Bird No. 9, Mr. Dollard stated that the validating work was done in the late summer of 1920. He testified that shale of the type discovered on the other claims was also found on this claim.

From this summary of the testimony, it is obvious that no evidence was presented to sustain the allegation of a discovery prior to February 25, 1920, on Blue Bird No. 9. On the contrary, the testimony of Mr. Dollard indicates that the discovery, if any, on this claim was made in the late summer of 1920, after the Mineral Leasing Act became effective. Hence, the decision of the Director of the Bureau of Land Management rejecting Mrs. Starks' contest against the issuance of an oil and gas lease to Mr. Black on land containing Blue Bird No. 9 was clearly correct.

As for the four claims on land now included in the Mackey lease, Blue Bird Nos. 12, 15, 18, and 19, only the testimony of Mr. Dollard was relevant to the issue of discovery. Even if Mr. Dollard's testimony is viewed in the most favorable light, it falls far short of establishing that valid discoveries of oil were made on these claims.

The question in cases of this kind is whether "valuable mineral deposits" have been discovered. See *United States v. M. W. Mouat et al.*, 60 I. D. 280 (1949). If the evidence indicates that mineral deposits have been discovered, the test to be applied in determining whether such deposits are valuable is whether they are "such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine." *Cameron et al. v. United States*, 252 U. S. 450, 459 (1920).

In *Oregon Basin Oil and Gas Company*, 50 L. D. 244 (1923), oil was actually taken from a well drilled to a depth of 425 feet, but the Department held that a valid discovery had not been made in view of the fact that the deposit struck as a result of the drilling had no economic importance. In *United States v. Ruddock*, 52 L. D. 313 (1927), evidence that 35 barrels of oil were skimmed from water bailed from a well drilled on the claim was held to be insufficient to show a valid discovery. In *H. Leslie Parker*, 54 I. D. 165 (1933), bubbles of combustible gas, with a distinct odor of petroleum and rainbow colors indicating the presence of oil, were found in three wells drilled on the claim, but this was not sufficient to constitute a valid discovery. See also *Southwestern Oil Co. v. Atlantic and Pacific R. R. Co.*, 39 L. D. 335 (1910), and *Butte Oil Company*, 40 L. D. 602 (1912), where

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seepages of oil were held not to constitute adequate bases of valid discoveries.

No evidence at all was presented by Mrs. Starks to show that the shale encountered in the wells drilled on Blue Bird Nos. 12, 15, 18, and 19, has any value for oil. On the contrary, the fact that the shale is only 3 feet thick and is underlain by dirt indicates that the shale has no economic or commercial value. Certainly, if the minerals discovered on these claims were of sufficient value that a person of ordinary prudence would be warranted in the expenditure of further time and money to develop the claims, some effort would have been made to develop them during the years that have elapsed since the date of the alleged discoveries, February 11, 1920.

Although Mrs. Starks testified generally regarding the expenditure of money in efforts to develop mining claims, the evidence in the case suggests that Mrs. Starks and her associates have been interested in numerous other claims in the area, and her general statements as to time and money spent on attempts to develop mining claims, therefore, have little evidentiary value because they were not related to the specific claims now under consideration.

The burden of proof was on the contestant to show that the mining claims involved in these proceedings are valid. *United States v. Rud-dock, supra*. The contestant completely failed to sustain that burden. The contests, therefore, were properly dismissed in both cases.

One further point requires attention. In addition to affirming the decisions of the acting manager of the district land office in dismissing the contests, the Director of the Bureau of Land Management declared the claims to be null and void. These declarations, of course, can be effective only as to those interests in the mining claims that are represented in the contest proceedings. *Cf. United States v. State of Arizona, A-24175, April 25, 1946*. The evidence is confusing as to what interests are represented by Mrs. Starks. She was not one of the original locators of the claims, and she apparently acquired by deed only a $\frac{1}{8}$ interest in the claims from one of the original locators. However, she testified that she organized and was the manager of the National Locating Company and that this Company was the real party in interest with respect to these claims.

A final determination as to what interests in the claims Blue Bird Nos. 9, 12, 15, 18, and 19, are represented by Mrs. Starks in these proceedings is not essential to the disposition of her appeals. She contested the issuance of oil and gas leases to Messrs. Black and Mackey on the ground that she held valid mining claims on land included in the respective leases. The evidence in these proceedings shows that

the claims constituting the bases of the contests are not valid. Accordingly, these proceedings can be disposed of, to the prejudice of whatever interests Mrs. Starks represents, by affirming the action of the Director of the Bureau of Land Management in dismissing her contests.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the dismissal of the contests is affirmed.

MASTIN G. WHITE,
Solicitor.

STATE OF OREGON

A-24715

Decided May 19, 1949

Public Lands—Surveys—Islands—Value of Land.

The Secretary of the Interior is authorized, and is under a duty, to consider and determine what lands are public lands, what public lands have been or should be surveyed, and what public lands have been or remain to be disposed of by the United States.

An island in the Columbia River in the State of Oregon which was in existence when the State was admitted into the Union is public land of the United States until disposed of by the Federal Government, and may be surveyed by this Department.

The relative worthlessness in 1859, when Oregon was admitted to the Union, of a stable island in the Columbia River above high watermark and approximately one-half mile long does not preclude its survey as public land of the United States.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This is an appeal by the State of Oregon from a decision dated July 11, 1947, of the Director of the Bureau of Land Management, dismissing the State's protest against the acceptance, on July 31, 1943, of the survey of an island in the Columbia River, containing 62.73 acres and located north of lot 1, sec. 8, and lots 2, 3, and 4, sec. 9, T. 5 N., R. 28 E., W. M., Oregon.

The issue here is whether the island was in existence on February 14, 1859, when the State of Oregon was admitted into the Union pursuant to the act of that date (11 Stat. 383). If the island was not then in existence, it belongs to the State of Oregon, because the State upon its admission into the Union acquired title to lands in the beds of navigable rivers in the State, of which the Columbia River is one. *Scott v. Lattig*, 227 U. S. 229, 242-244 (1913). If the island was in existence on February 14, 1859, it remained public land of the United States until disposed of by the Federal Government. *Scott v. Lattig*, *supra*; *Moss v. Ramey*, 239 U. S. 538 (1916).

A hearing on the State's protest was held in the district land office,

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The Dalles, Oregon, on May 4 and 5, 1944, at which numerous witnesses testified. Briefs were filed by the State and by the Inland Navigation Company as intervener.¹ The register's decision of June 30, 1944, reviewed the evidence in detail, held that the island was a stable formation of land in existence above ordinary high water at the date of the State's admission into the Union, and dismissed the State's protest. Upon an appeal by the State to the Director of the Bureau of Land Management, the latter reviewed the evidence and affirmed the register's decision on July 11, 1947. The State thereupon appealed to the head of the Department.

The earliest written evidence of the existence of this island is that shown in the plat and field notes of the survey of fractional T. 5 N., R. 28 E., W. M., Oregon, made in September 1861, by deputy surveyor Timothy W. Davenport, approved by the surveyor general of Oregon on December 7, 1861. The township plat of that survey shows an unsurveyed formation of land in the Columbia River lying off the shore of lot 1, sec. 8, and lot 4, sec. 9. It is the only such formation of land in the river which is shown in this township. Mr. Davenport's field notes refer to this formation as "a low gravelly island or bar about 40.00 chains long,"² and describe the Columbia River at the west boundary of the township (about 2 miles away) as "62.80 chains broad and a deep and rapid current."³ None of the witnesses at the hearing had seen the island prior to 1894. Their testimony described the island from about 1894 on, and related to the nature of its vegetation, timber, soil, rocks, and water line, and its geologic structure and rock formations.

The State admits that the island was in existence in 1859 as "a low gravelly island or bar," but argues that "this so-called island above ordinary high water in 1859 was no more than a narrow strip, a shifting sand bar, a towhead, or other unsubstantial area then considered of little value," and that such an island formation is not public land subject to survey and disposition by this Department.

The Secretary of the Interior is authorized, and is under a duty, to consider and determine what lands are public lands, what public lands have been or should be surveyed, and what public lands have been or remain to be disposed of by the United States.⁴ It is also

¹ The Inland Navigation Company had filed in this Department several applications for this island, as follows: One application for a special-use permit (The Dalles 031854); two applications for public sale under 43 U. S. C., 1946 ed., sec. 1171 (The Dalles 031871 and 031964); and an application for a right-of-way under sections 1 and 4 of the act of March 3, 1875 (18 Stat. 482; 43 U. S. C., 1946 ed., secs. 934, 937) (filed with the case record of The Dalles 031854).

² Oregon Field Notes, vol. 15, p. 208. Forty chains are 2,640 feet.

³ *Ibid.*, p. 213.

⁴ *Litchfield v. Register and Receiver*, 9 Wall. (76 U. S.) 575, 577 (1869); *Knight v. United States Land Association*, 142 U. S. 161, 176, 178 (1891); *Kirwan v. Murphy*, 189 U. S. 35, 53 (1903); *Carrick v. Lamar*, 116 U. S. 423 (1886).

settled that this Department, acting for the United States, has the authority to extend or correct the surveys on public lands as may be necessary, including the surveying of lands omitted from earlier surveys.⁵

The factual question as to whether the island under consideration here was in existence when the State of Oregon was admitted into the Union on February 14, 1859, so as to justify the survey of the island as public land of the United States, was decided in the affirmative by both the register (now the manager) of the district land office and the Director of the Bureau of Land Management. The evidence has been reviewed independently on the present appeal, and, upon such review, it is concluded that the island actually did exist as an island of stable formation above ordinary high watermark on February 14, 1859. As an island in existence on the date of the State's admission into the Union, it constituted public land of the United States. This would have been so even if Surveyor Davenport had omitted the island from his survey in 1861, when he surveyed the meanders of the shore.⁶ But his survey did not omit the island. Although his survey did not indicate the boundary of the island in exact detail, it did indicate the island as an item of topography and showed that it was then in existence as "a low gravelly island or bar" which was about 2,640 feet, or a half mile, in length.⁷

The cases of *United States v. Lane*, 260 U. S. 662 (1923), and *Arthur Savard*, 50 L. D. 381 (1924), upon which the State relies, do not support its contention that this island is not now subject to survey because of its relatively little value in 1859.

United States v. Lane involved the question whether certain lots, patented under the public-land laws according to a plat of survey showing them bordering on a lake, should be governed by the general rule that the meander line of a watercourse is designed only to measure the sinuosity of the stream or body of water, the water line itself, not the meander line, constituting the boundary line,⁸ or whether those patents should be governed by the exception that where there has

⁵ *Scott v. Lattig*, 227 U. S. 229 (1913); *Moss v. Ramey*, 239 U. S. 538 (1916); *Whitaker v. McBride*, 197 U. S. 510, 516 (1905); *Kirwan v. Murphy*, 189 U. S. 35 (1903); *Gardner v. Bonestell*, 180 U. S. 362 (1901); *New Orleans v. Paine*, 147 U. S. 261 (1893); *Cragin v. Powell*, 128 U. S. 691, 698-699 (1888); *Otto F. Henneke*, A-24240, June 11, 1946; *O. O. Cooper*, A-24208, October 28, 1946; act of March 3, 1909 (35 Stat. 845, as amended); 43 U. S. C., 1946 ed., sec. 772.

⁶ *Scott v. Lattig*, 227 U. S. 229 (1913); *Moss v. Ramey*, 239 U. S. 538 (1916).

⁷ See *Otto F. Henneke*, A-24240 (June 11, 1946).

⁸ *Railroad Company v. Schurmetr*, 7 Wall. (74 U. S.) 272, 286-287 (1868); *Hardin v. Jordan*, 140 U. S. 371, 380 (1891); *Mitchell v. Smale*, 140 U. S. 406, 412-413 (1891); *Jefferis v. East Omaha Land Co.*, 134 U. S. 178, 194 (1890); *United States v. Lane*, 260 U. S. 662 (1923); *Whitaker v. McBride*, 197 U. S. 510, 512 (1905); *Horne v. Smith*, 159 U. S. 40, 42 (1895); *Producers Oil Co. v. Hansen*, 238 U. S. 325, 339 (1915); *Kean v. Calumet Canal and Improvement Co.*, 190 U. S. 452, 459 (1903).

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been fraud, or such gross error as amounts to fraud, in the survey, the meander line constitutes the boundary.⁹ The *Lane* case involved apparent excesses of land attached to the surveyed meander line; it did not involve the failure to survey an island, particularly an island approximately one-half mile in length.

The *Arthur Savard* case involved a refusal to grant his application for the survey, as public land, of a strip of mainland along the left bank of the North Platte River, together with a group of "islands" in front thereof which Mr. Savard alleged had been in existence but had not been surveyed when the township was surveyed in 1875. The facts in that case are substantially different from the facts in this case. No islands, either surveyed or unsurveyed, were reported in the 1875 survey that was involved in the *Savard* case. Moreover, the allegedly unsurveyed land actually consisted of excess mainland rather than islands, since the alleged "islands" were in an area between the main channel of the river and a small intermittent channel only 40 to 50 links wide and 6 inches deep during high water. These so-called "islands" were a part of the mainland, the small channel being in existence only at the time of high water.¹⁰

Inasmuch as both the *Lane* and *Savard* cases involved excess mainland rather than islands, those decisions are not applicable to the present case. Islands are distinct in character and configuration; whereas meanders are average lines which can and often do include excess mainland. The Supreme Court in the *Lane* case quoted the following language from its previous decision in the case of *Mitchell v. Smale*, 140 U. S. 406, 413 (1891):

* * * The difficulty of following the edge or margin of such projections, and all the various sinuosities of the water line, is the very occasion and cause of running the meander line, which by its exclusions and inclusions of such irregularities of contour produces an average result closely approximating to the truth as to the quantity of upland contained in the fractional lots bordering on the lake or stream. * * * Such lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed; * * *

⁹ *Jeems Bayou Club v. United States*, 260 U. S. 561 (1923); *Security Land & Exploration Co. v. Burns*, 193 U. S. 167 (1904); *French-Glenn Live Stock Co. v. Springer*, 185 U. S. 47 (1902); *Niles v. Cedar Point Club*, 175 U. S. 300 (1899); *Horne v. Smith*, 159 U. S. 40 (1895).

¹⁰ Neither the printed report nor the record in the *Savard* case is explicit on whether the high water referred to was ordinary high water or flood water. If it was flood water, the so-called islands clearly could not be anything except part of the mainland. Even if the reference could be construed to mean ordinary high water, the small channel would not have been meandered under surveying rules. Section 231, Manual of Instructions for the Survey of the Public Lands of the United States (1947), provides in part: "Shallow streams, and intermittent streams without well-defined channel or banks, will not be meandered, even when more than 3 chains [198 feet] wide." Hence, in the *Savard* case the proper meander line was at the main channel and none of the alleged islands could properly have been considered as islands, but only as part of the mainland.

The Court then went on to say in the *Lane* case (at p. 666) :

* * * The survey, taken as a whole, with the exception of two large tracts already mentioned, follows with a fair degree of accuracy the contour of the lake and the evident purpose was to include in it all the land to the water's edge. * * *

The doctrine that the water line, not the meander line, is generally the boundary of land bordering a watercourse is designed to cope with the approximations which the meander line represents to the surveyor. Such approximations, which result in the excess mainland involved in suits governed by this doctrine, are quite unlike the question whether an island was or was not in existence. The relative worthlessness of excess mainland between the meander line and the water line may be a determinative factor in cases involving the question as to whether the water line or the meander line is the boundary of a meandered lot. But the alleged relative worthlessness of the island in 1859 does not preclude its present survey as unsurveyed public land of the United States when it is clear that it was then in existence as a stable island above ordinary high water. Thus, in *United States v. Mission Rock Company*, 189 U. S. 391, 393 (1903), it was held that two islands which in 1850 "were barren, without soil or water, and were of no value for purposes agricultural or mineral," and had an area, respectively, of $\frac{1}{400}$ of an acre and $\frac{1}{100}$ of an acre, were public land of the United States. See, also, *State of Washington*, 57 I. D. 228, 229 (1940), affirming the dismissal of a protest by the State of Washington against the survey of nine previously unsurveyed islands in the Columbia River, varying in size from a small fraction of an acre to 20 acres.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Director of the Bureau of Land Management is affirmed.

MARTIN G. WHITE,
Solicitor.

MINING LOCATIONS ON COLVILLE SURPLUS LANDS

Indian Surplus Lands—Withdrawal—Mining Locations—Revocation of Withdrawal.

The departmental order of September 19, 1934, temporarily withdrawing the surplus lands of the Colville Indian Reservation and of other Indian reservations from disposal of any kind until the matter of their permanent restoration to tribal ownership under the Indian Reorganization Act could be given appropriate consideration, was issued in the exercise of the Secretary's implied power temporarily to withdraw such lands, and was not issued under the act of June 25, 1910, authorizing the temporary withdrawal of public lands of the United States; and, therefore, the lands so withdrawn

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are not subject to the provision of the 1910 act, which declares that lands withdrawn under it shall be open to entry and location under the mining laws of the United States insofar as metalliferous minerals are concerned. The fact that the Indians of the Colville Reservation voted on April 6, 1935, to exclude themselves from the operation of the Indian Reorganization Act, and thus made it impossible to accomplish the purpose for which the withdrawal of their surplus lands had been made in 1934, did not terminate the withdrawal as to such lands.

M-35049

MAY 24, 1949.

TO THE SECRETARY.

It has been requested that I express an opinion on the following question:

Are the undisposed-of surplus lands in the S½ of the Colville Reservation, Washington, which lands have been temporarily withdrawn from disposal of any kind by Departmental Order of September 19, 1934 (54 I. D. 559); as supplemented by an order dated November 5, 1935, open to entry and location of mining claims under the mining laws of the United States so far as the same apply to metalliferous minerals?

The surplus lands of the Colville Indian Reservation are traceable to the act of March 22, 1906 (34 Stat. 80), which provided for the allotment of 80 acres to each person "belonging to or having tribal relations on said Colville Indian Reservation," for the classification of unallotted lands on the reservation as "irrigable lands, grazing lands, timber lands, mineral lands, or arid lands," and for the disposal of the unallotted lands under the homestead, town-site, mineral, timber, and reclamation laws, except for areas reserved for certain special purposes.

By the departmental order of September 19, 1934, the surplus lands of the Colville Indian Reservation, together with lands of other Indian reservations in the same category, were "temporarily withdrawn from disposal of any kind, subject to any and all existing valid rights, until the matter of their permanent restoration to tribal ownership, as authorized by section 3 of the Act of June 18, 1934 * * * can be given appropriate consideration."¹ The supplemental order of November 5, 1935, mentioned in the question, merely added the surplus lands of several Indian reservations to the list of such lands withdrawn by the order of September 19, 1934. It did not in any way affect the withdrawal of the surplus lands of the Colville Indian Reservation.

The principal legislation relating to temporary withdrawals is the act of June 25, 1910 (36 Stat. 847), as amended by the act of August 24, 1912 (37 Stat. 497; 43 U. S. C., 1946 ed., secs. 141-142), which

¹ The act of June 18, 1934 (48 Stat. 984; 25 U. S. C., 1946 ed., sec. 461 *et seq.*), is commonly known as the Indian Reorganization Act.

authorizes the President temporarily to withdraw from settlement, location, sale, or entry "any of the public lands of the United States," subject to the qualification that all lands withdrawn under this act shall "at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals * * *." The President's power under this legislation has been delegated to the Secretary of the Interior.²

It will be observed that the 1910 act refers to "public lands of the United States." With respect to the question whether this term is applicable to the surplus lands of the Colville Indian Reservation, it may be noted that section 6 of the act of March 22, 1906, *supra*, provided that the proceeds of the disposal of such lands should be deposited in the Treasury of the United States to the credit of the Colville Indians and should be expended for their benefit under the direction of the Secretary of the Interior, and that section 9 of the 1906 act expressly provided that the United States should act as trustee for the Indians in the disposal of their lands. The surplus lands of the Colville Indian Reservation, therefore, are Indian trust lands, and, in a strict sense, they are not public lands of the United States. *Ash Sheep Co. v. United States*, 252 U. S. 159 (1920).

I believe that, apart from authority derived by the Secretary of the Interior from the President for the making of temporary withdrawals of public lands of the United States under the 1910 act, the Secretary was vested with implied power, by virtue of his broad authority and responsibility in connection with the administration of Indian affairs, temporarily to withdraw the Indian trust lands involved in the order of September 19, 1934, from disposal of any kind if he regarded such action as necessary or advisable in order effectively to discharge his functions with respect to the administration of Indian affairs. The Secretary's implied power to make temporary withdrawals of lands in connection with the administration of Indian affairs was recognized and confirmed by the Congress in section 4 of the act of March 3, 1927 (44 Stat. 1347; 25 U. S. C., 1946 ed., sec. 398d), which, in prohibiting the executive branch of the Government from subsequently making "changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians," declared in a proviso "That this shall not apply to temporary withdrawals by the Secretary of the Interior."

Any mandatory requirement in the act of March 22, 1906, that the Secretary of the Interior dispose of the surplus lands of the Colville

² See Executive Order 9337, dated April 24, 1943 (8 F. R. 5516), which apparently was issued in confirmation of a practice that had developed whereby the Secretary of the Interior exercised the President's power to make temporary withdrawals of public lands of the United States.

May 24, 1949

Indian Reservation had been superseded prior to September 19, 1934, by the provision in section 3 of the Indian Reorganization Act of June 18, 1934 (25 U. S. C., 1946 ed., sec. 463), authorizing the Secretary "to restore to tribal ownership the remaining surplus lands of any Indian reservation * * *." In view of this authorization for the permanent restoration of Indian surplus lands to tribal ownership, it appears that the Secretary of the Interior was justified in utilizing his implied power by temporarily withdrawing the Colville surplus lands and other similar Indian trust lands on September 19, 1934, from disposal of any kind in order to maintain the *status quo* until the matter of their permanent restoration to tribal ownership could be given appropriate consideration.

Therefore, I conclude that, in temporarily withdrawing, on September 19, 1934, the surplus lands of the Colville Indian Reservation and of other Indian reservations, which are Indian trust lands, from disposal of any kind, the Secretary of the Interior was exercising his implied power temporarily to withdraw such lands; that he was not acting under the act of June 25, 1910; and, therefore, that the lands so withdrawn have not been and are not now subject to the provision of the 1910 act, which declares that lands withdrawn under it shall be open to entry and location under the mining laws of the United States insofar as metalliferous minerals are concerned.

The Indians of the Colville Reservation voted on April 6, 1935, to exclude themselves from the operation of the Indian Reorganization Act. Because of this action by the Colville Indians, the restoration of the surplus lands of that reservation to tribal ownership, as contemplated at the time of the issuance of the order of September 19, 1934, could not be accomplished. (See 25 U. S. C., 1946 ed., sec. 478.) However, since a temporary withdrawal which was valid when made continues in operation until revoked by proper authority, notwithstanding the fact that the purpose of the withdrawal can no longer be realized (5 L. D. 432 (1887)), the vote of the Colville Indians did not, *ipso facto*, terminate the temporary withdrawal order of September 19, 1934, as to the surplus lands of that reservation.

While the propriety, from an administrative standpoint, of continuing the temporary withdrawal of the Colville surplus lands during the years following the adverse vote of the Colville Indians on accepting the provisions of the Indian Reorganization Act may be open to serious question, recent developments have substantially affected the situation in this respect. On February 7, 1949, a bill (H. R. 2432), providing for the restoration to tribal ownership of the surplus lands of the Colville Indian Reservation was introduced in the Eighty-first Congress. On May 9, the House Committee on Public Lands unanimously recommended the enactment of the bill, with some amendments

which do not affect the restoration to tribal ownership of the lands covered by the bill. On May 16, the House passed the bill and transmitted it to the Senate, where a companion bill (S. 1021) is pending. Because of these developments, the continuation of the withdrawal of the surplus lands of the Colville Indian Reservation pending final action by the Eighty-first Congress on the current legislative proposal regarding these lands would seem to be warranted.

Any previous statements by this office indicating that the withdrawal order of September 19, 1934, was issued under the act of June 25, 1910, are modified by this memorandum.

MASTIN G. WHITE,
Solicitor.

STATE OF CALIFORNIA

A-25411

Decided June 2, 1949

State Exchanges—Agreements Between States and Federal Agencies— Withdrawals—Valid Claims.

Questions relating to an exchange of lands with a State pursuant to section 8 of the Taylor Grazing Act, as amended, must be determined under the applicable law and regulations, and without regard to any purported agreement which may have been entered into between the State and an agency of the Federal Government which has no jurisdiction over the public lands involved in the proposed exchange.

Prior to its compliance with all the requirements of the statute and the supplementary regulations, a State applying for an exchange of lands under section 8 of the Taylor Grazing Act, as amended, does not acquire any rights in the selected lands, so as to prevent the withdrawal of such lands for public purposes.

A "valid claim" to public land may be less than a vested right in such land; and a pending exchange application from a State under section 8 of the Taylor Grazing Act, as amended, constitutes a "valid claim" to the selected land within the meaning of the act of March 19, 1948, which added public lands to the Shasta National Forest subject to such claims, so that the selected land continues to be subject to selection by the State.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On February 19, 1942, the State of California filed an application under subsection (c) of section 8 of the Taylor Grazing Act, as amended (48 Stat. 1269; 49 Stat. 1976; 43 U. S. C., 1946 ed., sec. 315g), to exchange some 43,000 acres of State lands, which were included within the boundaries of certain military reservations in the State, for an approximately equal amount of public lands selected by the State. The selected lands were stated to be "unappropriated, non-mineral, unreserved public lands NOT in a grazing district," and the application stated that the exchange was to be made "without any reservation to the United States of the mineral deposits in the selected

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lands or without any reservation to the State of the mineral deposits in the base lands." The State proposed that the exchange be made on an equal-acreage basis. The State requested that it be relieved of the requirement of filing with its application a corroborated affidavit relating to springs or water holes on the selected land (43 CFR 147.4).

On March 17, 1942, the State was informed by the Acting Assistant Commissioner of the General Land Office¹ that as the affidavit was required by a departmental regulation, his office had no authority to waive the requirement. The State was also informed that unless it elected to receive title to the selected lands with a reservation of minerals to the United States, it would be necessary for the General Land Office to determine the mineral or nonmineral character of the lands applied for by the State. In reply, the State explained that the exchange was initiated at the request of and for the benefit of the War Department, and that the requirement respecting an affidavit would hold up the exchange. Nevertheless, the General Land Office adhered to its position.

On July 3, 1942, however, at the request of an official of the War Department, the Assistant Commissioner of the General Land Office waived the requirement concerning an affidavit relating to springs or water holes; but the Assistant Commissioner informed the State that, inasmuch as it had been found necessary to have a field examination made as to part of the selected lands in order to determine the mineral or nonmineral character thereof, it had been decided to authorize a field examination of all the lands applied for in order to determine whether such lands contained springs or watering places, and that the report of the regional field examiner, if favorable to the State, would be accepted as a substitute for the usual nonwater affidavit.

From time to time, as it was determined from the records of the Department or from information developed as a result of the field examination that certain of the offered lands were unsuitable for use as base lands in the exchange, and that certain of the lands originally selected by the State were unavailable for selection under the State's application because of their mineral character or because of their appropriation to other uses prior to the selection by the State, portions of the application were rejected; and the State accordingly amended its original application by offering other base lands and making other selections of public lands. The last amendment of the State's application appears to have been made on September 19, 1945. Thereafter, action upon the application was suspended pending the out-

¹ Effective July 16, 1946, the General Land Office and the Grazing Service were abolished and their functions were transferred to the Bureau of Land Management by section 403 of Reorganization Plan No. 3 of 1946 (11 F. R. 7875; 7876; 7776).

come of contest proceedings brought against an alleged mining claim on a tract of selected land. The claim was declared null and void on December 17, 1946.

On November 6, 1947, approximately 16,000 acres of the lands selected by the State were withdrawn from entry (12 F. R. 8002) under the first form of withdrawal provided for in section 3 of the Reclamation Act of June 17, 1902 (32 Stat. 388; 43 U. S. C., 1946 ed., sec. 416).

Thereafter, on January 13, 1948, the Director of the Bureau of Land Management rejected the State's application insofar as it covered selected lands which had been withdrawn on November 6, 1947. The Director held that the lands withdrawn on that date were not subject to selection by the State.

The State appealed to the head of the Department from the rejection of its application with respect to the selected lands that were withdrawn on November 6, 1947.

On March 19, 1948, legislation (62 Stat. 83) adding certain lands of the United States to the Shasta National Forest, "subject to any valid claim or entry now existing and hereafter legally maintained," was enacted. Included among the lands mentioned in this statute as being added to the national forest are the 16,000 acres of selected lands which were withdrawn on November 6, 1947, and approximately 6,000 acres of other lands selected by the State.

It is first necessary to decide whether the State, by virtue of the submission of its exchange application prior to November 6, 1947, had already become vested with valid rights in the 16,000 acres of selected lands referred to in the withdrawal order of that date, so as to prevent the withdrawal order from becoming operative as to such lands.

Subsection (c) of section 8 of the Taylor Grazing Act, as amended, pursuant to which the State's application was submitted, provides, in part, as follows:

Upon application of any State to exchange lands within or without the boundaries of a grazing district the Secretary of the Interior shall, and is hereby, directed to proceed with such exchange at the earliest practicable date and to cooperate fully with the State to that end, but no State shall be permitted to select lieu lands in another State. The Secretary of the Interior shall accept on behalf of the United States title to any State-owned lands within or without the boundaries of a grazing district, and in exchange therefor issue patent to surveyed grazing district land not otherwise reserved or appropriated or unappropriated and unreserved surveyed public land; and in making such exchange the Secretary is authorized to patent to such State, land either of equal value or of equal acreage: * * *

When an exchange is based on lands of equal acreage and the selected lands are mineral in character, the patent thereto shall contain a reservation of all minerals to the United States; and in making exchanges of equal acreage the Secretary of the Interior is authorized to accept title to offered lands which are mineral in character, with a mineral reservation to the State.

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It is provided in subsection (d) of section 8 that—

Before any such exchange under this section shall be effected, notice of the contemplated exchange, describing the lands involved, shall be published by the Secretary of the Interior * * *; lands conveyed to the United States under this Act shall, upon acceptance of title, become public lands * * *.

The State contends, *inter alia*, that prior to the submission of the exchange application it had entered into a binding contract with the United States, acting through the War Department, to acquire these lands through an exchange; and, accordingly, that it had become the equitable owner of the selected lands under such contract. However, the lands sought to be acquired by the State are under the jurisdiction of the Department of the Interior, and the exchange application was submitted to this Department under an act of Congress which the Secretary of the Interior is authorized to administer. The War Department had no jurisdiction over the selected lands, and no authority to bind the United States with respect to their disposition, at the time when the alleged contract was made. *Cf. Catholic Bishop of Nesqually v. Gibbon*, 158 U. S. 155, 167 (1895); *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301, 309 (1903). Therefore, the question of the State's rights in the selected lands must be determined under the applicable law and the pertinent regulations promulgated by this Department, and without regard to any agreement which the State may have made with the War Department.

The State also contends that it had, prior to November 6, 1947, performed every act required of it by section 8 of the Taylor Grazing Act in order to be entitled to receive a patent to the selected lands; and that it had thereby become vested with rights in the selected lands. In connection with this point, the State relies upon *Payne v. New Mexico*, 255 U. S. 367 (1921), and *Wyoming v. United States*, 255 U. S. 489 (1921).

The cases cited in the preceding paragraph involved State lieu selections under sections 2275 and 2276 of the Revised Statutes, as amended (43 U. S. C., 1946 ed., secs. 851, 852), which provided that where school sections granted to a State were included in a military or other reservation, the State could select in lieu thereof an equal acreage of unappropriated, nonmineral surveyed land; and that the selection would constitute a waiver of the State's right to the school sections. Regulations promulgated by the Department (39 L. D. 39 (1910)) required that a lieu selection list be accompanied by an affidavit stating that the selected lands were nonmineral in character, a certificate showing that indemnity had not previously been granted for the base lands, and a certificate to the effect that the base lands had not previously been sold by the State and were not in the possession of any third person claiming from the State. Within 3 months

after filing the selection list, the State was required to file a certificate from the county recorder or a reliable abstractor that no instrument purporting to convey or encumber the title to the base lands was of record or on file in the recorder's office. The State was also required to publish for 5 weeks a notice of the selection, which was to be prepared by the register of the district land office upon receiving the selection list, and to file proof of publication within 90 days after receiving the notice for publication. Thereafter, the papers were to be submitted to the Commissioner of the General Land Office for final action.

In the *New Mexico* and *Wyoming* cases, the States complied with all the requirements outlined above, and the papers were forwarded to the Commissioner of the General Land Office for final action. Before he acted upon the selections, however, the school section which constituted the base land in one case was eliminated from the reservation in which it had been included on the date of the selection, and, in the other case, the selected land was placed in a petroleum reserve. For these respective reasons, the selections were rejected by the Department.

The Department's actions in rejecting the State's selections were reversed by the Supreme Court in the *New Mexico* and *Wyoming* cases. The Court declared that the lieu-selection statute constituted an offer by the Government to make an exchange of land, and that when a State accepted the proposal and complied fully with the statutory requirements and the supplementary directions of the Secretary of the Interior, the State thereby acquired the equitable title to the selected land.

The clear implication of the decisions in the *New Mexico* and *Wyoming* cases is that if the States had not fully complied with all the requirements prescribed by the pertinent law and regulations, there would not have been an acceptance by each State of the Government's offer, and the State would not have acquired any rights in the selected land. *Hobart L. Pierson*, 49 L. D. 436 (1923); *cf. State of New Mexico, Robert M. Wilson, Lessee, v. Robert S. Shelton and John T. Williams*, 54 I. D. 112 (1932), and *State of California, Robinson, Transferee*, 48 L. D. 384 (1921).

In the present proceeding, there are numerous requirements imposed by section 8 of the Taylor Grazing Act, as amended, and the supplementary regulations which the State of California had not complied with on November 6, 1947. In connection with the publication of the notice required by subsection (d) of section 8, the regulations provide that, after an application has been filed and the necessary investigations have been made by the Commissioner of the General Land Office (now the Director of the Bureau of Land Management), a notice of the exchange will be submitted to the State for publication; and that, after publication of the notice, the State shall submit proof

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of such publication (43 CFR 147.8, redesignated 43 CFR, 1947 Supp., 147.6). With respect to the conveyance by the State of title to the offered lands, as required by subsection (c) of section 8, the State is required to submit a duly recorded deed of conveyance of the offered lands (unless they are unsurveyed), a certificate that the offered lands have not been sold or otherwise encumbered by the State, a certificate by the county recorder or by an approved abstractor that no instrument purporting to convey or encumber the title to the offered lands is of record or on file in the recorder's office, and, if the offered lands have ever been held in private ownership, an abstract of title and a tax certificate (43 CFR 147.8, redesignated 43 CFR, 1947 Supp., 147.6). None of the steps required of a State in connection with an exchange of lands under section 8 had been taken as of November 6, 1947, by the State of California in the present case, with the exception of the filing of the exchange application. Of course, the notice to be published by the State of California was to be prepared and furnished to the State by this Department, and the Department had failed to perform its part of this procedure as of November 6, 1947. However, I am of the opinion that such failure on the part of the Department could not operate to confer upon the State vested rights in the selected lands under the decisions in the *New Mexico* and *Wyoming* cases.

It might be contended that section 8 of the Taylor Grazing Act, as amended, goes beyond the doctrine announced by the Supreme Court in the *New Mexico* and *Wyoming* cases and confers upon a State rights in selected lands upon the mere filing of an exchange application under that section. Section 8, as originally enacted, was construed by the Department as authorizing only those exchanges of lands with States which the Secretary of the Interior determined would benefit the public interest in the control of grazing on the public range under the Taylor Grazing Act. Solicitor's opinion, 55 I. D. 9 (1934). By the act of June 26, 1936, section 8 was amended so as to provide that upon the filing of an exchange application by a State, the Secretary "shall, and is hereby, directed to proceed with such exchange at the earliest practicable date and to cooperate fully with the State to that end." The legislative history of the 1936 act clearly indicates that the purpose of the quoted language was to deprive the Secretary of his discretion in the matter of determining whether an exchange application submitted by a State was in the public interest, and to require him to act upon such an application without regard to the factor of the public interest. Solicitor's opinions M-31956 (October 26, 1942) and M-33608 (April 22, 1944); *State of Montana*, A-20068 (November 3, 1936; modified January 13, 1937). However, nothing in the language of the 1936 amendment to section 8 or in its legislative history requires or warrants the conclusion that the amendment was intended to go so

far as to confer upon a State rights in selected lands merely upon the filing of an application for such lands pursuant to section 8.

In this connection, it should be noted that, under the Supreme Court's construction of the lieu-selection law involved in the *New Mexico* and *Wyoming* cases, the Department did not have an option to accept or reject a lieu selection; the Department could only ascertain whether the requirements for a selection had been met by a State. Nevertheless, the Court did not hold that a State acquired rights in selected land merely upon filing a selection list. Instead, a State's rights in selected land vested under the lieu-selection law only after the State had complied with all requirements of the law and the pertinent regulations. Similarly, it is reasonable to conclude that under section 8 of the Taylor Grazing Act, as amended, a State must fully comply with all the requirements prescribed by the section and the applicable regulations in order to acquire rights in land selected pursuant to section 8.

Conversely, a State is at liberty to cancel or modify a selection under section 8 at any time prior to full compliance by the State with the prescribed requirements. If the construction of section 8 urged by the State of California in this case were to be adopted, the rights and obligations of a State in connection with an exchange would be fixed as of the date of the filing of the State's application, and the State could not thereafter make adjustments thought to be advantageous in the light of changing circumstances.

It is my opinion, therefore, that as the State of California had not, prior to November 6, 1947, fully complied with all the requirements prescribed by section 8 of the Taylor Grazing Act, as amended, and the supplementary departmental regulations, the State did not have on that date any vested rights in the selected lands, so as to prevent the withdrawal order of November 6, 1947, from being effective as to the 16,000 acres of selected lands referred to in the order. That order accordingly bars approval of the State's exchange application as to the 16,000 acres affected by the withdrawal order.

As the 16,000 acres of selected lands involved in this appeal were affected by the withdrawal order of November 6, 1947, it perhaps is unnecessary to consider at this time the effect of the act of March 19, 1948, adding lands to the Shasta National Forest. However, as to the 6,000 acres of selected lands which were not withdrawn by the order of November 6, 1947, but were affected, at least nominally, by the act of March 19, 1948, it may be noted that the 1948 act provided that the addition of lands to the national forest should be "subject to any valid claim or entry now existing and hereafter legally maintained." Similar legislation had been introduced in a number of preceding Congresses. The quoted phrase appeared for the first time in H. R. 2854, 79th Congress. Prior to that time, the bills provided that the transfer

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of lands to the national forest "shall not interfere with legal rights acquired under any public-land laws so long as such rights are legally maintained" (H. R. 1600, 77th Cong.; H. R. 2659 and S. 950, 76th Cong.). No explanation for the change in language appears in the legislative history of H. R. 2854, 79th Congress.

In *Stockley v. United States*, 260 U. S. 532 (1923), it was held that the phrase "existing valid claim" obviously meant something less than a vested right. A similar position has been taken by the Department concerning the meaning of the term "valid claim." *Ben S. Miller*, 55 I. D. 73 (1934). Consequently, it would be reasonable to interpret the phrase, "subject to any valid claim * * * now existing," in the act of March 19, 1948, as permitting something less than a vested right to remove an area of land from the operative effect of that statute. In view of the mandatory nature of the present language used in subsection (c) of section 8 of the Taylor Grazing Act, as amended, with respect to effectuating exchanges desired by States, it seems that the pendency on March 19, 1948, of an application from a State for an exchange of lands under section 8 of the Taylor Grazing Act, as amended, would constitute such a "valid claim" to the public lands selected by the State as to prevent such lands from being added to the Shasta National Forest under the provisions of the act of March 19, 1948, so long as the application may be maintained by the State. Accordingly, it appears that the act of March 19, 1948, does not prevent the Director of the Bureau of Land Management from approving the application of the State of California as to the 6,000 acres of land mentioned above.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

ANTHONY S. ENOS

A-25364

Decided June 3, 1949

Color of Title—Supervisory Power of Secretary.

The fact that the required good faith of an applicant to obtain a patent to public land under the Color of Title Act was not questioned by the Bureau of Land Management in allowing the application and in appraising the land does not preclude consideration of the factor of good faith on appeal by the applicant from the decision of the Bureau on the appraisal.

The fact that land may have been held by other persons in good faith for more than 20 years under color of title does not justify the issuance of a patent under the Color of Title Act to one who thereafter purchased the land with knowledge that title was in the United States.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Anthony S. Enos filed an application under the Color of Title Act (43 U. S. C., 1946 ed., secs. 1068, 1068a) to obtain a patent on lot 106, sec. 30, T. 4 S., R. 1 W., M. D. M., California. On December 2, 1946, the Acting Director of the Bureau of Land Management allowed the application on the basis of the allegations made by Mr. Enos in his application. On April 25, 1947, Mr. Enos was notified that the lot had been appraised at \$2,000, and he was allowed 30 days within which to deposit the money or to file an appeal to the head of the Department.

Mr. Enos appealed on the ground that the appraised value was excessive. In a departmental decision dated January 21, 1948, the appraisal was approved, but, in view of certain statements made by the applicant on appeal, the case was remanded to the Bureau of Land Management for further consideration of the good faith of the applicant (A-24646).

On March 9, 1948, the Assistant Director of the Bureau vacated the decisions of December 2, 1946, and April 25, 1947, and rejected the application on the ground that the applicant knew, at the time when he purported to purchase the property, that title was in the United States and, accordingly, that he is claiming the property merely by adverse possession, which is not sufficient to warrant the issuance of a patent under the Color of Title Act.

Mr. Enos has now appealed to the head of the Department from the decision dated March 9, 1948. He urges that the decisions of December 2, 1946, and April 25, 1947, be reinstated.

The mere fact that the good faith of the applicant was not questioned by the Bureau of Land Management in connection with the decisions of December 2, 1946, and April 25, 1947, did not preclude subsequent consideration of that point. It is well established that, so long as the legal title to public land remains in the United States, the Secretary of the Interior has the power to reopen and reconsider any administrative action previously taken with respect to such land. *West v. Standard Oil Co.*, 278 U. S. 200, 210 (1929); *Michigan Land and Lumber Co. v. Rust*, 168 U. S. 589, 592 (1897); *Knight v. United States Land Association*, 142 U. S. 161, 176 (1891).

The exercise of that power was particularly appropriate in the present case, where the applicant is proceeding under an act which authorizes the issuance of a patent to public land in the discretion of the Secretary of the Interior "whenever it shall be shown to the satisfaction of the Secretary" that the requirements of the statute have been met. One of those requirements is that the land must have been held in good faith by the applicant. Whenever there is reason

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to doubt the good faith of an applicant, personnel of the Department should be especially astute to see that the doubt is dispelled before authorizing the issuance of a patent.

The Color of Title Act requires that the land shall have "been held in good faith and in peaceful, adverse, possession by a citizen of the United States, his ancestors or grantors, for more than twenty years under claim or color of title," and authorizes the Secretary to "cause a patent to issue for such land to any such citizen." Mr. Enos contends that since his grantor and his grantor's predecessors held the property for more than 20 years in good faith under color of title, they acquired a right to a patent, and that he necessarily acquired such right when he purchased the property. However, I do not believe that the statute is reasonably subject to such a construction. The good faith of the person applying for a patent under the Color of Title Act must be established. Consequently, the fact that the land applied for may have been held by other persons in good faith for more than 20 years under color of title does not justify the issuance of a patent to one who thereafter purchased the land with knowledge that title was in the United States. In such a case, one of the requirements of the statute, the good faith of the applicant, is missing.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Assistant Director of the Bureau of Land Management in vacating the decisions of December 2, 1946, and April 25, 1947, and in rejecting the application of Mr. Enos is affirmed.

MASTIN G. WHITE,
Solicitor.

OIL AND GAS LEASES OF TRIBAL LANDS OF NORTHERN CHEYENNE TRIBE

Competitive Bidding—Tongue River Reservation.

The tribal lands of the Northern Cheyenne Tribe of the Tongue River Reservation cannot be leased for the development of oil and gas without competitive bidding.

An Indian tribe which has organized and incorporated under the Indian Reorganization Act can issue oil and gas leases on tribal lands without competitive bidding if, and only if, the constitution or charter of the tribe expressly provides for such leasing on a noncompetitive basis.

Neither the constitution nor the charter of the Northern Cheyenne Tribe specifies what procedure shall be followed in the issuance of tribal oil and gas leases, and, accordingly, the method of competitive bidding must be followed.

M-36007

JULY 7, 1949.

TO THE UNDER SECRETARY.

You have requested that I express an opinion on the question whether the tribal lands of the Northern Cheyenne Tribe of the Tongue River Reservation may be leased for the development of oil and gas without competitive bidding.

The leasing of tribal lands for any mining purpose is governed by the act of May 11, 1938 (52 Stat. 347; 25 U. S. C., 1946 ed., secs. 396a-396f), which is applicable to all Indian reservations, with certain specified exceptions. The Tongue River Reservation is not included among the reservations excepted from the provisions of the act.

Section 1 of the act provides that leases of tribal lands for mining purposes may be issued, with the approval of the Secretary of the Interior, "by authority of the tribal council or other authorized spokesmen for such Indians." Section 2 of the act expressly provides that a lease for the development of oil or gas may be issued only after competitive bidding.

However, section 2 of the act contains a proviso which states:

* * * That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 16 and 17 of the Act of June 18, 1934 (48 Stat. 984), to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to the Act of June 18, 1934.

The Northern Cheyenne Tribe of the Tongue River Reservation is organized and incorporated under sections 16 and 17 of the act of June 18, 1934 (commonly known as the Indian Reorganization Act; 25 U. S. C., 1946 ed., secs. 476, 477). However, neither the constitution nor the charter of the tribe prescribes any particular method for the leasing of tribal lands for oil and gas mining purposes. Section 5 (b) (3) of the corporate charter of the tribe merely authorizes the making of oil and gas leases for such periods as may be authorized by law. Moreover, this particular provision is preceded by a general provision declaring that any corporate powers granted by section 5 of the charter shall be exercised "subject to any restrictions contained in the Constitution and laws of the United States."

It is clear that the charter of the Northern Cheyenne Tribe does not dispense with the requirement for competitive bidding contained in the 1938 leasing statute with respect to oil and gas leases. On the contrary, the charter appears to incorporate this requirement by reference.

It is only when the organic law of an Indian tribe which has taken advantage of sections 16 and 17 of the Indian Reorganization Act specifies what procedure shall be followed in the making of tribal oil and gas leases that the procedure so specified must be followed to the exclusion of the statutory method.

July 7, 1949

It is my opinion, therefore, that the tribal lands of the Northern Cheyenne Tribe of the Tongue River Reservation cannot be leased for the development of oil and gas unless the leasing is preceded by competitive bidding.

I am aware that in a memorandum dated June 6, 1941, the Acting Solicitor of the Department expressed the view that the tribal lands of the Blackfeet Indian Reservation could be leased for oil and gas mining purposes without competitive bidding. The Blackfeet Tribe, like the Northern Cheyenne Tribe, is organized and incorporated under the Indian Reorganization Act. Insofar as the issuance of oil and gas leases on tribal lands is concerned, the provisions of the constitutions and charters of these two tribes are similar. Accordingly, to the extent that the views expressed by the Acting Solicitor in the memorandum of June 6, 1941, are inconsistent with the views expressed in this opinion, they should no longer be followed.

MASTIN G. WHITE,
Solicitor.

DAVID C. CAYLOR

A-25416

Decided July 7, 1949

Reclamation Homestead Entry—Farm Units.

A homestead entry made on land withdrawn under the second form of reclamation withdrawal is subject to all the pertinent provisions of the reclamation law, including provisions enacted subsequent to the date of the entry and prior to the acquisition by the entryman of equitable title to the land through full compliance with the law.

In fixing the size of a farm unit under the reclamation law, the only limitations are that the acreage shall not be less than 10 nor more than 160, and that it shall embrace the amount of land reasonably required to support a family.

When, at the time of the establishment of farm units on a reclamation project, another agency of the Federal Government is using part of the land embraced in a reclamation homestead entry, it is proper for the Department, in establishing a farm unit for the entryman, to exclude the acreage in Federal use and to set up as a farm unit the remainder of the land in the entry, if the remaining acreage can reasonably be expected to support a family.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On March 16, 1948, the Assistant Director of the Bureau of Land Management required David C. Caylor to conform his homestead entry on the S $\frac{1}{2}$ NW $\frac{1}{4}$ and the N $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 12, T. 9 S., R. 23 W., G. and S. R. M., Arizona, to a farm unit, designated as Farm Unit D, Yuma Mesa Division of the Gila reclamation project, pursuant to section 4 of the Reclamation Act of June 17, 1902 (43 U. S. C., 1946 ed.,

sec. 419), and pursuant to the public notice issued thereunder, announcing the lands as irrigable under the project and the limit of area per entry. The notice was issued on December 10, 1947 (12 F. R. 8845). The farm unit is described in the notice as lot 1, NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$, E $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, E $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$, and NE $\frac{1}{4}$ SW $\frac{1}{4}$, and includes 128.01 irrigable acres in the Caylor entry.

Mr. Caylor has appealed to the head of the Department. He asserts that Farm Unit D was not established under the authority of section 4 of the Reclamation Act, which empowers the Secretary of the Interior to limit the area of each entry to that acreage which in his opinion may be reasonably required for the support of a family, but, instead, that it was established by arbitrarily deducting from the appellant's entry, as originally made, approximately 27 acres of land which are now being used by the Federal Public Housing Authority, and by setting up the balance of the entry as a farm unit.

The land embraced in Mr. Caylor's entry was withdrawn on July 2, 1902, under a second-form reclamation withdrawal. Mr. Caylor's homestead entry was allowed on October 30, 1903,¹ subject to all the provisions, limitations, charges, terms, and conditions of the Reclamation Act, including the subsequent conformation of the entry to a farm unit, as provided for in section 4 of the act. (See *Mangus Mickelson*, 43 L. D. 210 (1914).) Mr. Caylor relinquished his entry in 1905. In 1913, Mr. Caylor applied for the reinstatement of his entry, and on March 2, 1915, the entry was reinstated.

By the act of June 25, 1910 (43 U. S. C., 1946 ed., sec. 444), entrymen who had previously made bona fide entries on lands proposed to be irrigated under the Reclamation Act, and who showed that they had made substantial improvements and that water was not available, might be granted, in the discretion of the Secretary of the Interior, leaves of absence from their entries until water for irrigation should become available. The act of April 30, 1912 (43 U. S. C., 1946 ed., sec. 445), protected such an entryman from contest for failure to maintain his residence on the land or to make improvements on the land prior to the time when water should become available for the land. However, the latter act required any such entryman, within 90 days after the issuance of public notice under section 4 of the Reclamation Act, to file a water-right application for the irrigable land

¹At that time, homestead entries were permitted on public lands withdrawn under the second form before the establishment of farm units and before water was ready for delivery to the lands. Section 5 of the act of June 25, 1910 (36 Stat. 836), as amended (43 U. S. C., 1946 ed., sec. 436), provides that after June 25, 1910, no entry shall be made on lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage per entry and water is ready to be delivered for the land in such unit or some part thereof and such fact has been announced by the Secretary of the Interior.

July 7, 1949

embraced in his entry, the application to be in conformity with the public notice and the approved farm-unit plats.

Section 3 of the Reclamation Act, as amended in 1906 (43 U. S. C., 1946 ed., sec. 434), authorizes the Secretary of the Interior to establish in reclamation projects farm units of not less than 10 nor more than 160 acres, whenever he deems it advisable to do so "by reason of market conditions and the special fitness of the soil and climate for the growth of fruit and garden produce."

The act of August 13, 1914 (43 U. S. C., 1946 ed., sec. 435), requires that all entries under reclamation projects containing more than one farm unit shall be reduced in area and conformed to a single farm unit within 2 years after making proof of residence, improvement, and cultivation, or within 2 years after the issuance of a farm-unit plat if the plat is issued subsequent to the making of such proof. This act also provides that if an entryman fails to dispose of the excess of his entry above one farm unit in the manner provided by law, and to conform his entry to a single farm unit, his entry shall be subject to cancellation as to the excess above one farm unit; and that, upon compliance with the applicable provisions of law, the entryman shall be entitled to receive a patent for that part of his entry which conforms to one farm unit, as established for the project.

After its reinstatement, Mr. Caylor's entry was, in effect, suspended because water was not then available and because no public announcement of the lands irrigable under the project or of the limit of the area per entry had been made.

While the entry was thus suspended, the Federal Public Housing Authority, on March 20, 1943, requested permission of this Department to use approximately 14 acres of land in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 12, T. 9 S., R. 23 W., G. and S. R. M., Arizona, for the construction thereon of war-housing units and the necessary streets and facilities to serve the war-housing project. On April 29, 1943, that agency was informed that the land was included in a reclamation withdrawal and that it was embraced in the valid reclamation homestead entry of David C. Caylor. The Authority was informed that, as the use of the land for housing purposes would interfere with the delivery of water from works of the Gila project, the requested permission could not be given.

On July 31, 1943, this Department was informed by the Commissioner, Federal Public Housing Authority, that the housing project had been constructed, and the Authority renewed its request for permission to use the land. Thereafter, on August 20, 1943, in view of the fact that the housing project had already been constructed on the land, permission was granted to the Federal Public Housing Authority, subject to valid existing rights and to the existing reclamation withdrawal, to use and occupy the land for the purposes of the housing:

project until the expiration of the 6 months' period following the termination of the unlimited national emergency declared by Proclamation No. 2487 of May 27, 1941 (55 Stat. 1647). Subsequently, an agreement was entered into between the Housing Authority and this Department, under which the housing facilities constructed on the land by the Authority should, after termination of the emergency, become the property of the Bureau of Reclamation of the Department of the Interior for use in connection with the Gila project.

On January 29, 1944, the Housing Authority requested permission to use approximately 13 acres of land in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 12 for the purpose of constructing additional war housing; and on March 7, 1944, the permission of this Department to the use of that land was given to the Authority, subject to valid existing rights. Attention was called to the fact that the land was embraced in the valid reclamation homestead entry of Mr. Caylor. A similar arrangement was made for the use of the housing facilities on this tract after the termination of the emergency.

Subsequently, on December 10, 1947, the Department announced that water would be available during the calendar year 1948 and thereafter for certain irrigable lands on the Yuma Mesa Division of the Gila project, as shown on approved farm unit plats, and stated that the area of public land in each of the farm units represents the acreage which, in the opinion of the Secretary of the Interior, may reasonably be required for the support of a family upon such land. Included in the list of lands for which water would be available was Farm Unit D, embracing 128.01 irrigable acres of the original Caylor entry. The parcels of land being used by the Federal Public Housing Authority were not included in any farm unit. Mr. Caylor was thereupon called upon to conform his entry to Farm Unit D.

The question before the Department at this time is the propriety of setting up Farm Unit D without including the land used as aforesaid by the Federal Public Housing Authority, and of requiring Mr. Caylor to conform his entry to that unit.

Mr. Caylor's entry on the land involved in this proceeding was subject to all the provisions of the reclamation law, since the land was withdrawn for reclamation purposes at the time of the entry. Among those provisions is the one which authorizes the Secretary of the Interior to establish farm units of not less than 10 nor more than 160 acres (43 U. S. C., 1946 ed., sec. 434). Another is the provision which requires an entryman to conform his entry to a single farm unit, as set up by the Secretary (43 U. S. C., 1946 ed., sec. 435). The only limitations placed on the discretion of the Secretary in fixing the size of a farm unit are the rule with respect to the minimum and maximum number of acres, and the standard to the effect that the acreage shall

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be the amount of land reasonably required to support a family. *Jerome M. Higman*, 37 L. D. 718 (1909).

The circumstance that the two provisions of law cited in the preceding paragraph were enacted subsequent to the date of Mr. Caylor's original entry does not prevent them from being applied in his case. In respect to land withdrawn for reclamation purposes, an entryman does not acquire equitable title to the land until he has complied with all the requirements of the law. See *Irwin v. Wright*, 258 U. S. 219 (1922). Prior to the time of full compliance, the area may be reduced through the establishment of a farm unit having a smaller acreage than that embraced in the entry.

Because part of the land embraced in the Caylor entry was being used by another agency of the Federal Government and substantial improvements had been built on the land by that agency, and such area was not in a condition to be used for reclamation homestead purposes, the Department, in determining the acreage to be included in Farm Unit D, eliminated the area that was being used by the Federal Public Housing Authority.

Mr. Caylor has submitted nothing to refute the finding that the 128.01 irrigable acres embraced in Farm Unit D are sufficient to support a family. As a matter of fact, the record shows that the average size of the units opened to entry on the project is 91.48 acres, and that Farm Unit D in sec. 12, T. 9 S., R. 23 W., is among the larger units on the project. Of the 54 units opened to entry by the public notice, only 8 are larger in area than Mr. Caylor's unit. Furthermore, there is nothing in the record to indicate that a farm unit embracing more than 128.01 acres would have been set up for Mr. Caylor if the factor of the use by the Housing Authority of part of the land included in his original entry had not been present.

As the decision appealed from merely required Mr. Caylor to conform his entry to the farm unit properly established under the reclamation law, there was no error in that decision.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Assistant Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

CLAIM OF S. J. DOBSON

Tort Claim—Forced Landing by Aircraft.

A trespass upon privately owned land due to a forced landing of an airplane is a "wrongful act," within the meaning of that term as used in 28 U. S. C. sec. 2672, even though the pilot used due care in the handling of the aircraft.

The Government is liable for the damage resulting from a forced landing on privately owned land of an airplane piloted by an employee of the Government acting within the scope of his employment.

T-199

JULY 29, 1949.

S. J. Dobson, 376 Piedmont Street, Calhoun, Georgia, filed a claim against the United States about March 1, 1949, in the amount of \$40 for compensation because of damage to land farmed by the claimant and owned by N. F. Parks, Calhoun, Georgia, and damage to a wheat crop which the claimant had planted on the land. The damage was the result of a forced landing on the property by a Government-owned airplane (C. A. A. No. NC-718) assigned to the Fish and Wildlife Service and piloted by an employee of this Department.

The question whether the claim should be paid under the Federal Tort Claims Act (28 U. S. C. sec. 2671 *et seq.*) has been submitted to me for determination. That act authorizes the settlement of any claim against the United States on account of damage to property caused by a negligent or wrongful act or omission of an employee of the Government while acting within the scope of his employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage in accordance with the law of the place where the act or omission occurred.

It appears that the pilot made a forced landing while engaged in a routine flight for the purpose of taking an inventory of waterfowl. The forced landing was necessitated by the failure of a flap valve on the carburetor heater to function properly. As a result of the failure of the valve, ice formed in the carburetor and made further flight hazardous. The valve had been inspected prior to the take-off and was found to be in working order. Apparently, it became defective in flight.

The claim is predicated primarily upon damage to a portion of the wheat crop and upon the fact that deep wheel tracks were made on the land by the plane while it was being maneuvered to a take-off position on the field.

Section 11-105 of the Code of Georgia Annotated provides that—

Damage to persons and property on the ground; prima facie evidence of negligence.—Proof of injury inflicted to persons or property on the ground by the operation of any aircraft and contact therewith, or by objects falling or thrown therefrom, shall be prima facie evidence of negligence on the part of the operator of such aircraft in reference to such injury.

In my opinion, the presumption of negligence raised by the statute is rebutted in this case by the record. It appears that the valve which became defective had been inspected before the take-off. Moreover,

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the evidence in the record indicates that the pilot of the airplane used due care in making the forced landing and in the take-off thereafter.

However, I do not believe that, under the law of Georgia, liability for damage resulting from a forced landing by aircraft rests solely on negligence. It is true that Georgia did not adopt the provisions of sections 4 and 5 of the Uniform Aeronautics Act, under which there is liability, without regard to negligence, for the damage resulting from a forced landing (see 11 Uniform Laws Annotated 160, 161; *State v. Sammon*, 189 Atl. 265, 270, 271 (Md., 1936)); and it does not appear that the rule of absolute liability enunciated in *Rochester Gas & Electric Corporation v. Dunlop*, 266 N. Y. S. 469 (1933), obtains in Georgia.

On the other hand, an unlawful interference with the right of private property is actionable under Georgia law (Code of Georgia Annotated, sec. 105-1401), and I assume that the courts of Georgia would follow the accepted doctrine that, although a person is privileged to enter the land of another without permission when it is necessary to do so in order to save himself from death or serious injury, he is liable for any damage which results from the entry. *Vincent v. Lake Erie Transp. Co.*, 124 N. W. 221 (Minn., 1910); *Ploof v. Putnam*, 71 Atl. 188 (Vt., 1908); Restatement of the Law of Torts, sec. 197; see also *Pentz v. The King*, Ex. C. R. 172, 175 (1931).

Further, in my opinion, a trespass upon privately owned land due to a forced landing of an airplane is, with respect to any damage which results, a "wrongful act," as that term is used in 28 U. S. C. sec. 2672, even though the pilot used due care in the handling of the aircraft.

The claimant is not the owner of the land upon which the forced landing was made. The land is owned by Mr. N. F. Parks, and, under some arrangement with him, the claimant was growing wheat on the land. The claimant stated that Mr. Parks and he were "damaged \$20.00 each, making the total claim \$40.00." There is no evidence that Mr. Dobson was authorized to make a claim on Mr. Parks' behalf, and any award made as a result of Mr. Dobson's claim must be confined to the damage which he suffered.

In Georgia, "The bare possession of land shall authorize the possessor to recover damages from any person who shall wrongfully, in any manner, interfere with such possession" (Georgia Code Annotated, sec. 105-1403), and a tenant in possession of land may recover damages for a trespass, his recovery being "restricted to the damages which he himself sustained as the tenant in possession, the right of recovery for damage by permanent injury to the freehold being in the person who then owned the premises." *Burkhalter v. Oliver*, 14 S. E.

704 (Ga., 1891) ; see *Davis v. Garden Hills Corporation*, 148 S. E. 861, 863, 864, 157 S. E. 472, 158 S. E. 345 (Ga.).

It appears from the record that the claimant does not seek compensation for any permanent injury to the land. Rather, he seeks to recover for the damage done to the wheat crop and for ruts made in the land which would hamper the operation of machinery in harvesting the crop. In these respects, the claimant, as the tenant in possession, may recover damages on his own behalf.

The evidence as to the amount of the damage done is sharply in conflict. Mr. Dean D. Hayes, county agent, stated that—

The damage to an area of approximately $\frac{1}{2}$ acre of very fertile land by trampling and the plane wheels cutting into the soil is estimated at \$20.00, and the loss of wheat and time in operating harvesting equipment over the ruts made by the plane is estimated at \$20.00.

A regional supervisor of law enforcement for the Fish and Wildlife Service, who was a passenger in the plane, and the investigating officer each concluded that an award of \$40 would be excessive, and recommended that an award of \$10 be made. While it is difficult to assess the amount of the damage from the evidence in the record, it appears that the damage suffered by the claimant might reasonably be fixed at the sum indicated by him as the amount of his own loss, i. e., \$20.

DETERMINATION AND AWARD

Therefore, in accordance with the provisions of the Federal Tort Claims Act and the authority delegated to me by the Secretary of the Interior (sec. 21, Order No. 2509, as amended; 14 F. R. 4766)—

1. I determine that—

(a) The claim of S. J. Dobson accrued on January 10, 1949, and was presented in writing to the Department of the Interior about March 1, 1949.

(b) The damage to the property of S. J. Dobson, on which this claim is based, amounted to \$20.

(c) Such damage was caused by a wrongful act of an employee of the United States Department of the Interior while acting within the scope of his employment; and

(d) The United States, if a private person, would be liable to the claimant for such damage under the law of Georgia, where the wrongful act occurred.

2. I award to S. J. Dobson the sum of \$20, and I direct that this amount be paid to him, subject to the availability of funds for such purpose.

MASTIN G. WHITE,
Solicitor.

MARGARET PRESCOTT

A-25732

*Decided August 4, 1949***Oil and Gas Lease—Application—Unsurveyed Lands.**

An oil and gas lease application for unsurveyed lands which fails to describe the lands by metes and bounds is defective and creates no preference rights as against a proper application filed before the defect is corrected.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On June 5, 1944, Mrs. Margaret Prescott filed an application for an oil and gas lease for certain unsurveyed lands in Utah.¹ Her application was rejected because it failed to describe the lands by metes and bounds and because it was not accompanied by an affidavit as to settlers. She filed an amended application properly describing the lands on June 20, 1944. By a decision dated January 19, 1949, the manager of the Salt Lake City district land office ruled that Mr. W. T. Stockman was entitled to a preference right over Mrs. Prescott to an oil and gas lease because Mr. Stockman had filed a valid application for these lands, correctly describing them, on June 12, 1944. On appeal by Mrs. Prescott, the Associate Director of the Bureau of Land Management, on March 21, 1949, affirmed the manager's decision.

Under the Department's regulations, an application for an oil and gas lease on unsurveyed land must describe the land by metes and bounds, tied to a corner of the public surveys by courses and distances (43 CFR, 1946 Supp., 192.42 (d); 11 F. R. 12958). An accurate description is essential to enable the land office to process the application and to administer the land. It is equally essential to inform all subsequent applicants and other interested persons that an application for the land has already been filed. Compliance with the regulations in this regard is essential to the creation of any rights in the applicant. *H. L. Rath*, 60 I. D. 225 (1948).

None of the decisions cited by Mrs. Prescott in her appeal is applicable to this case.

Melvin P. Yates, 11 L. D. 556 (1890), involved the rule that an application for a homestead entry may not be filed for land covered by an existing cash entry. That rule is not relevant here, since the filing of an application for an oil and gas lease does not preclude the filing of other applications.

Spindle Top Oil Ass'n v. Downing, 48 L. D. 555 (1922), permitted the first applicant for an oil and gas permit, without being defeated by a subsequent application by another applicant, to eliminate certain

¹ Under section 17 of the Mineral Leasing Act of February 25, 1920, as amended (30 U. S. C., 1946 ed., sec. 226).

lands from his application in order to comply with the rule as to compactness of the land covered by a permit. The initial failure of the applicant in that case to comply with the rule concerning compactness was not considered to be a fatal defect because the application of the rule depended on the extent of prior disposals within a particular area. Moreover, there was no question as to what lands were applied for in the *Spindle Top* case. In this case, however, involving a controversy over the leasing of particular lands, the very basis of a valid application is an accurate description of the lands for which the lease is desired; and precise compliance with the regulation requiring that the description of unsurveyed land be furnished by metes and bounds, connected with a corner of the public surveys by courses and distances, must be required.

Wakefield v. Russell, 52 L. D. 409 (1928), was based on a regulation (since changed) that applications accompanied by insufficient filing fees should be suspended rather than rejected.

Inasmuch as Mrs. Prescott's application of June 5, 1944, failed to comply with the regulations respecting an accurate description of the lands, it was fatally defective, it did not confer any rights upon her, and it was properly rejected. Her rights as an applicant for an oil and gas lease stem from her first valid application, which was filed on June 20, 1944. Her rights, however, are subject to the prior application, correctly describing the lands, which was filed by Mr. Stockman on June 12, 1944.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Associate Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

OHIO OIL COMPANY AND M. D. WOOLERY

v.

W. F. KISSINGER AND YALE OIL CORPORATION

A-25537

Decided August 19, 1949

Oil Placer Mining Claims—Diligence—Coal Lands—Rules of Practice— Field Examiner's Reports.

A finding by the head of a district land office in a contest proceeding between private parties, in which the Government has intervened, is subject to review by the Director of the Bureau of Land Management even though no appeal from the finding has been taken by either party to the contest or by the Government.

In view of the long-standing practice of the Department to treat as confidential the reports of field examiners of the Bureau of Land Management,

August 19, 1949

a motion by an appellant for an order to permit an examination of such a field report will be denied, particularly where no consideration has been given to the report in the decision from which the appeal is taken.

Oil placer mining claimants, whose claim, prior to discovery, was included in land withdrawn by an Executive order issued under the act of June 25, 1910, as amended, were not engaged on the date of the withdrawal and thereafter in such diligent prosecution of work leading to a discovery as to exclude their claim from the withdrawal, where they had only piled some lumber and started a derrick on the claim at the date of the withdrawal and where thereafter, over a period of 2½ years, they erected two incomplete derricks, worked on roads, excavated a sump, and did some grading and leveling of sites for equipment.

Where there is substantial evidence to show that a tract of land contains two beds of a high-ranking sub-bituminous coal of appreciable thickness and heat value which are subject to small-scale mining, and that coal from the same beds in adjoining land has in fact been mined and sold, the land will be considered as valuable for coal and may properly be classified as coal land, so that it is not subject to location under the mining laws.

Mining claimants who protest the issuance of an oil and gas lease on land covered by their claim have the burden of proving that they have a valid, subsisting claim.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

A 5-year noncompetitive oil and gas lease, embracing the $W\frac{1}{2}NE\frac{1}{4}$ (lot 2 and $SW\frac{1}{4}NE\frac{1}{4}$) sec. 23, T. 58 N., R. 100 W., 6th P. M., Wyoming, was issued to W. F. Kissinger on January 1, 1942, and thereafter was assigned to the Yale Oil Corporation. This tract and the $E\frac{1}{2}NE\frac{1}{4}$ (lot 1 and $SE\frac{1}{4}NE\frac{1}{4}$) sec. 23 had been classified as coal land on March 12, 1910, and priced at \$35 per acre for the $W\frac{1}{2}NE\frac{1}{4}$ and \$25 per acre for the $E\frac{1}{2}NE\frac{1}{4}$. On December 6, 1915, the entire $NE\frac{1}{4}$ sec. 23, together with other land, had been withdrawn by an Executive order under the act of June 25, 1910, as amended (43 U. S. C., 1946 ed., secs. 141-143), and placed in Petroleum Reserve No. 41. The $NE\frac{1}{4}$ sec. 23 lies in the western portion of the rich Elk Basin oil field.

On August 14, 1943, The Ohio Oil Company and M. D. Woolery filed a protest against the issuance of the lease to Mr. Kissinger. They alleged that on October 15, 1915, Mr. Woolery and seven other persons had located the $NE\frac{1}{4}$ sec. 23 as the Mack No. 5 placer mining claim; that on December 6, 1915 (the date of the Executive order withdrawing the $NE\frac{1}{4}$ sec. 23), the locators were in the diligent prosecution of work leading to the discovery of oil and gas on the claim; that they continued in such diligent work to a discovery; that the claim had always been, and at the time of the protest was, a valid, subsisting claim; and that The Ohio Oil Company was the holder of an oil and gas lease on the claim which had been issued by the locators on May 21, 1917.

On May 24, 1944, the Commissioner of the General Land Office¹ held the mining claim to be void on the ground that land classified and valuable for coal is not subject to location under the mining laws. On the protestants' appeal to the head of the Department, Assistant Secretary Chapman held on September 27, 1944, that the mere classification of land as coal land does not bar a mining location for nonmetallic minerals unless the land in fact possesses value for coal (58 I. D. 753). He remanded the case to the General Land Office for a hearing, at which the burden would be on the protestants to show that the land in the NE $\frac{1}{4}$ sec. 23 possessed no value for coal and the classification of the land as coal land was therefore erroneous; that on December 6, 1915, the locators of the Mack No. 5 claim were in the diligent prosecution of work thereon leading to the discovery of oil or gas, and that such work was continued with diligence to discovery.

Pursuant to the Assistant Secretary's decision, a hearing, in which the Government intervened, was held from June 5 to 12, 1945, resulting in 678 pages of testimony and over 250 exhibits. In addition, the testimony of seven witnesses was taken by deposition, and judicial notice was requested of numerous records in the Department.

Following the hearing, the register of the district land office held on October 4, 1945, that although the "Evidence indicates that the oil placer mining claim was developed with diligence," the prior classification of the land as coal land had been proper and the mining claim was therefore invalid from its inception. The register also held that as there was an oil well "on the land which has produced since the year 1919," the issuance to Mr. Kissinger of a noncompetitive oil and gas lease on the land had been improper. He therefore recommended that the Mack No. 5 claim be declared invalid "because invalid at time of its location," and that the lease to Mr. Kissinger be canceled because the land was not subject to lease without competitive bidding.

The protestants and the contestees appealed to the Director of the Bureau of Land Management. On July 13, 1948, the Director held that the evidence showed that the locators had not made a diligent effort to develop the Mack No. 5 claim for a period of more than 2 $\frac{1}{2}$ years after the withdrawal, and that the protestants had failed to prove that the coal classification was erroneous. He therefore held the Mack No. 5 claim to be invalid in its entirety. As for the Kissinger lease, the Director stated that there is no oil well on the land covered by the lease, and that it was only after the issuance of the lease that the land covered by the lease was defined on August 29, 1944, as being on the known geologic structure of the Elk Basin field as of June 28,

¹ Effective July 16, 1946, the General Land Office was abolished and its functions were transferred to the Bureau of Land Management by section 403 of Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

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1943.² The Director accordingly rejected the register's recommendation that the Kissinger lease be canceled.

The protestants have appealed from the Director's decision to the head of the Department.

At the oral argument on the appeal, which was heard on July 29, 1949, the appellants filed a motion to strike the reply of the Government to the appellants' notice of appeal and a motion to strike the contestees' brief on appeal, the ground of the motions being that the reply and brief discussed matters which were not mentioned in any appeal by the Government or by the contestees from the register's decision. The matters referred to are not specified in the motions, but the appellants evidently refer to discussions of the question of due diligence. The appellants also filed a third motion for an order requiring the Government to produce for appellants' inspection reports of G. B. Morgan with respect to the Mack oil placer mining claims in general and Mack No. 5 in particular.

1. The appellants contend that as neither the contestees nor the Government appealed from the register's statement concerning the evidence on the issue of diligence, the register's conclusion on that issue was final and was not subject to review by the Director. The motions to strike the Government's reply and the contestees' brief are predicated upon this contention.

The appellants concede that the Department has expressly ruled that a decision by a register may be reviewed by the Director in the absence of any appeal, but they assert that the rulings have been made only in cases where contests were brought by the Government rather than by private parties. This is not correct. A private contest was involved in *City of Phoenix*, 53 I. D. 245 (1931), in which such a ruling was made; see, also, *United States v. Central Pacific Railway Company*, 49 L. D. 465 (1923). Moreover, in the cases involving Government contests, the ruling was not predicated upon the fact that a Government contest, as distinguished from a private contest, was involved. *United States v. Robert L. Pope, Jr.*, 58 I. D. 574 (1943). The appellants' contention is tantamount to an assertion that a register's decision is *res judicata*, if no appeal is taken from it. Such an assertion is clearly without foundation, in view of the fact that even a decision of the Secretary of the Interior is not *res judicata*. *United States v. U. S. Borax Company*, 58 I. D. 426, 430 (1943); *H. W. Rowley*, 58 I. D. 550, 556 (1943). The Director's consideration of the issue of diligence was therefore proper.

Furthermore, it may be noted that as the register concluded that the Mack No. 5 mining claim was void from its inception because it was

² The register's mention of a producing well apparently was intended to refer to a well on the E $\frac{1}{2}$ NE $\frac{1}{4}$, which tract is not covered by the Kissinger lease.

G. B. MORGAN.

located on land in a coal classification, and recommended that the claim be declared invalid, there was no necessity or reason for an appeal by the contestees or the Government with respect to the register's comment on the question of diligence. The Department's Rule of Practice (43 CFR 221.50), which provides that notice of appeal from a register's decision shall specify the errors which constitute the grounds of appeal and that grounds of error not specified shall be regarded as waived, obviously was not intended to require the specification of errors which did not result in rulings unfavorable to the appellant.

The appellants' motions to strike the Government's reply and the contestees' brief are therefore denied.

2. The appellants' motion for an order to require the production of reports by G. B. Morgan relative to the Mack oil placer claims states that the Government has possession of the documents and has refused permission for the appellants to examine them. The motion does not identify the reports other than to say that they were made during the years 1923 to 1928 and that they contain evidence as to some or all of the facts involved in this proceeding.

An examination of the files of the Department on the Mack No. 5 mining claim discloses no report of any kind prepared by G. B. Morgan. There is no indication that such a report exists.

As for the other Mack claims, the records of the Department indicate that 13 Mack claims, including Mack No. 5, were located at approximately the same time. Discoveries were made on Mack Nos. 1, 4, 7, 9, 10, and 11, and patents were issued for the claims upon applications submitted by the locators. In the processing of the applications, a field examination was made of each claim, and a report was submitted by the examiner. Mr. Morgan examined and submitted reports on all but Mack No. 11, and it is presumably his field reports that the appellants wish to inspect.

Under sections 1 and 2 of the act of August 24, 1912 (5 U. S. C., 1946 ed., secs. 488 and 489), the Secretary of the Interior or the head of a bureau in the Department is authorized to furnish copies of official records "when not prejudicial to the interests of the Government," and the Secretary is authorized to prescribe rules and regulations governing the inspection of the records of the Department. Section 1 was amended on July 30, 1947, but without change in the provision referred to above (5 U. S. C., 1946 ed., Supp. II, sec. 488). Prior to March 15, 1948, the regulations of the Department provided that no inspection would be permitted of any record "which is deemed to be confidential under the rules of the Department," other than for a proper purpose to be stated by the applicant for inspection (43 CFR 2.4). The regulations were completely revised on March 15, 1948

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(13 F. R. 1454), and the subject matter of 43 CFR 2.4 was restated in 43 CFR 2.1, which states that official records shall be made available for inspection by persons directly and properly concerned in the subject matter of such records, unless the disclosure "would be prejudicial to the interests of the Government." There is nothing, however, to indicate that the change in language was intended to change any practice that had theretofore obtained with respect to the disclosure of records considered to be confidential.

The practice has been long followed by the Department of treating the reports of field examiners of the Bureau of Land Management and its predecessor, the General Land Office, as confidential and not open to public inspection. (Letter dated October 16, 1908, to Clark, Prentiss and Clark, 38 L. D. 464; *George F. Goodwin*, 43 L. D. 193 (1914).) In special cases, the substance of relevant portions of a field report has been disclosed, but the report itself has not been made available for inspection. (*Glen L. Wilson et al.*, A-24288, December 31, 1946.) No particular reason has been offered by the appellants to justify a deviation from this practice in the present case.

On the contrary, the appellants have not been prejudiced in any way by any refusal to permit them to inspect the G. B. Morgan reports on the Mack Nos. 1, 4, 7, 9, and 10, claims. The register did not allude to those reports in any way in his decision; there is nothing in his decision from which it may be inferred that he even saw the Morgan reports. As for the Director's decision, it is clear that it was based entirely upon the testimony of witnesses at the hearing and upon the exhibits introduced into evidence. There is no reference whatsoever in the decision to the Morgan reports. It is plain that neither the register nor the Director relied upon any evidence except that which was fully available to the appellants.

The motion for the production of the Morgan reports is therefore denied.

3. Section 2 of the act of June 25, 1910, as amended (43 U. S. C., 1946 ed., sec. 142), under which the withdrawal of December 6, 1915, was made, provides, in part, as follows:

* * * the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands and who, at such date, is in the diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work: * * *

It will be observed that this provision protected an oil and gas mining claimant from a subsequent withdrawal only if (1) on the date of the withdrawal he was diligently prosecuting work leading to a discovery of oil or gas, and (2) he diligently continued such work thereafter until a discovery was made.

The record in the case clearly shows that the Mack No. 5 claim was located on October 15, 1915; that seven of the eight locators were officials or employees of The Ohio Oil Company; that all work done on the claim was performed by or through the Company; and that on July 19, 1918, Ohio commenced to drill a well in the extreme northeast corner of the claim, and diligently continued such drilling to a discovery in November 1918. The question presented under the 1910 act is whether Ohio was engaged in the diligent prosecution of work on December 6, 1915, and continued such diligent prosecution of work through July 19, 1918.

On this issue, the protestants introduced in evidence numerous excerpts from old accounting records of Ohio. These records show that from October 15 to December 6, 1915, the following work was performed on the claim: November 15, $\frac{1}{2}$ day spent by a teamster in placing timbers on the claim; November 19 and 20, $1\frac{1}{2}$ days spent by two men in putting up the bottom sections of a derrick; November 30, $\frac{1}{2}$ day spent by one man in hauling casing to the claim. No further work was done until December 15, when another $\frac{1}{2}$ day was spent by two men in hauling timber to the claim. During the remainder of December 1915, the following work was done: December 16, $\frac{1}{4}$ day spent by one man in hauling derrick sills to the claim; December 26, 1 day spent by one man in digging a sump, and $\frac{1}{2}$ day by two men in hauling timber to the claim; December 27, 1 day spent by one man in digging foundations for mud sills; December 30, 1 day spent by one man and $\frac{1}{2}$ day by each of two other men in building a drilling rig (presumably the derrick started on November 19 and 20), and 1 day by one man in hauling timber to the claim. Timber purchases were made during the month, but it is not clear whether the purchases were delivered to the claim by the lumber company or by employees of Ohio.

Ohio's accounts show that, from January 1916 through July 1916, approximately 95 man-days of work were spent in building roads, and approximately 100 man-days of work were devoted to grading and leveling sites for water and fuel tanks and a boiler, digging a ditch for sand pumpings, and doing some general grading and excavating. From August through October 1916, apparently the only work done was in excavating a sump hole, about 90 man-days being spent on this job. From November 1916 through June 1917, road building constituted practically the entire work on the claim, approximately 125 man-days being spent on this work. Seldom was more than one man employed at any one time in doing work listed in this paragraph.

Ohio's accounts show some expenditures in September, October, and November 1917, for hauling a rig to Mack No. 5 and tearing down and building a rig. The next significant expenditures shown are for repairing, wrecking, and building a rig in April and May 1918. No

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further expenditures are shown until July 1918, when the discovery well was commenced on the claim.

The testimony of a number of witnesses who had worked in the Elk Basin field in 1915-1918 was presented on behalf of the appellants and the Government. Many of the witnesses, including Government witnesses, recalled having seen a stub or incomplete derrick on the Mack No. 5 claim at various times during the period 1915-1918, but only one, Alex Pryde, said that he saw rig builders working on the claim. He stated, however, that there were three successive derricks on the claim and that the work which he observed was performed mostly in connection with the 1918 derrick. Except for this testimony, none of the witnesses testified that he personally saw any specific work being performed on the claim. Albert J. Rosenlieb, superintendent in charge of Ohio's operations in Elk Basin from December 1916 to January 1919, testified that he checked all the work reported on time slips, to be sure that the work had been done; but he did not testify as to any particular work. Fred E. Smith said that in the fall of 1916 he visited a roustabout living on the claim in a tarpaper shack, and that this man had the job of working on roads with a pick and shovel; but Mr. Smith did not say that he saw any work actually being performed.

The appellants' most persuasive evidence in the record respecting the issue of diligence shows that one-third of a derrick was erected on the Mack No. 5 claim in December 1915; that this partial derrick was apparently blown over in the winter of 1915-1916; that in the fall of 1917 a second incomplete derrick was erected on the claim; and that it, too, was blown down in the winter of 1917-1918. Outside of this work, the appellants' contention as to diligence during the period from October 15, 1915, to July 1918, is based upon a relatively small amount of work, usually done by one man at a time, in grading sites for fuel and water tanks and a boiler (which were never installed), digging a sump hole, and building roads.

The appellants assert that the work summarized above represented diligence in view of the general conditions obtaining in the Elk Basin field in the period 1915-1918. They point to the testimony of numerous witnesses who stated that the winters during that period were unusually severe; that freezing cold and heavy snows hampered and prevented drilling operations for several months each year; that roads to and in the basin were poor; that water for drilling and domestic purposes was extremely scarce; and that the labor supply was limited.

To evaluate these factors properly, it is necessary to consider their impact upon operations generally in the Elk Basin field during the period 1915-1918. On the same day that the Mack No. 5 claim was located, October 15, 1915, Mack claims Nos. 1, 4, 7, 9, and 10, were

located. On October 21, 1915, the Mack No. 11 claim was located. On or around these two dates, Mack claims Nos. 2, 3, 6, 8, 12, and 13, were located, making a total of 13 Mack claims. There were eight locators on each claim, seven of the eight being the same on all the claims. The Mack claims were located roughly in the form of a V which enclosed the principal portion of the Elk Basin field on the east, south, and west. Inside the V were 13 other oil placer mining claims. The Mack No. 5 claim was at the top of the west arm of the V. This arm was approximately $2\frac{1}{2}$ miles long, and the east arm was $3\frac{1}{2}$ miles long.

According to the applications for patent filed by the locators and a tabulation submitted by The Ohio Oil Company in connection with a former appeal involving a number of the Mack claims (Cheyenne 044808), the following wells were completed on Mack claims in 1915-1918:

Claim	Well No.	Work commenced	Discovery made	Well completed
Mack No. 1-----	1	Oct. 22, 1915	July 25, 1916	Aug. 5, 1916
	2			Aug. 9, 1917
Mack No. 4-----	1	Nov. 4, 1915	Apr. 24, 1916	May 6, 1916
	2			July 19, 1918
Mack No. 7-----	1	Oct. 30, 1915	July 30, 1916	Aug. 2, 1916
Mack No. 9-----	1	Oct. 22, 1915	May 31, 1916	June 4, 1916
	2			Dec. 1, 1917
Mack No. 10-----	1	Oct. 22, 1915	May 5, 1916	May 5, 1916
	2			June 19, 1917
	3			Sept. 14, 1917
Mack No. 11-----	1	Oct. 21, 1915	May 20, 1916	June 18, 1916

The Department has no record of drilling on the other seven Mack claims, except Mack No. 5.

The six claims listed in the preceding paragraph are strung out over a distance of $2\frac{1}{2}$ miles and are situated in the east arm of the V and just above the apex in the west arm of the V. They lie within a distance of from 1 to $2\frac{1}{2}$ miles of Mack No. 5. The drilling on each claim was performed by The Ohio Oil Company. Each application for patent recited that the drilling of the first well was hindered by severe winter weather, insufficient water, the freezing of water pipe lines, and poor road conditions.

The Ohio Oil Company also performed the drilling on three other claims held by other locators inside the V. On the Woods No. 3 claim, which was contiguous to Mack Nos. 1, 4, and 10, Ohio made an initial discovery on March 15, 1916, and completed 2 producing wells in 1916, 4 producing wells in 1917, and 1 well on July 14, 1918. On the Elk No. 9 claim, which cornered on the northeast corner of

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the Mack No. 5 claim, Ohio made an initial discovery on November 11, 1915, and completed the first well on December 4, 1915. Thereafter, Ohio completed 4 producing wells on the claim in 1916. On the Elk No. 3 claim, which was situated within a mile of Mack No. 5, Ohio drilled to a discovery on December 6, 1915, and completed the first well on December 15, 1915. In 1916, Ohio drilled 9 more wells on the Elk No. 3 claim; in 1917, another well; and in 1918, prior to July 19, 3 more wells.

In addition, Ohio drilled an unsuccessful well on the Hillside placer claim (sometimes referred to as the Zimmerman claim), which adjoined the Mack No. 5 claim on the north. According to the testimony in this proceeding and the records of the Department, a Keystone rig and then a Standard or Star drilling rig were moved to the claim in November or early December 1915 by the Zimmerman group, and the drilling of a well was commenced. Shortly thereafter, Ohio moved a rig on the claim and started drilling a second well. Injunction proceedings were brought by the Zimmerman group against Ohio, but the matter was settled out of court at the end of the month, with Ohio being permitted to continue drilling. Ohio's well was unsuccessful. Another contractor then drilled a third well to a discovery on June 30, 1917. Ohio's well was drilled 142 feet and 76 feet, respectively, from the south and east lines of the Hillside claim. The discovery well on Mack No. 5 was drilled 200 feet from the north and east lines of that claim, the two wells thus being approximately 370 feet apart. Testimony in this case indicates that some water for drilling on the Hillside claim was obtained from dammed-up water in a coulee on the Mack No. 5 claim.

Ohio was not the only company operating in the Elk Basin field in 1915-1918. Of the nine remaining claims in the V, discoveries were made on six claims, Elk Nos. 1, 2, 5, 6, 7, and 8, in November and December 1915, and in April 1916.³ On these claims, except for the Elk No. 1 claim, 11 additional wells were drilled in 1916, 11 more in 1917, and 5 more in 1918 prior to July 19.

It is clear from this evidence that the delay of more than 2½ years in drilling on the Mack No. 5 claim cannot be excused on the grounds of severe winter weather, lack of equipment or materials, and short-

³ For convenience of reference to the departmental records, the serial numbers of the 16 claims referred to in this decision are as follows:

Mack No. 1-----	Cheyenne 044808	Elk No. 1-----	Lander 013214
Mack No. 4-----	Cheyenne 045460	Elk No. 2-----	Lander 013215
Mack No. 7-----	Cheyenne 044810	Elk No. 3-----	Lander 014555
Mack No. 9-----	Cheyenne 044809	Elk No. 5-----	Lander 013216
Mack No. 10-----	Cheyenne 044811	Elk No. 6-----	Lander 013213
Mack No. 11-----	Billings 018018	Elk No. 7-----	Lander 013212
Hillside placer-----	Billings 027490	Elk No. 8-----	Billings 017661
Woods No. 3-----	Cheyenne 044819	Elk No. 9-----	Billings 018019

age of labor. These factors presumably affected the entire Elk Basin field; yet they did not prevent the drilling of 7 producing wells in 1915 (after October 15), 33 wells in 1916, 21 wells in 1917, and 10 wells in 1918 (up to July 19)—a total of 71 wells on the group of 16 claims just considered. Of these wells, Ohio itself drilled 2 in 1915, 21 in 1916, 9 in 1917, and 5 in 1918, a total of 37 wells on 9 claims. These figures exclude the unsuccessful well drilled by Ohio on the Hillside claim.

It is especially significant that of the 37 wells drilled by Ohio, only 9 were discovery wells required to validate the 9 claims. The remaining 28 wells drilled in 1916–1918 were unnecessary for discovery purposes. The labor, equipment, and time utilized for the drilling of the 14 nondiscovery wells that were completed in 1916 would easily have sufficed for the drilling of one well in that year on the Mack No. 5 claim.

The appellants attempt to explain the delay in the development of the Mack No. 5 claim by asserting that the Mack No. 5 was much more remote from the rest of the field than the other Mack claims; that it was farther from water; that a separate road was required to reach the claim, whereas general roads in the field gave access to the other claims; and that war conditions in 1916 and 1917 required maximum production from known sources rather than development work. The answer to these assertions is that Ohio was able to drill a well on the Hillside claim in December 1915 within 150 feet of Mack No. 5, using some water caught on Mack No. 5, and to drill five wells on the Elk No. 9 claim in 1915 and 1916, which wells were within 2,300–3,000 feet of Mack No. 5. Ohio was able to haul timber to Mack No. 5 on several days in November and December 1915; and, at least by 1917, Ohio should have had improved road conditions after the expenditure of labor for road building claimed for 1916. As for war conditions, no evidence was submitted to show how the war affected operations in the field. Moreover, war was not declared by the United States until April 6, 1917.

What constitutes the diligent prosecution of work within the meaning of section 2 of the act of June 25, 1910, depends upon the peculiar facts in each case. *United States v. North American Oil Consolidated*, 242 Fed. 723 (S. D. Calif., 1917); *United States v. Ruddock*, 52 L. D. 313, 321 (1927). From the facts presented in this case, it seems indisputable that Ohio could easily have drilled a well upon Mack No. 5 in 1916, or, at the latest, by the early summer of 1917. Whatever doubt there may conceivably be with respect to whether appellants' efforts up to December 6, 1915, represented the diligent prosecution of work, there is no doubt whatsoever that, from the late spring of 1916 to the fall of 1917, appellants' work was desultory, to say the least, and contributed little toward the making of a discovery on the claim.

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Similar work, consisting of the excavating of sump holes, the building of small cabins, and the erection of two derricks which were never used or equipped for drilling, was held insufficient to constitute the diligent prosecution of work in *United States v. Midway Northern Oil Co.*, 232 Fed. 619 (S. D. Calif., 1916). The work performed by the appellants on Mack No. 5 also fell short of that held to be insufficient in *United States v. Stockton Midway Oil Co.*, 240 Fed. 1006 (S. D. Calif., 1917). It did not approach the work found to be sufficient in *United States v. Grass Creek Oil & Gas Co.*, 236 Fed. 481 (C. C. A. 8th, 1916); *United States v. North American Oil Consolidated, supra; Consolidated Mutual Oil Co. v. United States*, 245 Fed. 521 (C. C. A. 9th, 1917); and *United States v. Standard Oil Co.*, 265 Fed. 751 (S. D. Calif., 1920).

I conclude that the appellants have failed to show that on December 6, 1915, the locators of the Mack No. 5 claim were engaged in the diligent prosecution of work leading to a discovery and that they continued thereafter in such diligent prosecution of work to the discovery of oil in 1918. On the contrary, the evidence shows that work on the claim leading to a discovery was not prosecuted with diligence until sometime in the fall of 1917 or spring of 1918.

4. The conclusion reached on the issue of diligence is sufficient to dispose of this case. However, in view of the value of the land covered by the Mack No. 5 claim, it appears desirable to consider the issue whether the land involved in this proceeding is valuable for coal and was properly classified as coal land at the time when the location of the Mack No. 5 claim was attempted.

The evidence on this issue is directed to the entire NE $\frac{1}{4}$ sec. 23. It is undisputed that a 25 $\frac{1}{2}$ -acre tract in the northeast corner of the quarter-section contains no coal at all and that a large portion, if not all, of the remainder of the NE $\frac{1}{4}$ sec. 23 is underlain by two principal beds of coal in what is known as the Eagle formation. These beds are exposed in an outcrop which runs south through the center of the E $\frac{1}{2}$ NE $\frac{1}{4}$ sec. 23 to a point in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 23, and then curves to the southeast through sections 24 and 25. The beds dip to the west at an angle of approximately 21 degrees and have never been mined, the only exposures being along the outcrop.

Measurements of the beds were made at several points in the outcrop by witnesses for the appellants and the Government, most of the measurements being made at the same points.

Six witnesses testified for the appellants at the hearing, four of whom, W. E. Pinkney, George B. Pryde, Verner A. Gilles, and William Redshaw, claimed experience as practical coal miners; the other two, C. J. Hares and Wilson B. Emery, both in the employ of Ohio, testified only as geologists.

Mr. Hares measured the upper coal bed at four points, finding at the respective points $14\frac{1}{2}$ inches of coal with a $\frac{1}{2}$ -inch shale parting, $20\frac{1}{2}$ inches of coal with a $\frac{1}{2}$ -inch shale parting, $38\frac{1}{2}$ inches of very dirty coal, and $25\frac{1}{2}$ inches of poor coal, bony coal, and poor dirty coal. Mr. Hares measured the lower bed at seven places, finding 20 inches of coal, separated by 3 inches of shale, at one point. At the other six points he measured from 30 to 45 inches of very poor, poor, and dirty coal, separated by varying layers of shale and clay. He did find 15 inches of fair coal at one of the six points. Messrs. Pryde, Redshaw, and Emery testified that they had checked Mr. Hares' measurements and found them to be substantially correct.

Mr. Pinkney made measurements of three exposures in the lower bed and one in the upper bed. He testified that he found thicknesses of 24, 15, 22, and 20, inches of coal at these respective points, in addition to layers of poor and bony coal.

Mr. Gilles measured the upper bed at two points and the lower bed at four points, finding $7\frac{1}{2}$ inches of coal at one exposure, and only dirty coal at the other exposures, the dirty coal measuring from $24\frac{1}{2}$ inches to $38\frac{1}{2}$ inches with and without partings.

Appellants' six witnesses testified unanimously that, in their opinion, the land in the NE $\frac{1}{4}$ sec. 23 had no present, past, or future value for coal in view of the thinness of the coal, its impurities, the separation of the coal layers by layers and partings of slate and clay, the dip of the bed, and the location of the tract as to rail transportation and market, all of which factors made it impossible to mine the coal economically.

Three witnesses for the Government, E. C. Galbraith and Oral J. Berry, field examiners of the General Land Office, and Carroll E. Dobbin, geologist employed in the Geological Survey, all of whom are experienced in examining coal deposits although lacking practical coal-mining experience, testified as to measurements made jointly by them of the two coal beds in the NE $\frac{1}{4}$ sec. 23. Their measurements of five exposures in the upper bed showed 35 and 38 inches, respectively, of coal at two points, and 32, $37\frac{1}{2}$, and 39, inches, respectively, of coal, with one or two thin shale partings, at the other three points. Their measurements of seven exposures in the lower bed showed 32, 35, 37, 46, $48\frac{1}{2}$, 33, and 30, inches, respectively, of coal, with a single parting in the coal at each of three points. The witnesses described the coal as a black weathered coal which would be classified as a good quality of sub-bituminous coal. They further testified that, in their opinion, the coal would improve in quality away from the outcrop, where it was subject to weathering and the infiltration of impurities. On this point, Messrs. Hares, Gilles, and Redshaw also thought that there might be some, but not much, improvement in the coal underground.

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The Government witnesses further testified that they measured the coal in the Silvertip No. 2 mine in the SW $\frac{1}{4}$ sec. 24, about 1,800 feet southeast from the southeast corner of the Mack No. 5 claim. This mine was driven in the lower coal bed of the Eagle formation. Twenty-eight and 32-34 inches, respectively, of clean black coal were measured in the mine 100 and 150 feet down the slope. Measurements were also taken in the Silvertip mine in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 25, which was driven in the upper coal bed of the Eagle formation. This was apparently the Silvertip No. 1 mine, as distinguished from the original Silvertip mine, which had also been located on the NW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 25. Fifty-five inches of a good grade of sub-bituminous coal, with some small lenses of dirt, were measured about 120 feet in the mine. In the opinion of the Government witnesses, the same quality of coal could be expected in the Mack No. 5 claim. Of the appellants' witnesses, only Mr. Hares testified that he had been in the Silvertip No. 2 mine; he said that the coal did not improve in the mine. None of appellants' witnesses had been in the Silvertip No. 1 mine.

J. R. Lerwill, district mining supervisor of the Geological Survey, testified for the Government that the SW $\frac{1}{4}$ sec. 24 had been included in a coal prospecting permit (Cheyenne 059073) issued to Jesse A. Oldham on November 30, 1935, and that a coal lease for the SW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 24 had been issued to Mr. Oldham on September 30, 1940. Mr. Oldham opened the Silvertip No. 2 mine. Mr. Lerwill testified that 833 tons of coal had been mined from the property, that he had seen coal weighed and trucked from the mine, and that minimum sale prices set by the Bituminous Coal Commission had been posted at the mine. The records of the Department show that Mr. Oldham filed a relinquishment of his lease on September 27, 1941, stating that he had operated at a loss under the permit and the lease and that the prices set for his coal had caused him to lose trade. The relinquishment was accepted by the Department as of September 29, 1942.

Mr. Lerwill also testified that the Silvertip No. 1 mine on sec. 25 was operated under a coal lease (Cheyenne 056303) issued on February 14, 1936, and ultimately assigned to Clarence E. Malliott. This lease was awarded to the second-high bidder of a \$155 bonus at public auction after the high bidder of a \$160 bonus failed to comply with the award. Mr. Lerwill stated that 4,476 tons of coal had been produced from the Malliott lease and that he had seen as many as four men working in the mine at one time. The records of the Department show that Mr. Malliott requested a cancellation of the lease on April 24, 1943. He stated that the mine was operated at a loss because of the thin section of the coal and the expense of keeping the dip workings dewatered; and that the market for coal was such that the minimum annual production of 275 tons required under the lease could not be

mined. The Geological Survey substantiated his allegations and reported on June 3, 1943, that the high cost of mining, due to low coal, bad roof conditions, and the pumping of water, precluded the probability of any other party being interested in the lease "at this time." Mining ceased on November 23, 1942, but the lease has not yet been canceled.

John D. Northrop, of the Geological Survey, another Government witness, testified that in 1926 he measured the coal beds in the Mack No. 5 claim. He found 28½ inches and 20½ inches, respectively, of clean coal at the two points measured in the lower bed, and 36 inches and 25½ inches, respectively, of clean coal at the two points measured in the upper bed. In his opinion, the dip of the beds and their lenticular character would be adverse for large-scale or commercial mining but not for small-scale mining, such as wagon mines. Mr. Northrop also measured and took three samples of coal from the original Silvertip mine. The samples had a heat value of 9,980–10,300 B. t. u., as received, and 10,670–11,020 B. t. u., air dried.

In Bulletin 341, Contributions to Economic Geology, 1907, Part II, prepared by the Geological Survey, a description (pp. 183–187) is given of the Silvertip coal field, which includes the coal beds and lands under discussion. Measurements of the two coal beds in sec. 23 are given, and the beds are described as "most excellent" (p. 185). A brief description is also given of the original Silvertip mine (p. 186). The bulletin states that the mine had reported production up to July 1907 of 500 tons but that the workings indicated a much larger production, and that the coal was sold at \$5 to \$6 per ton.

It is clear that there is substantial evidence to show that the coal in the NE¼ sec. 23 falls within the limits of thickness and fuel value prescribed in the departmental regulations of April 10, 1909 (37 L. D. 653), pursuant to which the NE¼ sec. 23 was classified and valued as coal land on March 12, 1910. The coal further meets the requirements of the revised regulations of February 20, 1913, for the classification and valuation of coal lands (41 L. D. 528). Although the evidence tends to show that large-scale commercial mining operations cannot economically be undertaken on the NE¼ sec. 23, the evidence indicates that small-scale operations would be feasible.

It is true that the operations of Messrs. Oldham and Malliott on adjoining land proved to be economically unsuccessful, but their experience does not necessarily disprove the value of the land in the NE¼ sec. 23 for coal. The fact is that, as early as 1907, coal of the same quality and mode of occurrence as that in the Mack No. 5 claim was mined and sold. A substantial tonnage of coal was also mined and sold under the Oldham and Malliott leases. This is evidence that the mine operators believed the land to be valuable for coal and were

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willing to support their belief with substantial investments in money and equipment. It is also evident that the coal was of a commercial quality and had a market. The test as to whether land is to be considered as valuable for coal is not necessarily whether a miner would be able to make a profit in operating the property. It is sufficient if the coal is of "such quantity and quality as would warrant a prudent coal miner or operator in the expenditure and labor incident to the opening and operation of a coal mine or mines on a commercial basis." *Samuel D. Pulford et al.*, 45 L. D. 494, 500 (1916).

It is my opinion, therefore, that the evidence supports a finding that the NE $\frac{1}{4}$ sec. 23 was valuable for coal, and was properly classified as coal land, when the attempted location of the Mack No. 5 claim was made; and that the location was therefore invalid. *Arthur K. Lee et al.*, 51 L. D. 119 (1925); *Empire Gas and Fuel Company*, 51 L. D. 424 (1926); *John McFayden et al.*, 51 L. D. 436 (1926); *H. W. Rowley, supra*.

It is of interest to note that the *McFayden* case involved the coal classification of the Mack No. 1 claim, which embraced the SE $\frac{1}{4}$ sec. 25, in which the Silvertip No. 1 mine is situated. The Department's decision granted the locators, whose application for a mining patent to the SE $\frac{1}{4}$ sec. 25 had been rejected on the ground that the land was classified as coal land, an opportunity to apply for a hearing to show the mineral character of each 2 $\frac{1}{2}$ -acre unit in the claim. Subsequent to the reported decision, an examination of the land was made and a 42 $\frac{1}{2}$ -acre tract in the northeast corner of the SE $\frac{1}{4}$ sec. 25 was reclassified as noncoal land. The locators accepted a patent to that tract. They thereby acquiesced in the determination that the rest of the quarter-section, approximately 117 $\frac{1}{4}$ acres of land, was valuable for coal. This area is underlain by the same two coal beds of the Eagle formation which have been described and which extend under the Mack No. 5 claim. The same situation existed in the *Rowley* case, which involved the Hillside placer claim adjoining the Mack No. 5 claim on the north.

5. There remains for consideration appellants' contention that the Department's decision of September 27, 1944, improperly required them to sustain the burden of proof on the issues of diligence and coal classification. This requirement was in accord with consistent holdings of the Department and has been imposed on other mining claimants who filed protests against entries or leases. *United States v. Ruddock, supra*; *Minerva L. Jones Starks v. Frank P. Mackey*, 60 I. D. 309 (1949). Moreover, having assumed, without objection, the burden of proof at the hearing, appellants should not be permitted to raise the question for the first time on appeal. *Floyd et al. v. Montgomery et al.*, 26 L. D. 122, 131 (1898).

In connection with this point, another contention of the appellants should be considered, namely, that the Director erred in affirming the register's statement that all interested parties appeared at the hearing. Appellants contend that, except for Mr. Woolery, none of the locators or their successors was notified of the proceedings. In the first place, it may be noted that in their protest, which started this proceeding, appellants stated that they were acting "for themselves and on behalf of said locators and their successors." In the second place, this proceeding does not involve a contest brought by the Government to declare the claim invalid, but only a ruling on a protest which has been made by the appellants against an outstanding oil and gas lease. In a Government contest, all persons interested in the claim would be notified and the burden of proof would rest on the Government. In this proceeding, only the interests of the protestants and those whom they in fact represent are affected by this decision. *Minerva L. Jones Starks v. Frank P. Mackey, supra.*

6. Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), and for the reasons set out above, the decision of the Director is affirmed to the extent indicated in this decision.

MASTIN G. WHITE,
Solicitor.

R. C. McCLYMONDS v. CHARLES COOPER

A-25729

Decided August 19, 1949

Reclamation Homesteads—Veterans' Preference—Contests.

A veteran of World War II applying for a reclamation homestead is entitled to a preference right of entry only if he rendered 90 days or more of military service, or if he has received wounds or incurred disability during his period of military service.

Where an applicant has erroneously been allowed to make a reclamation homestead entry under the veterans' preference provisions of the act of September 27, 1944, his entry must be canceled upon a subsequent determination that he was not entitled to preference as a veteran.

Under the Department's Rules of Practice, a contest cannot be brought against a reclamation homestead entry upon grounds shown by the records of the Department.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Public Notice No. 59 (12 F. R. 6092) was issued on August 22, 1947, opening to reclamation homestead entry on September 9, 1947, certain farm units in the Yuma project, Arizona-California.

Subparagraph (a) of paragraph 3 of the Public Notice provided that, pursuant to the act of September 27, 1944, as amended (43

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U. S. C., 1946 ed., Supp. I, secs. 279, 282), the farm units would be opened to entry for a period of 90 days to persons falling within certain classes, the first two of which were described as follows:

(1) Persons * * * who have served in the Army * * * of the United States for a period of at least 90 days at any time on or after September 16, 1940, and prior to the termination of the present war, and are honorably discharged therefrom.

(2) Persons * * * who have served in said Army * * * during such period, regardless of length of service, and are discharged on account of wounds received or disability incurred during such period in the line of duty, or, subsequent to a regular discharge, are furnished hospitalization or awarded compensation by the government on account of such wounds or disability.

Subparagraph (c) of paragraph 3 of the notice required any applicant claiming veterans' preference to attach to his application a copy of an official document constituting evidence of the facts upon which the claim for preference was based.

The Public Notice provided (subparagraph (c), paragraph 6; subdivisions (2) and (3) (b), subparagraph (c), paragraph 7) that applications filed within the 90-day period by persons qualifying under the veterans' preference provisions would be placed in a first-priority group and would be considered in the award of farm units prior to the consideration of nonpreference applications filed within the 90-day period and applications filed either by preference or nonpreference applicants after the expiration of the 90-day period.

Charles Cooper filed an application for a farm unit as a preference-right claimant and was awarded Farm Unit E on March 22, 1948, by the board of examiners appointed by the Commissioner of the Bureau of Reclamation to conduct the opening. He filed an application on April 8, 1948, to make a homestead entry on the farm unit, and his application was allowed on the same day by the acting manager of the district land office at Phoenix, Arizona. Attached to Mr. Cooper's homestead application was a photostatic copy of his certificate of discharge from the military service, which showed that he had served in the Army for 1 month and 9 days and had been discharged by reason of a certificate of disability.

Thereafter, in a manner not precisely disclosed by the record, a question was raised as to whether Mr. Cooper was entitled under Public Notice No. 59 to a preference right. On August 12, 1948, the Chief, Branch of Land Disposal, Division of Adjudication, Bureau of Land Management, requested from the Adjutant General's Office, Department of the Army, a report on Mr. Cooper's military service, with particular reference to whether he was discharged on account of disability incurred during his period of service. On October 14, 1948, a reply dated October 11, 1948, was received by the Bureau of

Land Management from the Adjutant General, who stated that Mr. Cooper was discharged because of a disability which existed prior to his induction into the military service. The reply was transmitted to and received by the district land office at Phoenix on February 7, 1949.

In the interim, on August 23, 1948, the Washington office of the Bureau of Land Management received copies of letters dated July 19 and August 2, 1948, which the regional office of the Veterans' Administration at Phoenix had addressed to the Bureau of Reclamation office at Yuma, Arizona, and which stated that the Veterans' Administration had not recognized the disability for which Mr. Cooper was discharged as having been incurred in or aggravated by his military service.

On August 25, 1948, without waiting for the requested report from the Adjutant General's Office and without referring to the letters from the Veterans' Administration, the Director of the Bureau of Land Management held that, although the evidence of Mr. Cooper's military service did not show that he was discharged on account of disability incurred in the line of duty during his period of military service, a cancellation of the entry would be an injustice to him and would work a hardship on one who had apparently acted in good faith and had relied upon the action of the board of examiners; and that, as the Bureau of Reclamation had stated that it would not object to the entry and as the preference-right period had expired and no other filing had thereafter been made for the land, the entry would be permitted to stand.

On January 31, 1949, Robert C. McClymonds filed in the district land office at Phoenix an application to contest Mr. Cooper's entry on the ground that the entryman did not possess the minimum qualifications for veteran's preference, in that he had not performed 90 days of military service and did not incur a disability during his period of military service. The contest application was dismissed by the manager upon the basis of the Director's decision of August 25, 1948.

Mr. McClymonds appealed to the Director. On April 22, 1949, the Director affirmed the dismissal of Mr. McClymonds' application, for the reason that the charge made by the contestant was based upon a matter of record in the Department and, therefore, did not present a valid ground upon which to predicate a contest. However, the Director stated that, in view of a report from the Adjutant General's Office that Mr. Cooper had been discharged from the military service because of a disability which existed prior to his induction, Mr. Cooper was not eligible to make an entry as a veteran. The Director accordingly revoked his decision of August 25, 1948, and canceled the entry.

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Mr. McClymonds and Mr. Cooper have separately appealed to the head of the Department from the Director's decision of April 22, 1949.

On his appeal, Mr. Cooper makes no contention that the disability for which he was discharged from the military service was incurred during his period of service. He merely asserts that he made a full disclosure of the pertinent information on his application for a farm unit and that he submitted his Army discharge papers with his application. In view of this tacit admission of failure to qualify under the clearly stated provisions of the public notice with respect to veterans' preference, it appears that there was no reasonable basis for the action of the board of examiners in according a preference right to Mr. Cooper. It also appears that the Director's decision of August 25, 1948, was erroneous.

Section 3 of the act of September 27, 1944, as amended (43 U. S. C., 1946 ed., Supp. I, sec. 282), provides that, upon the opening of public lands to entry, persons entitled to credit under the act for military service "shall have a preferred right of application" under the homestead laws for a period of not less than 90 days. Section 1 of the act (43 U. S. C., 1946 ed., Supp. I, sec. 279) allows credit for military service only to persons who have rendered at least 90 days of military service or who have received wounds or incurred disability during the period of military service. The requirements of the act were incorporated in Public Notice No. 59.

The grant of the preference right is mandatory, and there is no authority in the Secretary of the Interior to disregard it. Conversely, the Secretary does not have any authority to grant the 90-day preference to any person who lacks the minimum qualifications prescribed by Congress as essential for those who seek to exercise the right of preference. Mr. Cooper cannot, as a nonpreference applicant, be allowed to make an entry in preference to qualified veteran-applicants who are entitled by law to preference in making entries. Therefore, his entry was properly canceled by the Director's decision of April 22, 1949.

All the facts bearing upon Mr. Cooper's lack of qualifications as a preference-right applicant were contained in the records of the Department long before Mr. McClymonds filed his contest application on January 31, 1949. The reply from the Adjutant General and the copies of the letters from the Veterans' Administration had been received prior to that date. Mr. McClymonds did not present any new facts or advance any new grounds for contesting Mr. Cooper's entry. He simply called attention to what was already of record in the Department.

Rule 1 of the Department's Rules of Practice has provided since December 9, 1910, that contests may be initiated "for any sufficient cause affecting the legality or validity of the claim, *not shown by the*

records of the Land Department." [39 L. D. 395; 43 CFR 221.1; italics supplied.] The Department has consistently held that, under this rule, a contest cannot be brought for reasons apparent in the records of the Department. *Caddell v. Myers*, 46 L. D. 501 (1918); *Coyle v. Drake*, 47 L. D. 148 (1919); *Keating v. Doll*, 48 L. D. 199 (1921). The rule has specifically been applied to a contest against a reclamation homestead entry. *Jack L. Brumfield v. Audrey June Ward*, A-24312, June 5, 1946; A-25130, February 23, 1949.

Mr. McClymonds contends, however, that paragraph 29 of the general reclamation circular of May 18, 1916 (43 CFR 230.27), provides that an entry embracing land in a reclamation withdrawal may be contested "because of entryman's failure to comply with the law or for any other sufficient reason * * * and any contestant who secures the cancellation of such entry * * * will be awarded a preferred right of making entry."

A reading of this provision clearly indicates that it was not intended to establish a separate and independent contest procedure from that provided for in the Rules of Practice. The grant of a preference right of entry to a successful contestant is conferred by section 2 of the act of May 14, 1880 (43 U. S. C., 1946 ed., sec. 185). The Rules of Practice provide a detailed procedure for the conduct of contests pursuant to this statute. They specify in detail the requirements respecting a contest application, form of contest notice, service of notice, answer, depositions and interrogations, trials, and related matters (43 CFR 221.1 *et seq.*), and for the giving of notice to a successful contestant of the award to him of a preference right of entry under the act of May 14, 1880 (43 CFR 221.96). On the other hand, 43 CFR 230.27 prescribes no details for the conduct of a contest, except that it warns a contestant to keep the register (now manager) of the district land office informed of his address in order that notice of his preference right of entry may be mailed to him, in the event of a successful contest. It seems clear that the contests referred to in 43 CFR 230.27 are to be governed by the procedure detailed in the Department's Rules of Practice.

The explanation of the difference in language between 43 CFR 230.27 and Rule 1 appears to be that, when the provision now codified as 43 CFR 230.27 was first adopted in instructions approved June 6, 1905 (paragraph 6, 33 L. D. 607), Rule 1 did not then contain the clause "not shown by the records of the Land Department." (31 L. D. 527.) Paragraph 6 of the instructions was amended on January 19, 1909, to prohibit contests in certain cases (37 L. D. 365), but was restored to its original substance on August 24, 1912 (41 L. D. 171; see *Wells v. Fisher*, 47 L. D. 288 (1919)). In the restoration, it was apparently overlooked that, in the interim, Rule 1 had been amended on December 9, 1910, to include the clause concerning the records of

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the Department, or it was assumed that a corresponding change in paragraph 6 of the instructions was unnecessary. Whatever the reason may have been, there is no indication that the difference in language was intended for the purpose of establishing two different contest procedures.

It must be concluded that Mr. McClymonds' application to contest Mr. Cooper's entry is governed by Rule 1 of the Rules of Practice, and that it was properly dismissed for the reason that it was based solely upon grounds disclosed in the records of the Department. In this connection, it may be noted, in response to Mr. Cooper's contention that he received no notice of the contest, that the Rules of Practice provide for the service of notice only where an application for contest is allowed (43 CFR 221.5). Mr. McClymonds' application was dismissed.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the Director's decision of April 22, 1949, is affirmed.

MASTIN G. WHITE,
Solicitor.

GEORGE B. WILLOUGHBY

A-25292

Decided September 21, 1949

Reclamation Withdrawal—Sale by Irrigation District.

Where land in a desert-land entry is withdrawn under the Reclamation Act and the entry is subsequently canceled, the withdrawal becomes effective as to such land upon the cancellation of the entry.

Where assessments were levied by an irrigation district under the act of August 11, 1916, against unpatented land in an existing desert-land entry, the irrigation district can enforce the lien arising from such assessment by a sale of the land in accordance with the provisions of the act, despite the cancellation of the entry and the withdrawal of the land under the Reclamation Act during the intervening period.

The purchaser of the land at such a sale may obtain a patent to the land only if he submits proof of the reclamation and irrigation of the land, as required by the Reclamation Act, and pays to the United States the amounts required under that act.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

George B. Willoughby's desert-land application (Los Angeles 067422) for certain land in California was rejected by the Director of the Bureau of Land Management in a decision dated December 16, 1947, on the ground that the land had been withdrawn on October 19, 1920, under a first-form reclamation withdrawal, pursuant to section 3 of the Reclamation Act (43 U. S. C., 1946 ed., sec. 416). The Director suggested that Mr. Willoughby file an application for the revocation of the withdrawal.

On appeal to the head of the Department, Mr. Willoughby states that the land for which he applies was subject to the desert-land entry (El Centro 03209; Los Angeles 039469) of Andrew Nelson from June 2, 1917, to March 30, 1938; that the land is within the boundaries of the Imperial irrigation district; that the district's plan of irrigation was approved by the Secretary of the Interior under the act of August 11, 1916 (39 Stat. 506; 43 U. S. C., 1946 ed., sec. 621 *et seq.*); that this land was duly assessed by the Imperial irrigation district; that Mr. Nelson paid the annual assessments for the years 1917 through 1931, but failed to pay the annual assessments "commencing with the fiscal and tax year of 1931-1932 and thereafter"; that in 1941 the Imperial irrigation district "took assessment deed to the whole of said 160 acres"; and that, after the period of redemption had expired, Mr. Willoughby purchased from the Imperial irrigation district its "assessment deed interest" in the land. The appellant contends that he is entitled to obtain a patent to the land upon the payment of the minimum price per acre prescribed by the act of August 11, 1916.

The act of August 11, 1916, relates to the formation under State law of irrigation districts within areas which include lands of the United States. Upon approval by the Secretary of the Interior of an irrigation district's plan, public lands subject to entry and entered but unpatented lands within the district are made subject, in the same manner as privately owned lands, to the laws of the State relating to irrigation districts. Section 2 of the act, as amended (43 U. S. C., 1946 ed., secs. 622, 626), provides for apportioning the cost of the irrigation structures among the lands within a district, makes the unpatented lands subject to a lien for the assessed charges, and authorizes the enforcement of the lien against unpatented entries by sale of the land in the same manner as assessments are enforced against privately owned lands.¹

Mr. Willoughby's contention that he is entitled to receive a patent to the land involved in this appeal upon the payment of the minimum price per acre prescribed by the 1916 act is apparently based on section 6 of the act (43 U. S. C., 1946 ed., sec. 628). That section provides that a person who has purchased from an irrigation district entered but unpatented land sold by the district because of failure on the part of the entryman to pay assessments may receive a patent upon paying to the Government a prescribed price per acre. However, section 6 specifically indicates that it is applicable only to entered but unpatented lands which are "not subject to reclamation law."

¹ Cf. Solicitor's opinions of August 12, 1942 (58 I. D. 65), and October 30, 1942 (58 I. D. 170), discussing the methods of enforcing lien assessments by State agencies against Federal lands under the act of May 20, 1908 (35 Stat. 169), and the act of January 17, 1920 (41 Stat. 392).

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Consequently, this section is not applicable in the present case because the land involved here was withdrawn under the Reclamation Act, and it must be regarded, therefore, as "subject to reclamation law."

Although the reclamation withdrawal of October 19, 1920, did not become effective as to this land while Mr. Nelson's entry was in existence, it became effective as of March 30, 1938, when that entry was canceled. 43 CFR 230.19; *Wendell H. Brodhead*, A-24315, Bismarck 024824 (June 25, 1946). The subsequent sale by the irrigation district was one with respect to land subject to the Reclamation Act. Accordingly, the purchaser, if he has any right to the land, would have to comply with the requirement of section 2 of the 1916 act that the purchaser of unpatented land withdrawn under the Reclamation Act must, in order to receive a patent, submit satisfactory proof of the reclamation and irrigation of the land in accordance with the Reclamation Act, as well as make the payments required under that act.

Under section 2 of the 1916 act, an irrigation district's authority to sell Government land because of unpaid assessments is applicable to "lands covered by unpatented entries." In this case, as the irrigation district's sale apparently took place in 1941, or 3 years after the Nelson entry had been canceled, the question arises whether this was a sale of land covered by an unpatented entry, within the meaning of section 2.

Any doubt on the point mentioned in the preceding paragraph appears to be resolved by the provision in section 5 of the 1916 act (43 U. S. C., 1946 ed., sec. 627) that "No public lands which were unentered at the time any tax or assessment was levied against same by such irrigation district shall be sold for such taxes or assessments * * *." This statutory language seems to imply that the converse of the proposition stated is permissible, i. e., that Government land which was entered but unpatented at the time when assessments were made may be sold by an irrigation district in order to collect such assessments, even though the entry may have been canceled in the meantime. Accordingly, it is concluded that the cancellation of the Nelson entry in 1938 did not preclude the irrigation district from thereafter effecting a valid sale of the land to enforce its lien for assessments made during the period when the entry was in existence.

The only remaining question is whether the first-form withdrawal of October 19, 1920, precludes the approval of Mr. Willoughby's application. That withdrawal became effective as to the land involved here on March 30, 1938, when the Nelson entry was canceled. Ordinarily, when a first-form reclamation withdrawal attaches to public lands, they cannot thereafter be entered, selected, or located so long as they remain withdrawn (43 CFR 230.13, 230.19). However, section 2 of the 1916 act provides that if entered but unpatented land

be withdrawn under the Reclamation Act, the holder of a tax deed or tax title to such land from an irrigation district is entitled to the rights of an assignee under the act of June 23, 1910 (36 Stat. 592; 43 U. S. C., 1946 ed., sec. 441). Moreover, in view of the power granted to the irrigation district to enforce by sale its liens based on assessments levied on Government lands while they were covered by unpatented entries, it seems clear that this constitutes a "valid existing right" which is not affected by the withdrawal of land subsequent to the making of the assessments. In this case, the right became effective as of the date of the assessments made during the period when the Nelson entry was in effect. The withdrawal order of October 19, 1920, which became effective when the Nelson entry was canceled on March 30, 1938, expressly safeguarded valid existing rights. Hence, Mr. Willoughby, as the present holder of such a right, is entitled to acquire a patent in accordance with section 2 of the 1916 act, upon complying with the regulations which are applicable to the purchasers of assessment liens under the act of August 11, 1916, and with the requirements as to reclamation and irrigation of the land and the making of payments under the Reclamation Act.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Director of the Bureau of Land Management is reversed, and the case is remanded for further action not inconsistent with this decision.

MASTIN G. WHITE,
Solicitor.

FRANCES R. REAY, LESSEE,
STANDARD OIL COMPANY OF CALIFORNIA, OPERATOR

A-25747

Decided October 17, 1949

Rights-of-Way—Pipe Lines.

The Secretary of the Interior has no authority to grant rights-of-way for pipeline purposes for the transportation of oil or gas over the public domain, except in accordance with the provisions, limitations, and conditions embodied in section 28 of the Mineral Leasing Act.

An application by an oil and gas lessee under the Mineral Leasing Act for such a grant across public land not covered by the lease, on a basis which would exclude the common-carrier condition of section 28, must be denied, even though it merely involves a pipe line for the transportation of oil or gas from one portion of the leased land to another portion of such land across an intervening 40-acre tract.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Frances R. Reay holds an oil and gas lease issued pursuant to the Mineral Leasing Act, as amended (30 U. S. C., 1946 ed., sec. 181 *et seq.*), on the SW $\frac{1}{4}$ SW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$, and NE $\frac{1}{4}$ SE $\frac{1}{4}$

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sec. 22, T. 21 S., R. 15 E., M. D. M., California. The Standard Oil Company of California is the operator of the lease. The operator has laid certain lines across the SE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 22, a 40-acre tract of land not embraced in the lease, in order to move the oil produced in one subdivision of the leased land to another subdivision of such land.

The operator has requested that it be granted rights-of-way for these lines across the intervening tract, because the lines are necessary in the operation of the lease. It contends that the lines are gathering lines necessary for the proper movement of the oil produced in one subdivision to another subdivision of the land included in the same lease, and that the lines are not pipe lines within the contemplation of section 28 of the Mineral Leasing Act, as amended (30 U. S. C., 1946 ed., sec. 185). Section 28 authorizes the granting of rights-of-way for pipe lines only upon the express condition that the pipe lines shall be constructed, operated, and maintained as common carriers.

In a letter to the operator dated January 26, 1948, the Director of the Bureau of Land Management held that section 28 of the Mineral Leasing Act is the only statutory provision under which a right-of-way for a line for the transportation of oil or gas across public land can be granted, and that the Department is without authority to waive any of the provisions of that section. The operator appealed to the head of the Department.

The pertinent part of section 28 is as follows:

Rights-of-way through the public lands * * * may be granted by the Secretary of the Interior for pipe-line purposes for the transportation of oil or natural gas * * * upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers * * *: *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. * * *

The language of the section is clear. It permits the granting of rights-of-way "through the public lands * * * for pipe-line purposes for the transportation of oil or natural gas" under certain conditions, one of them being that the pipe lines "shall be constructed, operated, and maintained as common carriers"; and it specifically prohibits the granting of any right-of-way "over said lands for the transportation of oil or natural gas" except under those conditions. This Department is bound by the plain meaning of the quoted phrases.

Although the pipe lines involved in the present proceeding may be short in length and necessary to the operation of the lease, nevertheless, the requested right-of-way is "through the public lands," and it is proposed to be used "for the transportation of oil or natural gas." The case comes within the scope of the unambiguous language of section 28.

The existence of the lease is immaterial, because the lease grants to the lessee no rights in lands outside the subdivisions described in the lease.

The opinion of the Attorney General (36 Op. Atty. Gen. 480) cited by the operator does not cover the present case. There, the Attorney General merely held that if it were made to appear to the Secretary of the Interior that the establishment of a pumping station on the public domain, outside the 50-foot strip in which a pipe line was laid pursuant to section 28 of the Mineral Leasing Act, was reasonably necessary for the operation of the pipe line, the Secretary had the authority to authorize the grantee of the pipe-line right-of-way to construct the pumping station. The Attorney General pointed out that section 28 contains no express reference to pumping stations, and said that "the power to grant a right for pumping stations is one necessarily implied on the ground of necessity to make the pipe line operative * * *." Insofar as the present case is concerned, section 28 is as explicit as words permit with respect to pipe-line rights-of-way and the conditions under which they may be granted. No implication contrary to the express command of Congress is possible.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

HUNTING, FISHING, AND TRAPPING RIGHTS OF THE NEZ PERCE INDIANS

Indian Reservation—State Regulation—Fish and Game Furnished by State.

Members of the Nez Perce Tribe of Indians who were not granted trust patents to their allotted lands prior to May 8, 1906, and who have not received fee patents for such lands, may engage in hunting, fishing, and trapping on tribal lands or trust allotments within the exterior boundaries of the Nez Perce Indian Reservation in the State of Idaho without observing the provisions of the State conservation laws.

The State of Idaho could not, by stocking the reservation with fish and game, acquire the power to regulate hunting, fishing, and trapping by the Nez Perce Indians on the reservation.

M-36000

OCTOBER 21, 1949.

TO THE COMMISSIONER OF INDIAN AFFAIRS.

This responds to your request for an opinion on the question whether members of the Nez Perce Tribe of Indians who were not granted trust patents to their allotted lands prior to May 8, 1906, and who

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have not received fee patents for such lands, may engage in hunting, fishing, and trapping on tribal lands or trust allotments within the exterior boundaries of the Nez Perce Indian Reservation in the State of Idaho without observing the provisions of the State conservation laws.

The significance of the date, May 8, 1906, in connection with questions of State jurisdiction over Indians on reservations, derives from the fact that section 6 of the General Allotment Act of February 8, 1887 (24 Stat. 390), which had subjected allottees, as soon as trust patents were issued to them, to the civil and criminal laws of the State or Territory in which they happened to reside, was amended by the act of May 8, 1906 (34 Stat. 182; 25 U. S. C., 1946 ed., sec. 349), in such a way as to subject allottees to State laws only after fee patents have been issued to them.

Thus, it has been held that allottees who received trust patents prior to May 8, 1906, are subject to the criminal jurisdiction of the States of their residence to the same extent as non-Indians (*United States v. Kiya*, 126 Fed. 879 (D. N. D., 1903), and *In re Now-ge-zhuok*, 76 Pac. 877 (Kans., 1904)); and that allottees who have received patents in fee to allotted lands at any time are similarly subject to State criminal jurisdiction. *Eugene Sol Louie v. United States*, 274 Fed. 47 (C. C. A. 9th, 1921); *Kitto v. State*, 152 N. W. 380 (Nebr., 1915); *State v. Big Sheep*, 243 Pac. 1067 (Mont., 1926); *State v. Monroe*, 274 Pac. 840 (Mont., 1929); and *People v. Pratt*, 80 P. (2d) 87 (Calif., 1938). In some of these cases, State criminal jurisdiction has been upheld notwithstanding the existence of Federal statutes punishing the same crimes. In *State v. Bush*, 263 N. W. 300 (Minn., 1935), the court upheld the conviction of a patent-in-fee Indian who had taken muskrat on reservation land in violation of the State conservation laws; and, in 58 I. D. 455 (1943), this office held that an Indian allotted prior to May 8, 1906, could be convicted of violating the game laws of South Dakota, although he had hunted on reservation land.

Apart from Indians who come within the categories mentioned above, however, both State and Federal courts, as well as this office, have held that the States cannot regulate the right of Indians to hunt, fish, and trap on tribal lands and trust allotments. See *State v. Cooney*, 80 N. W. 696 (Minn., 1899); *Cohen v. Gould*, 225 N. W. 435 (Minn., 1929); *State v. Cloud*, 228 N. W. 611 (Minn., 1930); *State v. Johnson*, 249 N. W. 284 (Wis., 1933); *Pioneer Packing Co. v. Winslow*, 294 Pac. 557 (Wash., 1930); *United States v. Sturgeon*, Fed. Cas. No. 16,413 (D. Nev., 1879); *In re Blackbird*, 109 Fed. 139 (W. D. Wis., 1901); *In re Lincoln*, 129 Fed. 247 (N. D. Calif., 1904); *United*

States ex rel. Lynn v. Hamilton, 233 Fed. 685 (W. D. N. Y., 1915); 56 I. D. 38 (1936); 57 I. D. 295 (1941); 58 I. D. 331 (1943). The power of the States to apply their conservation laws to Indians taking fish and game on their own reservations is excluded (in the absence of congressional consent) both by the Federal control of the reservations and by the existence of tribal sovereignty, subject to such control.

The Nez Perce Indian Reservation is not, in this respect, in any special category. It is true that the Supreme Court of Idaho, in applying the State criminal law to a case of larceny by a Nez Perce Indian who had received an allotment upon the Nez Perce Reservation prior to 1906, apparently regarded the cession to the United States of part of the reservation under the agreement of May 1, 1893, between the Nez Perce Indians and the United States, ratified by the act of August 15, 1894 (28 Stat. 327), and the allotment of the remainder of the reservation under legislation conferring citizenship upon the allottees and conferring general civil and criminal jurisdiction over allottees upon the State, as having effected a termination of the reservation, for the court referred to the reservation as the "former" Nez Perce Indian Reservation (*State v. Lott*, 123 Pac. 491 (1912)). However, the cession of part of the reservation to the United States could not have the effect of removing the remainder of the area, which was retained for Indian use, from the category of an Indian reservation; and the existence of the reservation was not terminated by the allotment of the reservation lands to the Indians under trust patents (*United States v. Celestine*, 215 U. S. 278 (1909)). Hence, in the absence of congressional action discontinuing the Nez Perce Indian Reservation, that reservation must be regarded as still being in existence. Presumably, the Supreme Court of Idaho itself no longer regards the Nez Perce Indian Reservation as having been terminated (see *State v. McConville*, 139 P. (2d) 485 (1943)).

I am of the opinion, therefore, that members of the Nez Perce Tribe of Indians who did not receive trust allotments prior to 1906 and who have not received patents in fee to their allotments may engage in hunting, fishing, and trapping on tribal lands or trust allotments within the exterior boundaries of the Nez Perce Indian Reservation in Idaho without observing the provisions of the conservation laws of the State of Idaho.

As for your subsidiary question, whether the State of Idaho could apply its conservation laws to the Indians of the Nez Perce Reservation if the State stocked the reservation with fish and game, it is plain that this question must be answered in the negative. In the modern world, property and sovereignty have been regarded as distinct concepts. The power to regulate the taking of fish and game is an aspect of sovereignty, and the sovereignty of a State does not (in the

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absence of consent by Congress) extend to the members of an Indian tribe on an Indian reservation. Moreover, the State cannot assert ownership of fish and game with which it may stock a particular area, for the rule has long been recognized that there is no property in fish and game once held captive but since returned to a state of nature. They are regarded as *ferae naturae*.

MASTIN G. WHITE,
Solicitor.

UNITED STATES *v.* MARGHERITA LOGOMARCINI

A-25448

Decided October 24, 1949

Mining Claims—Patents.

A mineral patent will not be issued to an applicant unless and until he shows that he has the full possessory title or right to the mining claim.

An application for a mineral patent will be rejected where, although the claim may formerly have been valuable for minerals, it is not shown as a present fact that the land is mineral in character and is valuable for its mineral content.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Cavure gold placer mining claim was located on December 15, 1885. It contained 160 acres, and consisted of the NW $\frac{1}{4}$ NE $\frac{1}{4}$, N $\frac{1}{2}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 32, the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 30, and the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 31, T. 20 N., R. 12 E., M. D. M., California. The north fork of the Yuba River flows westward through the lower portion of the NW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 32.

On August 20, 1945, Mrs. Margherita Logomarcini filed an application for a patent to the "Cavure Placer Mining Claim," but she described it as consisting only of the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 30, the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 31, and the NW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 32, and as containing 60 acres. Mrs. Logomarcini stated in her application that the claim contains gravel deposits carrying free gold of an average value of \$4.50 per yard, and that she had been the sole owner of the claim since October 14, 1932.

On June 10, 1946, the Forest Service of the Department of Agriculture filed a protest against the application and requested its rejection on the grounds that—

1. The land is nonmineral in character.
2. The land is not valuable for its mineral but is valuable for national forest uses.
3. The applicant does not have title to that part of the claim south of the north bank of the north fork of the Yuba River.

A hearing on the protest was held on March 25, 1947. On August 7, 1947, the acting manager of the district land office at Sacramento held that the Forest Service had failed to sustain the first two charges. The acting manager said nothing about the third charge. He recommended that the contest be dismissed and that, "all things being regular," the claim proceed to patent. The Forest Service appealed to the Director of the Bureau of Land Management.

On February 3, 1948, the Director held that the Forest Service had not sustained the first charge (i. e., that the land applied for is non-mineral in character), but that the Forest Service had sustained the second charge ("which in effect is that there has been no valid discovery") and the third charge (that the applicant does not have title to the part of the claim situated south of the north fork of the Yuba River). The Director therefore rejected the application for patent, but he stated that the rejection was without prejudice to the right of the applicant to remain in possession of the claim so long as she is diligently and persistently engaged in seeking a valid discovery.

The applicant has appealed to the head of the Department from the Director's decision.

Considering the third charge first, it is conclusively shown by the abstract of title submitted by the applicant with her application for patent that she has no title to the portion of the claim covering the part of the NW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 32 which lies south of the north fork of the Yuba River. According to the abstract, this portion of the claim was conveyed on November 30, 1889, to Giovanni Ghidotti and Luigi Ferro. No conveyance of this part of the claim to the applicant is shown in the abstract, nor has any other showing been made by the applicant to support her claim of title respecting this tract. In fact, the applicant admitted in her reply briefs before the acting manager and the Director that this part of the claim is owned by Messrs. Ghidotti and Ferro.

The abstract reveals a further defect in title which extends to the claim as a whole. The notice of location of the claim shows that the location was made by eight individuals, one of whom was J. H. Henderson. No conveyance by J. H. Henderson of his interest in the claim is shown in the abstract of title. It cannot be assumed, therefore, that the applicant has succeeded to the one-eighth interest of J. H. Henderson in the claim.

In addition, the abstract shows that the portion of the claim lying north of the Yuba River was conveyed on September 2, 1889, to Jerome Castagnetto and Luigi Lagomarsino, and that on August 12, 1932, Rose Castagnetti conveyed an undivided one-half interest in this portion of the claim to the applicant. There is nothing in the abstract or elsewhere in the record to establish the relationship of

October 24, 1949

Rose Castagnetti to Jerome Castagnetto, or to show that she succeeded to his interest in the claim.

In the circumstances, it is clear that, apart from the other objections to the issuance of a mineral patent in this case, no patent can be issued to the applicant unless and until these defects in the title are cured and she shows that she has the full possessory right or title to the portion of the claim applied for by her. *E. J. Ritter*, 37 L. D. 715, 716 (1909).

With respect to the first two charges made by the Forest Service, the evidence offered by both sides is substantially as set forth in the Director's decision. It will only be summarized briefly here.

The three witnesses for the Forest Service testified that the claim is largely covered with glacial debris and contains little water-washed or river gravel in which placer gold could be expected to be found. The witnesses further testified that, of 21 samples of material taken and panned from all parts of the claim, only insignificant gold values, ranging from 0.2 cent to 9 cents per cubic yard, were found in 6 of the samples; and that the other 15 samples showed no values at all.

The applicant and her witnesses testified that the applicant's father and, at times, other members of the family worked the claim from 1885 to 1909 and found enough gold to support two families living on the claim. This testimony does not make clear the extent to which the gold was found on the portion of the Cavure claim applied for by the appellant and the extent to which it was found on other portions of the claim which are not included in the application. The applicant offered practically no evidence as to the mineral content of the claim at the present time.

Although the precise issue does not appear to have been decided before, it seems clear that, before a mineral patent can be issued, it must be shown as a present fact, i. e., at the time of the application for patent, that the claim is valuable for minerals. See *Houghton v. McDermott et al.*, 15 L. D. 509 (1892); *Peirano et al. v. Pendola*, 10 L. D. 536 (1890); *The Clipper Mining Co. v. The Eli Mining and Land Co. et al.*, 33 L. D. 660 (1905); *Davis' Administrator v. Weibbold*, 139 U. S. 507, 523 (1891); 43 CFR 185.54; Lindley on Mines (3d ed.), sec. 94. In line with this principle, it has been held that where a mining claim has been worked out, the land becomes subject to disposition under the nonmineral land laws and not under the mining law. *United States v. Reed*, 28 Fed. 482 (C. C. Ore., 1886); *United States v. Central Pac. R. Co.*, 93 Fed. 871 (C. C. N. D. Calif., 1899); *Cutting v. Reininghaus et al.*, 7 L. D. 265 (1888); *Thomas v. Thomasson*, 16 L. D. 52 (1893); *Dargin et al. v. Koch*, 20 L. D. 384 (1895).

A fair view of the evidence presented here requires the conclusion that, although the portion of the Cavure claim applied for may have been valuable for gold up to 1909, the claim now possesses no value for its gold content. It must be held, therefore, that the Forest Service sustained its charges that, insofar as the issuance of a mineral patent is concerned, the land is nonmineral in character and is not valuable for its mineral content at the present time.

The Director's statement that the appellant might remain in possession of the claim so long as she is diligently engaged in seeking a discovery is justified by the fact that the Forest Service made no attempt to have the appellant's mining claim declared to be null and void. The Forest Service stated in its reply brief before the acting manager, "this is a contest of application for patent, not a contest of the location." The charges that the claim is nonmineral in character and is not valuable for its mineral content are considered as having a bearing only upon the present proceeding respecting the issuance of a mineral patent.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the Director's decision rejecting the application for patent is affirmed.

MASTIN G. WHITE,
Solicitor.

**ESTATE OF GEORGE BIRD EAGLE, ALLOTTED PINE RIDGE
SIOUX INDIAN**

IA-13

Decided November 3, 1949

Indian Custom Divorce—Motive in Effecting Separation—Mental Condition of Husband—Gifts by Husband Subsequent to Separation—Performance of Services by Wife.

A ceremonial marriage of Indians living in tribal relations may be terminated by a divorce in accordance with Indian custom.

A divorce by Indian custom results if the parties to a marriage separate and either party intends that the separation shall be permanent. It is immaterial whether such intention is or is not justified because of cruel treatment or other wrong suffered from the other party.

As a divorce in accordance with Indian custom may be accomplished unilaterally by one party, it is immaterial that the other party may have been mentally unbalanced and therefore incapable of entertaining any rational intention to effect a permanent separation.

The fact that the husband, after a permanent separation, may have attempted to befriend his former wife would not reestablish the marriage relationship.

The fact that the wife performed services for the benefit of the husband during their matrimonial relationship gives her no right to share in his estate.

November 3, 1949

APPEAL FROM EXAMINER OF INHERITANCE, BUREAU OF INDIAN AFFAIRS

George Bird Eagle, Pine Ridge Sioux allottee No. 1168, died intestate on April 24, 1947, at the age of 57 years, leaving an estate valued at \$11,222.40. On February 16, 1949, the Examiner of Inheritance, after notice and hearing, entered an order determining that Austin Bird Eagle, the father of the decedent, is his sole heir.

On April 5, 1949, Julia Bird Eagle (nee Kills Crow), claiming that she was the wife of the decedent and that, as such, she was entitled to share in his estate, filed with the Examiner of Inheritance a "petition on appeal," which apparently was treated by the Examiner as a petition for rehearing. After this petition was denied on April 18, 1949, Julia Bird Eagle filed a "bill of particulars," which has been treated as an appeal to the head of this Department.

The appellant was married to the decedent by civil ceremony in 1919 and by religious ceremony in 1921. The Examiner of Inheritance found, however, that the appellant was divorced from the decedent in 1931 in accordance with Indian custom.

It appears that the appellant separated from the decedent in 1931 because he had a habit of discharging a six-shooter at her. She went to live with her relatives on the Standing Rock Indian Reservation, and she never returned to the decedent's domicile. To quote from her testimony—

Q. How and when did your marriage to this decedent end?

A. We separated about 17 years ago and I went back to the Standing Rock Reservation. George got off his head once in a while and when he got like that he tried to shoot me and I picked up and left him.

Q. Did you ever go back to live with him again?

A. No.

The contention of the appellant that, notwithstanding this separation, she remained the wife of the decedent seems to be based primarily upon the fact that she was never divorced from him by judicial decree, and upon the necessity of separating from him in the interest of her own safety. It is well settled, however, that even a legal ceremonial marriage of Indians living in tribal relations may be terminated by a divorce in accordance with Indian custom. It is true that an Indian tribe may itself require its members to be married and divorced in accordance with State law, and that the tribal council of the Oglala Sioux Tribe of the Pine Ridge Reservation has taken such action. The ordinance effecting the change in the law of the tribe was not adopted, however, until March 2, 1937, which was long after the appellant had separated permanently from the decedent. As for the motive of the appellant, it is immaterial that she may have been wholly justified in leaving her husband, if in fact she intended that their separation should be permanent.

The other arguments of the appellant are couched in rather obscure terms. She apparently denies the possibility in her case of a divorce in accordance with Indian custom, on the ground that the decedent was mentally unbalanced and, therefore, was incapable of effecting a divorce. A divorce in accordance with Indian custom may be accomplished unilaterally, however, by either of the parties to the marriage. The only reasonable inference from the long separation of the appellant and decedent is that the appellant, at least, intended to separate from her husband for good. An intention by one of the parties to effect a permanent separation is sufficient to constitute a divorce in accordance with Indian custom.

The appellant also seems to argue that no divorce in accordance with Indian custom took place because, subsequent to her separation from her husband, he "tried to have others carry money and various articles" to her. It is not clear that the appellant knew this to be true of her own knowledge. Even if it be assumed, however, that it could be satisfactorily established that the decedent attempted to befriend the appellant in this way, it would neither furnish persuasive proof of the decedent's desire to resume his matrimonial relationship with the appellant, nor affect the finality of the appellant's own intention to separate permanently from her husband.

Finally, the appellant seems to assert that she is entitled to share in the decedent's estate because, while she was married to him, she helped him to take care of his cattle, and performed other wifely duties. The performance of services by a wife does not, in itself, confer upon her a right to inherit from her husband. Such a right could be recognized, to be sure, by State law (as, for instance, in those States where a system of community property prevails in matrimonial relationships), but it would have no bearing upon the distribution of restricted Indian property by this Department, which is required to apply in such cases only the State's rules of devolution.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 25, Order No. 2509; 14 F. R. 307), the order of the Examiner of Inheritance denying the appellant's petition for rehearing is affirmed.

MASTIN G. WHITE,
Solicitor.

MARY I. CHAPMAN
HARRY M. KIRCHNER

A-25517

Decided November 16, 1949

A-25688

Oil and Gas Leases—Applications—Defects.

Applications for noncompetitive oil and gas leases will confer no rights upon the applicants where the applications do not comply with the requirements of

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the Department's regulations that the land applied for must be as nearly compact in form as possible or that an application submitted by an attorney in fact must be accompanied by the applicant's own affidavit as to citizenship and acreage holdings.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

On July 14, 1944, Dorothy Bassie, Minnie Mae Hefner, LaRue Dye, J. E. Dye, and Lillie Dye each filed an application for a noncompetitive oil and gas lease under section 17 of the Mineral Leasing Act, as then amended (49 Stat. 676). The applications were filed at 8:30 a. m. in the district land office at Buffalo, Wyoming. On the same day, there was published in the Federal Register at Washington, D. C. (9 F. R. 7859), an amendment to the Department's oil and gas leasing regulations which required that applicants for noncompetitive leases pay at the time of filing at least one-half of the first year's rental, and directed that applications not accompanied by such payments be rejected by the register (43 CFR, 1944 Supp., 192.16). The amendment to the regulations, by its terms, became effective on the date of publication.

On July 18, 1944, the acting register rejected the applications because they were not accompanied by rental payments. Promptly thereafter, on July 26, the applicants tendered the required payments, saying that they had just learned of the new regulation. In the interim, Mary I. Chapman had filed on July 20 an oil and gas lease application which conflicted with all the five previous applications, and Harry M. Kirchner had filed on July 22 an oil and gas lease application which conflicted with three of the previous applications. The Chapman and Kirchner applications were accompanied by the required rental.

Upon appeals from the register's decision by the first five applicants, the Commissioner of the General Land Office,¹ in a decision approved by Assistant Secretary Chapman on October 11, 1944, directed the reinstatement of the applications as of July 26, subject to prior intervening applications. Upon motions for rehearing, Assistant Secretary Chapman, on May 12, 1945, directed the reinstatement of the applications as of July 14. *Dorothy Bassie et al.*, A-24015, 59 I. D. 235. Separate protests against this decision were filed by Mrs. Chapman and Mr. Kirchner but the protests were dismissed on May 15, 1946.

Leases accordingly were issued to the five original applicants, following which the Assistant Director of the Bureau of Land Management rejected Mr. Kirchner's application on March 9, 1948, and Mrs. Chapman's application on April 14, 1948.

¹ Effective July 16, 1946, the General Land Office was abolished and its functions were transferred to the Bureau of Land Management by section 403 of Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

Mr. Kirchner and Mrs. Chapman have filed separate appeals to the head of the Department from these decisions. They repeat the same basic contention that has heretofore been considered by the Department, namely, that the Department had no authority to waive the new regulation on rentals in order to permit the reinstatement of the Bassie and other applications as of July 14, 1944. The appellants contend that as they had filed their applications before the first five applicants had complied with the new regulation, they were entitled to a preference right to a lease in accordance with section 17 of the Mineral Leasing Act.

Assuming for purposes of argument only that the Bassie and other applications could be considered as having been filed only on July 26, when the required rentals were paid, this fact would not avail the appellants, for the appellants' own applications were defective when filed.

At the time when the appellants' applications were filed, the regulations of the Department, which had been in effect at least since 1936 (55 I. D. 506, 43 CFR 192.23), provided (1) that if an application was submitted by the applicant's attorney in fact, the "applicant's own affidavit as to his citizenship and holdings must be attached thereto," and (2) that the application must include a description of the lands sought to be leased "which may not exceed 2,560 acres as nearly compact in form as possible."

Mr. Kirchner's application was signed by Carl C. Montgomery, his attorney in fact, and was not, when filed, accompanied by Mr. Kirchner's own affidavit as to his citizenship and acreage holdings. This affidavit was not filed until August 2, 1944, so it was not until that date that Mr. Kirchner's application complied with the Department's regulations and entitled him to any preference over subsequent applicants. *Edwina S. Elliott*, 56 I. D. 1 (1936); *Sour v. McMahon*, 51 L. D. 587 (1926).

Mrs. Chapman's application was filed for the following land:

1. T. 53 N., R. 72 W., 6th P. M.,
 - sec. 11, E $\frac{1}{2}$ W $\frac{1}{2}$.
 - sec. 14, E $\frac{1}{2}$ W $\frac{1}{2}$.
 - sec. 23, E $\frac{1}{2}$ W $\frac{1}{2}$.
 - sec. 26, E $\frac{1}{2}$ W $\frac{1}{2}$.
 - sec. 35, NE $\frac{1}{4}$ NW $\frac{1}{4}$.
2. T. 53 N., R. 72 W., 6th P. M.,
 - sec. 35, E $\frac{1}{2}$ SW $\frac{1}{4}$.
3. T. 51 N., R. 72 W., 6th P. M.,
 - sec. 10, S $\frac{1}{2}$ NE $\frac{1}{4}$.
 - sec. 11, S $\frac{1}{2}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$.
4. T. 51 N., R. 71 W., 6th P. M.,
 - sec. 30, NE $\frac{1}{4}$ SW $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$.

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This land comprises four noncontiguous tracts in three separate townships. The first tract described consists of a strip of land $\frac{1}{4}$ of a mile wide and $4\frac{1}{4}$ miles long. It is separated from the second tract by the space of a 40-acre tract; the second from the third tract by a distance of $1\frac{1}{4}$ miles; and the third from the fourth tract by a distance of $3\frac{1}{4}$ miles. A rectangle of land approximately 10 miles long and $3\frac{1}{2}$ miles wide would be required to embrace the four tracts applied for.

By no stretch of the imagination could it be said that the land applied for by Mrs. Chapman was "as nearly compact in form as possible." Construing the similar phrase "reasonably compact form" as used in section 13 of the Mineral Leasing Act, as amended (49 Stat. 674), the Department has held as a matter of "extreme liberality" that land consisting of incontiguous tracts would be considered to be reasonably compact if all the tracts could be included in a general area equal to a township, i. e., an area 6 miles square. *Helen F. Curns*, 50 L. D. 353 (1924); *William J. O'Haire*, 50 L. D. 562 (1924); see, also, Solicitor's opinion of December 1, 1933, 54 I. D. 338. The 6-mile-square rule of compactness is one of long standing which has now been specifically incorporated in the Department's regulations. 43 CFR, 1947 Supp., 192.40.

It is true that the Department has allowed an applicant for a prospecting permit, whose application did not conform with the requirement of compactness, an opportunity to correct his application without losing his priority over a subsequent intervening applicant. *Spindle Top Oil Association v. Downing et al.*, 48 L. D. 555 (1922). However, implicit in this practice has been the recognition that an application which does not conform with the compactness requirement is a defective application which the Department has discretion to allow or reject. See 43 CFR, 1947 Supp., 192.40. In the unusual circumstances presented in this case, the Department sees no valid reason for allowing Mrs. Chapman to cure the defect in her application as of July 20, 1944, and denying that privilege to Mrs. Bassie and her coapplicants.

It is clear, therefore, that when the Kirchner and Chapman applications were filed, neither one conformed to the Department's regulations. The Kirchner application was perfected on August 2, 1944, but the Chapman application has never been amended to comply with the regulation on compactness. In any event, when the Bassie and other applications were validated by the payments of rentals on July 26, there were no pending valid prior applications. The issuance of leases on these applications and the rejection of the Kirchner and Chapman applications were therefore proper.

The Assistant Director's decisions of March 9 and April 14, 1948, are affirmed.

The Solicitor of the Department, who customarily disposes of appeals in public-land cases under a delegation of authority from the Secretary of the Interior (see sec. 23, Order No. 2509; 14 F. R. 307), took no part in the consideration and disposition of these appeals.

OSCAR L. CHAPMAN,
Under Secretary.

JOSE C. CRESPIN v. THELMA D. SLOAN

A-25520

Decided November 16, 1949

Homestead Entry—Color of Title.

Where an application for a tract under the Color of Title Act was rejected by a Bureau official on the ground that the applicant's predecessors in interest had no color or claim of title to the land and the applicant had been put on notice early in his possession of the land that title was in the United States, and the applicant failed to appeal from such decision within the time allowed by the Department, he cannot, years later, reassert his claim under the Color of Title Act, to the prejudice of another person whose intervening application to enter the land under the homestead laws has been allowed.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On January 15, 1948, the homestead entry of Thelma D. Sloan for lot 13, sec. 25, T. 2 S., R. 1 W., N. M. P. M., New Mexico, was allowed. Thereafter, Jose C. Crespin filed an application to contest the entry. Mr. Crespin alleged that he had been in possession of the land and had cultivated it for more than 20 years; that he originally entered the land under deeds from its former owners; and that he was entitled to acquire the land under the Color of Title Act (43 U. S. C., 1946 ed., secs. 1068, 1068a).

On May 18, 1948, the Assistant Director of the Bureau of Land Management dismissed Mr. Crespin's application to contest Miss Sloan's homestead entry. Mr. Crespin thereupon appealed to the head of the Department.

This is Mr. Crespin's second attempt to contest a homestead entry with respect to the tract of land mentioned above. On August 24, 1940, one Jessie F. Sipes applied for lot 13, and his application (Las Cruces 058263) was allowed on July 16, 1941. On September 9, 1941, Mr. Crespin filed an application to contest Mr. Sipes' entry. Mr. Sipes later relinquished his entry.

On July 20, 1942, Mr. Crespin applied for lot 13 under the Color of Title Act. In support of his claim, he submitted two deeds which Josefita L. de Pino and Lauterio Pino, respectively, had executed. The first deed, dated June 12, 1922, purported to convey certain land to Mr. Crespin, but this land could not be identified, from the plats

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of survey on file in the General Land Office,¹ as including any portion of lot 13.² The second deed, dated June 16, 1924, purported to convey to Mr. Crespin all of lot 13, and recited that—

The party of the first part having resided upon and cultivated the said lot for more than ten years, transfers to the second party all his property and improvements, posts and fence, for which the said second party can obtain patent for said land from the Office of Lands of the United States. This being the description on the map, Lot 13, Sec. 25, T. 2 S., R. 1 W.

Mr. Crespin made no showing as to his grantors' claim of title. He merely stated that they had been in peaceful, adverse possession of the land for more than 20 years prior to June 12, 1922.

On November 9, 1942, the Assistant Commissioner of the General Land Office rejected Mr. Crespin's application under the Color of Title Act. The Assistant Commissioner held that Mr. Crespin's case did not come within the scope of that act, because his purported grantors had no color or claim of title to the land, but only adverse possession, and that Mr. Crespin was put on notice by the deed of June 16, 1924, that title to the land was in the United States. The decision expressly stated that it was subject to a right of appeal on the part of Mr. Crespin, and that it was "without prejudice to the right of the applicant to file an application to homestead the land or to have it ordered into the market and sold at public auction." Mr. Crespin took no appeal from the decision of November 9, 1942, and he therefore permitted it to become final 30 days after it was rendered.

On December 3, 1942, in response to a request made by Mr. Crespin, the proper forms upon which to make a homestead application were supplied to him by the acting register of the Las Cruces land office. Mr. Crespin apparently took no further action in the matter until some 5 years later, after Miss Sloan's homestead entry had been allowed.

In view of Mr. Crespin's long acquiescence in the finding of November 9, 1942, that his claim to lot 13 was not entitled to recognition under the Color of Title Act, it appears that he should not be permitted to raise the point at this late date against another person who asserts an intervening claim to the land.

However, it may be noted that the act provides:

That whenever it shall be shown to the satisfaction of the Secretary of the Interior that a tract of public land, not exceeding one hundred and sixty acres, has been held in good faith and in peaceful, adverse, possession by a citizen

¹ Effective July 16, 1946, the General Land Office was abolished and its functions were transferred to the Bureau of Land Management by section 403, Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

² Mr. Crespin now says that the first deed placed him in possession of that part of lot 13 which lies west of Small Holding Claim No. 1728.

of the United States, his ancestors or grantors, for more than twenty years under claim or color of title, and that valuable improvements have been placed on such land, or some part thereof has been reduced to cultivation, the Secretary may, in his discretion, upon the payment of not less than \$1.25 per acre, cause a patent to issue for such land to any such citizen: * * *

The purpose of the statute is to provide a legal method whereby a citizen who, relying in good faith upon a title or claim of title derived from some source other than the Government, has been in peaceful, adverse possession of a tract of public land for the prescribed period, and who has placed valuable improvements upon the land or reduced part of it to cultivation, may acquire a valid title to the land. *Ralph Findlay*, A-23522, February 23, 1943. The element of reliance in good faith on the validity of the title or claim of title under which the land has been held is an essential factor. The mere occupation of public land for the prescribed period, or its occupation under a title or claim of title which the claimant knew or had good reason to believe was invalid, is not sufficient, even though the statutory requirement as to the improvement or cultivation of the land has been met.

It seems unlikely that the Assistant Commissioner of the General Land Office made an error in applying the provisions of the Color of Title Act to Mr. Crespin's case in the decision of November 9, 1942. At any rate, Mr. Crespin accepted the decision, despite the fact that he was expressly advised that he might take an appeal from it. Moreover, Mr. Crespin failed to take advantage of the virtual invitation which the Assistant Commissioner extended to him with respect to homesteading the land or asking that it be made available for purchase at a public auction.

It follows that the dismissal of Mr. Crespin's application to contest Miss Sloan's entry was correct.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Assistant Director is affirmed.

MARTIN G. WHITE,
Solicitor.

OSCAR L. KIND v. JOSEPH E. SELSTAD

A-25745 Decided November 25, 1949

Homestead Entry—Residence Requirement—Affidavit of Contest.

A homestead entry may be canceled where it is shown that the statutory requirement with respect to the maintenance of residence has not been met. An application to contest a homestead entry which asserts that the entryman "has never resided on said farm" raises the issue of whether the entryman has complied with the statutory requirement respecting the maintenance of residence on the land.

November 25, 1949

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Application 7802 to contest Joseph E. Selstad's reclamation homestead entry was filed by Oscar L. Kind on September 7, 1944. Mr. Selstad's reclamation homestead entry covered Farm Unit B, or the NW $\frac{1}{4}$ sec. 24, T. 21 N., R. 5 W., P. M., within the Greenfields irrigation district, Montana.¹ The affidavit of contest alleged that Mr. Selstad had not established his residence on the land. This contest was dismissed in a decision of the Department dated July 30, 1946, because the contest application was not accompanied by a corroborative affidavit, as required by Rule 3 of the Departmental Rules of Practice (43 CFR 221.3).

A second application, 7809, to contest Mr. Selstad's entry was filed by Mr. Kind on October 2, 1946. The grounds of this contest are the same as those stated in the first application, namely:

Joseph E. Selstad has never resided on said farm although he has farmed the place with the help of a tenant for several years. That his absence from the land has not been due to his being in military or naval service and he is not now nor has he been in the service of the government in any capacity.

On May 7, 1947, after a hearing, the acting manager of the district land office held that the entry should be canceled. On April 20, 1949, the Director of the Bureau of Land Management affirmed the decision of the acting manager. The contestee has appealed from the Director's decision to the head of the Department.

The appellant's assertion that the charges set forth in the application of contest are insufficient to state a cause of action cannot be sustained. 43 CFR 221.1 permits contests "for any sufficient cause affecting the legality or validity of the claim, not shown by the records of the Land Department." The homestead statute requires that an application for entry on homestead lands shall be made in good faith for actual settlement and cultivation. Residence on the land for 3 years after filing the entry affidavit is required, and failure to establish and maintain such residence (subject to exceptions not here relevant) will result in the reversion of the land to the Government. (43 U. S. C., 1946 ed., secs. 162, 164, 169.) In this case, the application to contest states that the entryman "has never resided on said farm." This statement adequately raises the question of whether, within the period prescribed by the statute for the establishment and maintenance of residence on the entry, the entryman ever lived on it. It clearly raises a question "affecting the legality or validity of the claim" and is a sufficient basis for initiating a contest within the meaning of 43 CFR 221.1.²

¹ 43 U. S. C., 1946 ed., secs. 161, 162, 164, 169, 416.

² *O'Connell v. Rankin*, 9 L. D. 209 (1889); *Harper v. Biene*, 26 L. D. 151 (1898).

The appellant also argues that the Director's decision to cancel the entry was improperly based on the appellant's noncompliance with the requirement of the homestead laws respecting the maintenance of residence, whereas the contest application only mentioned failure to establish residence. The simple answer to this contention is that the statement in the contest application to the effect that Mr. Selstad had "never resided on said farm" necessarily included within its scope the allegation that Mr. Selstad had never maintained his residence on the land. It raised the broad issue "of whether he had maintained sufficient residence to meet the statutory requirements."³

Moreover, the appellant does not dispute the correctness of the conclusions reached with respect to his failure to maintain his residence on the entry. Hence, the alleged error is, in any event, not substantial, and the ordering of a third hearing on this ground would be futile.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

**ESTATE OF MER-DAH-KE (HERBERT HOMOVICH), COMANCHE
ALLOTTEE NO. 1928**

IA-14 *Decided December 13, 1949*

Indian Wills—Revocation—State Law—Marriage of Testator.

The law of the State of Oklahoma on the revocation of wills has no applicability to the will of a Comanche Indian domiciled in that State, devising restricted or trust property.

The States cannot legislate with respect to restricted or trust Indian property, in the absence of enabling legislation by the Congress.

The mere fact of a subsequent marriage does not revoke a will made by an Indian under Federal law and regulations for the purpose of devising restricted or trust property.

APPEAL FROM EXAMINER OF INHERITANCE, BUREAU OF INDIAN AFFAIRS

Neoma Homovich has appealed to the head of the Department from the decision dated June 7, 1949, of the Examiner of Inheritance, denying her petition for a rehearing in the matter of the estate of Mer-dah-ke (Herbert Homovich), Comanche allottee No. 1928, whose last will and testament, dated June 4, 1947, was approved by the Examiner of Inheritance on April 6, 1949.

³ *Oscar L. Kind v. Joseph E. Selstad*, A-24342, July 30, 1946.

December 13, 1949

The chief contention of the appellant, who was married to the testator on April 10, 1948, is that her marriage to him had the effect of revoking the will previously executed by him. This contention, which is based on a law of the State of Oklahoma,¹ where the testator and the appellant were domiciled, is wholly untenable.

The will, insofar as it purports to dispose of property which is restricted against alienation or which is held in trust by the United States, was executed under the authority of section 2 of the act of June 25, 1910 (36 Stat. 855, 856), as amended (37 Stat. 678; 25 U. S. C., 1946 ed., sec. 373). This section confers upon Indians such as Merdah-ke the right to dispose of their restricted or trust property by will in accordance with regulations prescribed by the Secretary of the Interior, and subject to his approval.

The notion that the right conferred upon an Indian by section 2 to dispose of restricted or trust property by will may be defeated or impaired by resort to the law of the State in which he was domiciled is completely dispelled by the decision of the Supreme Court in *Blanset v. Cardin*, 256 U. S. 319 (1921). In that case, it was held that a will made by an Indian woman in Oklahoma and approved by the Secretary of the Interior, devising her restricted lands to others than her husband, was not invalidated by a provision of the Oklahoma Code, which declared that a married woman could not bequeath more than two-thirds of her property away from her husband. The Court said:

The Secretary of the Interior made regulations which were proper to the exercise of the power conferred upon him * * * and it would seem that no comment is necessary to show that * * * [the provision of the Oklahoma Code] is excluded from pertinence or operation.

* * * In a word, the act of Congress is complete in its control and administration of the allotment and of all that is connected with or made necessary by it, and is antagonistic to any right or interest in the husband of an Indian woman in her allotment under the Oklahoma Code. * * *

See, also, *Hanson v. Hoffman et al.*, 113 F. (2d) 780, 789 (C. C. A. 10th, 1940). Cf. *Sperry Oil Co. v. Chisholm*, 264 U. S. 488 (1924); *Bunch v. Cole et al.*, 263 U. S. 250 (1923).

The power to legislate with respect to restricted or trust Indian property is vested in the United States to the exclusion of the several States, which cannot invade this field in the absence of enabling legislation by the Congress. See *United States v. Kagama*, 118 U. S. 375 (1886); *Blanset v. Cardin*, *supra*.

¹ See Okla. Stat. Anno., title 84, sec. 107, which provides, in part, that, "If, after making a will, the testator marries, and, the wife survives the testator, the will is revoked, unless provision has been made for her by marriage contract, or unless she is provided for in the will."

In view of the lack of power in the State of Oklahoma to legislate respecting the field under consideration here, it is also necessary to reject the further contention of the appellant to the effect that, as the regulations prescribed by the Secretary of the Interior under section 2 of the 1910 act make no provision with respect to the manner in which a will once made may be revoked, the Secretary must be deemed to have adopted the law of the State of Oklahoma as the governing law on this point. A similar situation confronted the Court in *Sperry Oil Co. v. Chisholm, supra*. There, an act of Congress provided for the leasing of restricted Indian lands with the approval of the Secretary of the Interior and under rules and regulations prescribed by him. An Indian allottee had made a lease on his restricted land, which constituted the family homestead under Oklahoma law, without obtaining the signature of his wife to the lease, as required by the Oklahoma family homestead law. The regulations of the Secretary contained no provision relating to the manner in which leases should be executed on such homesteads. It was contended that the lease was invalid under the Oklahoma family homestead law. Rejecting the contention, the Court said:

The authority thus given by the act of Congress to an Indian of the half-blood to make an oil and gas lease upon his restricted "homestead" allotment, with the approval of the Secretary of the Interior, cannot be limited or contravened by the provision of the Oklahoma law attaching to the execution of a lease upon the family homestead the condition that it must also be executed by his wife. This added requirement is inconsistent with the authority given the allottee by the act of Congress to make such lease when approved by the Secretary of the Interior, and, if the wife does not consent to the lease, would entirely defeat the purpose of Congress. As applied to an oil and gas lease made by such an allottee upon his restricted "homestead", the provision of the Oklahoma law is hence invalid because of its repugnancy to the paramount act of Congress. * * * [P. 494.]

Of course, the right conferred on an Indian by the Congress to dispose of his restricted or trust property by will necessarily carries with it, by implication, the right to revoke such a will at any time during his lifetime. However, this right is one to be exercised by the Indian, and not by the legislature of the State of Oklahoma. A revocation can only flow from an act of the Indian which clearly evidences an intention to cancel or supersede the will. The mere fact of a subsequent marriage is not such an act as necessarily shows an intention upon the part of an Indian to revoke a will made under section 2 of the 1910 act and the regulations of the Secretary of the Interior.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 25, Order No. 2509; 14 F. R. 307), the orders of the Examiner of Inheritance, approving the will of the testator and denying the appellant's petition for a rehearing, are affirmed.

MASTIN G. WHITE,
Solicitor.

EARLE T. MILLER

A-25583

Decided December 30, 1949

A-25584

Avulsion—Administrative Action.

Where the medial line of a nonnavigable stream constitutes the boundary between Indian land and public land, and the river channel shifts during a sudden, heavy flood to a new location, the change does not affect the boundary line, and the land lying between the old medial line of the river and the new medial line continues to be public land or Indian land, as it was before the change.

A long-continued course of action by an administrative agency, reflecting an interpretation of the law respecting a matter within its jurisdiction, should not be departed from by the agency unless such course of action is obviously erroneous.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

On February 19, 1948, the Director of the Bureau of Land Management rejected two applications filed by Earle T. Miller for oil and gas leases on land in Oklahoma, because the two tracts of land applied for were situated south of the medial line of the Canadian River and were therefore believed by the Director to be included within the country set aside for the Choctaw and Chickasaw Indians by the treaty of June 22, 1855 (11 Stat. 611). Under the terms of the treaty, the medial line of the Canadian River was fixed as the north boundary of the Indians' land.

Mr. Miller requested a reconsideration of the decision. He stated that the two tracts lay north of the medial line of the Canadian River, as surveyed in 1873, and that they were owned by the United States at that time; that the river changed its course by avulsion in 1904, shifting its medial line north of the two tracts, so that the tracts now lie south of the present medial line of the river; and that, as the change in the river's course was caused by avulsion, the boundary line of the Indians' land did not change, and the tracts remained in the ownership of the United States. On April 14, 1948, the Assistant Director of the Bureau of Land Management held that the evidence submitted by Mr. Miller in support of his contentions was insufficient to show that the channel of the Canadian River had been altered by avulsion.

Mr. Miller again requested a reconsideration of the decision and submitted further evidence in support of his contentions. However, the Acting Chief, Branch of Minerals, Division of Adjudication, Bureau of Land Management, held on September 29, 1948, that the evidence failed to show a change in the river's course by avulsion rather than by rapid erosion and accretion. Mr. Miller has appealed from this decision to the head of the Department.

One of the tracts applied for by Mr. Miller is described as "all accretion and riparian rights" to lots 3 and 4, sec. 33, T. 9 N., R. 3 W., I. M., Oklahoma. The other tract involved in this proceeding adjoins the first tract and is described as "all accretion and riparian rights" to lot 9, sec. 4, T. 8 N., R. 3 W., I. M.

Prior to 1904, lots 3, 4, and 9, were public lands situated adjacent to the north bank of the Canadian River, a nonnavigable stream, the north bank of the river constituting one of the boundary lines of each lot. Since 1904, the river has changed its course and, as a result, lots 3, 4, and 9, are now situated south of the present medial line of the river. The two tracts applied for by Mr. Miller consist of the land adjoining lots 3, 4, and 9, and lying between the medial line and the north bank of the river, as they existed prior to 1904. These tracts are, of course, south of the present medial line of the river. Hence, the tracts involved in this proceeding are in the same category as lots 3, 4, and 9, insofar as the shift of the medial line of the river is concerned. All were transformed from public lands into Indian lands by that shift, or all continued to be public lands after the shift.

The evidence presented by the appellant consists primarily of affidavits by five long-time residents of the area, stating that the Canadian River shifted its channel during a sudden, heavy flood in 1904. The appellant has also submitted a contemporary newspaper account of the flood, which substantiates the recitals in the affidavits. There is no persuasive evidence in the record to overcome the appellant's data on this point.

In view of the evidence in the record, it must be concluded that the change in the river channel was due to avulsion. Therefore, it worked no change in the boundary between the Government's land and the Indians' land. *Arkansas v. Tennessee*, 246 U. S. 158, 173 (1918); *Rew Baker*, 58 I. D. 242, 252 (1942). As a consequence, the two tracts of land applied for by Mr. Miller did not lose their pre-1904 status as public lands and become Indian lands.

The conclusion stated above is consistent with the position which the Department has taken since 1904 respecting lots 3, 4, and 9. The records of the Department show that lots 3 and 4 were patented on December 20, 1935, under a homestead entry, with a reservation of the oil and gas deposits to the United States; and that they were also included in an oil and gas prospecting permit issued in 1934 and in an oil and gas lease issued in 1939. Lot 9 was included in a stock-raising homestead entry allowed in 1932, in oil and gas permits issued in 1928 and 1935, and in an oil and gas lease issued in 1943. Thus, over a long period of time, these lots have been consistently regarded as public lands rather than as Indian lands, despite the change in the

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course of the Canadian River which placed them south of the medial line of the river.

As previously indicated, the Government's rights in lots 3, 4, and 9, would have been affected by the shift of the medial line of the Canadian River to the same extent, if any, as the Government's rights in the tracts applied for by Mr. Miller. Hence, the actions of the Department in treating lots 3, 4, and 9, as public lands after 1904 are significant. A long-continued course of action by an administrative agency, reflecting an interpretation of the law respecting a matter within its jurisdiction, is given great weight by the courts, and it should not be departed from by the agency itself unless the prior position is obviously erroneous.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decisions rejecting Mr. Miller's applications are reversed and the case is remanded to the Bureau of Land Management for further consideration of the applications.

MARTIN G. WHITE,
Solicitor.

M. C. STEELE ET AL. v. RUBY RECTOR KIRBY

A-25713

Decided March 6, 1950

Private Exchange—Grazing License or Permit—Hearing.

A proposed private exchange which meets all the requirements prescribed by law for such exchanges may be approved even though the selected land is subject to an existing grazing license or permit.

A grazing license or permit issued under the Taylor Grazing Act is not a contract with the United States or a profit *a prendre*, and it does not confer upon the licensee or permittee any vested right to the continued use of the land covered by the license or permit. It is merely a privilege that may be revoked by the Department for the purpose, *inter alia*, of consummating a private exchange affecting the land covered by the license or permit.

It is not necessary that a hearing for the reception of evidence be held on a protest by a grazing licensee or permittee against the consummation of a private exchange affecting the land covered by the license or permit.

District advisory boards and local associations of stockmen have no powers or duties under the Taylor Grazing Act with respect to the alienation of public lands situated within grazing districts.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

A joint appeal by M. C. Steele, C. E. Steele, and Everett Rector, of Rangely, Colorado, and a similar appeal by Joe and Edna Standifird, of Vernal, Utah, were filed on April 8 and April 29, 1949, respectively, from a decision dated March 4, 1949, by the Director of the Bureau

of Land Management. That decision dismissed the protests of the five appellants against a private exchange application (Denver 053760) filed by Mrs. Ruby Rector Kirby, of Grand Junction, Colorado, under section 8 (b) of the Taylor Grazing Act.¹

A report based on a field examination shows that the offered lands consist of two almost equal parcels situated within the boundaries of Colorado Grazing District No. 1; that the two tracts are separated and completely surrounded by public lands; that the offered lands contain a total of 1,288.10 acres and have an estimated appraised value of \$3,220.25; and that living water sufficient for stock grazing in this area occurs on some of the tracts.²

The selected lands consist of four parcels of surveyed Federal range which comprise part of Colorado Grazing District No. 1. They contain a total of 836.99 acres and, with their timber, are appraised at \$2,851.61. Parcel A, comprising 596.35 acres, was once part of the community range but is now wholly within Mrs. Kirby's individual allotment. Parcels B, C, and D comprise 240.64 acres and lie wholly within the community allotment, in an area which consists largely of patented lands. It appears that each of the four parcels is adjoined on two sides by lands owned by Mrs. Kirby. The parcels are partly isolated from other public lands by privately owned tracts and by natural barriers.³

From these facts, it is clear that the exchange would integrate the offered lands with the public lands surrounding them, and would consolidate the selected lands with the patented Kirby lands which

¹ Act of June 28, 1934 (48 Stat. 1269), as amended June 26, 1936 (49 Stat. 1976); 43 U. S. C., 1946 ed., sec. 315g (b).

² The offered lands are described as follows:

T. 3 S., R. 98 W., 6th P. M.,
 sec. 17, NW $\frac{1}{4}$, SW $\frac{1}{4}$, W $\frac{1}{2}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ SE $\frac{1}{4}$,
 sec. 18, SE $\frac{1}{4}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$,
 sec. 19, NE $\frac{1}{4}$ NE $\frac{1}{4}$,
 sec. 31, SW $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$, N $\frac{1}{2}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ W $\frac{1}{2}$, lots 1, 2, 3, 4.

T. 4 S., R. 98 W., 6th P. M.,
 sec. 6, SE $\frac{1}{4}$ NW $\frac{1}{4}$, lots 3, 4, 5.

³ The selected lands are described as follows:

Parcel A:
 T. 4 S., R. 101 W., 6th P. M.,
 sec. 31, S $\frac{1}{2}$ S $\frac{1}{2}$.

T. 5 S., R. 101 W., 6th P. M.,
 sec. 5, lot 8.

sec. 6, lots 8, 9, 10, 11, 12.

sec. 7, N $\frac{1}{2}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$, lots 5, 6.

Parcel B:
 T. 5 S., R. 101 W., 6th P. M.,
 sec. 19, lots 9, 10, 11, 12.

Parcel C:
 T. 5 S., R. 102 W., 6th P. M.,
 sec. 24, SW $\frac{1}{4}$ NE $\frac{1}{4}$.

Parcel D:
 T. 5 S., R. 102 W., 6th P. M.,
 sec. 26, NE $\frac{1}{4}$ NW $\frac{1}{4}$.

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they adjoin. The exchange, therefore, would make holdings compact, improve the public-land pattern, and facilitate administration of the grazing district. In addition, it would give the grazing district 451.11 acres more than the Government would give up, and it is estimated that the acquired tracts would be worth \$368.64 more than those which would be alienated. It seems, therefore, that the proposed exchange would be in the public interest, and would be advantageous to the Government and the applicant alike.

Appellants contend, however, that the exchange would be contrary to the principles stated by the court in *Red Canyon Sheep Co. v. Ickes*, 98 F. 2d 308 (D. C. Cir., 1938). In that case, the court held that the Secretary of the Interior lacked authority to make a certain private exchange under legislation (other than the Taylor Grazing Act) prescribing conditions which the applicant could not fulfill, and that effectuation of the exchange would be an illegal act. The court found that the threatened illegal exchange would interfere with the plaintiff's grazing privileges and would destroy the plaintiff's lawful business. Upon the basis of these holdings and findings, the court enjoined the Secretary from consummating the exchange.

The decision in the *Red Canyon Sheep Co.* case is not controlling here. The Taylor Grazing Act, under which Mrs. Kirby's exchange is proposed, prescribes no conditions which the applicant has been unable to meet. This exchange clearly comes within the terms of section 8 (b) of the act, which grants broad, discretionary authority for the consummation of private exchanges (1) if the value of the selected land does not exceed the value of the offered land, (2) if the selected land is "surveyed grazing district land" or "unreserved surveyed public land," (3) if the selected land is situated "in the same State or within a distance of not more than fifty miles within the adjoining State nearest the base lands," and (4) if it is determined that "public interests will be benefited" by the exchange. The present case meets all these statutory requirements.

Moreover, it may be observed in passing that the record does not show that this exchange would destroy or even seriously impair the appellants' grazing privileges, either collectively or individually. Admittedly, the exchange would reduce the common range by 240 acres and, correspondingly, the forage available thereon, which has been estimated to have an average annual carrying capacity of not more than 8 animal units. At present, according to their protest papers, the five appellants have permits for an aggregate of 483 animal units. The reduction of this number by 8 units, apportioned among the permittees, would be too insignificant to endanger their respective operations.⁴

⁴ See *State of Utah, A-25710* (January 30, 1950).

The appellants also assert that their permits give them vested rights to the continued use of the particular lands described in the permits, and that the exchange would unlawfully invade these vested rights. There is no merit in this contention.

For many decades before the enactment of the Taylor Grazing Act, immense areas of the public domain were freely used by stockmen for grazing. The Government did not object to this practice, but allowed and even encouraged it, thus permitting to spring up from long use and custom an implied license to utilize the public lands for this purpose as long as the Government should not withdraw its tacit consent to such use. However, the Government's failure to object to the practice—

* * * did not confer any vested right on the * * * [stockmen using the lands], nor did it deprive the United States of the power of recalling any implied license under which the land had been used for private purposes.⁵

Similarly today, although passage of the Taylor Grazing Act has made it possible for the implied license of early times to become an express license or permit granted by the Department of the Interior in writing, the Congress has not converted into a vested right the express privilege which it has authorized in the Taylor Grazing Act, nor has it deprived this Department of the power to modify or terminate the statutory license or permit for reasons which are unrelated to any acts or omissions on the part of the permittee, but concern the Government's over-all land policies and laws.

It is well established in departmental decisions that a licensee or permittee under the Taylor Grazing Act does not have any right as a matter of law to demand that his license or permit shall give him grazing privileges in any particular part of a grazing district. Determination of what the permitted area shall be is entrusted entirely to the discretion of the Department. In a spirit of cooperation, an allotment to a licensee or permittee of lands previously grazed by him is generally made when it is consistent with proper range practices, but it is no acknowledgment of a right in him to the use of those particular lands.⁶

However much the authority to graze livestock on United States lands, expressed in a grazing license or permit, may be thought to correspond in form to a contract with the United States⁷ or to resemble the common law profit *a prendre* appurtenant, several or

⁵ *Osborne v. United States*, 145 F. 2d 892, 894 (9th Cir., 1944). See also *Buford v. Houtz*, 133 U. S. 320, 326 (1890); *Light v. United States*, 220 U. S. 523, 535 (1911); *United States v. Grimaud*, 220 U. S. 506 (1911); *Stewart et al. v. Eastern Oregon Land Co.*, 57 I. D. 95, 100 (1940); *Willis J. Lloyd and Oscar Jones*, 58 I. D. 779, 786, 787 (1944).

⁶ *National Livestock Co. and Zack Cow, John Day and others, Interveners*, A-21222, Las Cruces 051611, 051705, 051708, 052395, 052998, July 7, 1938; *King Brothers, Inc. et al.*, A-21159, August 9, 1938; *Stewart et al. v. Eastern Oregon Land Co.*, 57 I. D. 95, 100 (1940).

⁷ See *Osborne v. United States*, 145 F. 2d 892, 895 (9th Cir., 1944).

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common, with its freedom from interference by the grantor,⁸ the Taylor Grazing Act grazing permit or license is no creature of the common law but a statutory privilege. It is subject to the several limitations which are imposed upon it by the statute and which distinguish it from profits *a prendre*, rights of contract, and other classes of rights.

Among these statutory limitations is the provision that, although grazing privileges which have been recognized and acknowledged shall be adequately safeguarded so far as may be consistent with the purposes and provisions of the act—

* * * the creation of a grazing district or the issuance of a permit pursuant to the provisions of this Act shall not create any right, title, interest, or estate in or to the lands.⁹

Furthermore, the statute indicates that the maintenance of grazing districts on the public domain and the allotment of privileges therein are interim only, "pending final disposal" of the public lands.¹⁰ The classification and disposal of land which is subject to a license or permit may occur at any time, the only condition being that reasonable notice of such action must be given to the licensee or permittee.¹¹ One of the authorized means of disposal is, of course, the exchange of grazing-district land for privately owned land under the portion of the Taylor Grazing Act that is involved here.

Thus, the statute itself puts every grazing permittee or licensee on notice from the outset that the privilege of using the land covered by his permit or license may at any time be reduced or canceled under the statutory provisions previously mentioned. In addition, the Federal Range Code and the permit or license form carry the same warning that a permit or license is subject to termination in whole or in part. It is particularly pertinent here that the Federal Range Code specifically provides that a license or permit is subject to a proportionate reduction if the Federal range covered by it is diminished "due to * * * selection."¹²

The permit or license form,¹³ in paragraph 2, gives notice that the permit or license will cease to be effective as to any of the lands which it describes "immediately upon the termination of administration of said lands by the Bureau of Land Management." This provision contemplates, of course, the possibility of the alienation of grazing-district lands under the provisions of the Taylor Grazing Act, including alienation by means of a private exchange.

⁸ *Tiffany*, "The Law of Real Property" (3d ed.), vol. 3, ch. 16, secs. 839-847.

⁹ 43 U. S. C., 1946 ed., sec. 315b.

¹⁰ 43 U. S. C., 1946 ed., sec. 315.

¹¹ 43 U. S. C., 1946 ed., sec. 315f.

¹² 43 CFR 161.6 (c) (5).

¹³ Form No. 4-1096, December 1947.

The appellants' objections with respect to the absence of a formal hearing for the reception of evidence in this proceeding are not well taken. Even though all the selected lands involved in an application for a private exchange are within a grazing district, the consideration and disposition of the matter are not governed by the sections of the Taylor Grazing Act¹⁴ and the Federal Range Code¹⁵ which provide for the holding of formal hearings in certain types of cases arising under the act. Those provisions relate only to matters that arise in the administration of grazing districts. They are not applicable to the exercise of the Secretary's power respecting exchanges.

The consideration and disposition of proposed private exchanges are governed by subsections (b) and (d) of section 8 of the Taylor Grazing Act¹⁶ and by the regulations especially promulgated to implement these statutory provisions.¹⁷ The pertinent provisions of the statute and the regulations entrust to the discretion of the Secretary of the Interior (or his designee) the determination of the question whether a proposed exchange will benefit public interests and whether it otherwise meets the statutory requirements prescribed by the Congress, and no hearing is required as a prerequisite to the making of a decision. Such a case is outside the scope of the section of the Administrative Procedure Act¹⁸ which governs the holding of formal hearings by Government agencies in the administrative adjudication of controversies. Nevertheless, it is the customary practice in this Department, when an appeal in an exchange case is taken to the head of the Department from a decision rendered in the Bureau of Land Management, to grant to any interested person, upon request, an opportunity to make an oral argument on the issues that are involved in the case.¹⁹ No request for an opportunity to make an argument was submitted by the appellants in the present case.

Moreover, despite the appellants' assertion to the contrary, a proposed exchange is not a subject for official consideration by either a district advisory board or a local association of stockmen. The functions of these bodies under the Taylor Grazing Act²⁰ and the supplementary regulations²¹ relate only to the administration of a grazing district. The board and the association have no powers or duties with respect to the alienation, by exchange or otherwise, of public lands situated within a district.

None of the contentions made by the appellants warrants a reversal

¹⁴ 43 U. S. C., 1946 ed., sec. 315h.

¹⁵ 43 CFR 161.9.

¹⁶ 43 U. S. C., 1946 ed., sec. 315g.

¹⁷ 43 CFR 146.1-146.9.

¹⁸ 5 U. S. C., 1946 ed., sec. 1004.

¹⁹ See 43 CFR 221.80.

²⁰ See 43 U. S. C., 1946 ed., secs. 315h, 315o-1.

²¹ See 43 CFR 161.12, 161.13.

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of the decision previously rendered by the Director of the Bureau of Land Management.

Therefore, in pursuance of the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Director of the Bureau of Land Management dismissing the protest and directing action to effectuate the exchange is affirmed.

MASTIN G. WHITE,
Solicitor.

CHARLES H. HUNTER

A-25707

Decided March 8, 1950

Public Sales—Isolated Tracts—Preference Rights.

A preference-right claim for an isolated tract offered at public sale may be asserted by a person who acquires the ownership of contiguous land after the date of the sale but during the period of time allowed for the assertion of preference-right claims.

A preference-right claimant for an isolated tract is not necessarily required to submit, prior to the expiration of the period allowed for the assertion of preference rights, proof that he is the owner of contiguous land. Such proof may be considered if submitted within a reasonable time after the Bureau of Land Management calls upon the claimant for such proof or informs him of a deficiency in this respect.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Pursuant to the application of Estes Teague, the public sale of an isolated 40-acre tract (SW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 2, T. 15 N., R. 9 W., 5th P. M.) was ordered in accordance with section 2455 of the Revised Statutes, as amended (43 U. S. C., 1946 ed., Supp. II, sec. 1171). On the day of the sale, August 3, 1948, the only bid received was a bid of \$200 from Mr. Teague.

Within the 30-day period allowed from the date of the sale for the assertion of preference rights by the owners of contiguous lands, a bid of \$200 was received from Charles H. Hunter in the form of a letter from his attorneys, who stated that Mr. Hunter was "the owner of the adjacent lands on two sides of said forty acres * * *." This letter was received on September 2, 1948, the 30th day following the date of the sale.

On September 3, 1948, the 31st day after the date of the sale, a bid of \$225 was received from T. B. Tate, who enclosed a deed and other papers establishing his ownership in fee of land adjoining the 40-acre tract on the east and north.

On January 3, 1949, the Acting Regional Administrator, Region VI, Bureau of Land Management, denied Mr. Hunter's claim of preference

and declared Mr. Tate to be the purchaser. (Mr. Teague had not claimed to be an owner of contiguous land.) Mr. Hunter's claim was denied on the ground that he had failed to furnish proof of the ownership of adjacent land, since the letter from his attorneys did not contain a description of the land on which Mr. Hunter's claim of preference was based.

On February 11, 1949, Mr. Hunter's appeal from the decision of January 3, 1949, to the Director of the Bureau of Land Management was received. He submitted with this appeal an abstract of title showing his ownership of land adjoining the isolated tract on the south and west.

On March 25, 1949, the Director of the Bureau of Land Management affirmed the Regional Administrator's decision. The Director found that, on the date of the sale, the adjoining land on which Mr. Hunter based his claim of preference was not owned by Mr. Hunter alone but by Mr. Hunter and H. Bennett; and that Mr. Hunter did not acquire full title to the adjoining land until August 24, 1948. The Director held that a preference-right claimant under section 2455 of the Revised Statutes, as amended, must be the sole owner of adjoining land on the date of the sale; and, accordingly, that Mr. Hunter could not validly assert such a right.

Mr. Hunter has appealed from the decision of March 25, 1949, to the head of the Department.

Section 2455 of the Revised Statutes, as amended, provides for the sale at public auction of isolated tracts of the public domain, and then states:

* * * That for a period of not less than thirty days after the highest bid has been received, any owner or owners of contiguous land shall have a preference right to buy the offered lands at such highest bid price * * *

There is no express requirement in this statutory provision that a preference-right claimant must be the owner of contiguous land on the date of the sale. On the contrary, the language of the quoted portion of the section appears to apply to anyone who is the owner of contiguous land at the time when the claim of a preference right is asserted, including a person who acquired such ownership after the date of the sale.

There is nothing in the legislative history of section 2455 which casts any light upon the intent of the Congress in enacting the provision under consideration here. However, the basic policy of the section is to favor the owners of contiguous lands over other persons, and it is not apparent why it should be important to this policy that the ownership of contiguous land must exist as of the date of sale, rather than as of the time when the claim of a preference right is asserted. Accordingly, I believe that the language used in the provi-

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sion should be taken at face value and should be regarded as making the ownership of contiguous land at the time of the assertion of a preference-right claim the proper test for determining the standing of the claimant. Any claimant must, of course, act during the period allowed for the assertion of preference rights.

The applicable regulations of the Department which supplement section 2455 of the Revised Statutes, as amended, are not inconsistent with the view expressed above.¹

As Mr. Hunter acquired full title to contiguous land on August 24, 1948, or within 30 days after the date of the sale, he was then entitled to assert a preference-right claim as the owner of contiguous land. He was the only person in the preferred category who acted within the 30-day period allowed for the assertion of preference rights. Mr. Tate's claim was submitted on the day after the 30-day period ended.

However, the conclusion stated above does not necessarily dispose of the case. Consideration must also be given to the problem of whether the action that was taken on behalf of the appellant within the 30-day period met the requirements prescribed by the pertinent regulations respecting the essential action to be taken during that period by a preference-right claimant. In this connection, the regulations governing public sales provide, in part, as follows:

(b) *Preference right of purchase; declaration of purchaser.* The owners of contiguous lands have a preference right, for a period of 30 days after the highest bid has been received, to purchase the land offered for sale at the highest bid price or at three times the appraised price if three times such appraised price is less than the highest bid price. * * *

(1) A preference right to purchase must be supported by proof of the claimant's ownership of the whole title to the contiguous lands * * *²

With respect to proof of the ownership of contiguous land, the only submission made on behalf of Mr. Hunter within the 30-day period allowed for the assertion of preference rights was in the form of a letter from his attorneys. This letter stated, among other things:

We, as his attorneys, certify that he is the owner of the adjacent lands on two sides of said forty acres, as shown by Abstract of Title which we have examined, but which is now in the possession of the abstracter at Melbourne, Arkansas, for the purpose of being brought to date.

Please * * * advise us what evidence of title in addition to our certificate is necessary for the purchase of this land.

It apparently was the view of the Acting Regional Administrator that the regulation quoted above required that the proof of ownership of contiguous land be submitted by a preference-right claimant within the 30-day period allowed for the assertion of preference rights, and,

¹ See 43 CFR, 1947 Supp., 250.11 (b); reissued August 27, 1948 (13 F. R. 5182), without any change insofar as the point involved here is concerned.

² 43 CFR, 1947 Supp., 250.11 (b) (1); reissued August 27, 1948 (13 F. R. 5182).

accordingly, that Mr. Hunter's claim of right must stand or fall, as to this point, on the certificate contained in the letter which was received from his attorneys on September 2, 1948. The Acting Regional Administrator held that the certificate from Mr. Hunter's attorneys did not constitute adequate proof of the claimant's ownership of contiguous land, because the certificate did not contain a description of such contiguous land.

Assuming for the purpose of discussion that the certificate of Mr. Hunter's attorneys did not fully meet the requirement that a claim of preference right must be supported by proof of the claimant's ownership of contiguous land, the question arises whether Mr. Hunter's privilege of submitting such proof terminated at the end of the 30-day period allowed for the assertion of preference rights, or whether the proof subsequently submitted in the form of an abstract of title can properly be considered.

It will be noted that the governing regulation does not state specifically when the proof of the ownership of contiguous land is to be submitted by a preference-right claimant. As the requirement respecting the submission of such proof is found in a subparagraph of a paragraph which mentions "a period of 30 days after the highest bid has been received," it might be argued that the provision prescribing a 30-day period is carried forward by implication into the subparagraph and, hence, is a time limitation on the submission of proof of the ownership of contiguous land, as well as a limitation on the assertion of claims of preference rights.

However, members of the public should be clearly informed in regulations regarding any time limitations to which they are subject. It is doubtful whether the average person, on reading the regulation involved here, would come to the conclusion that it requires the proof of the ownership of contiguous land to be submitted within "a period of 30 days after the highest bid has been received." On the contrary, it seems probable that the average reader would regard the numbered subparagraph which contains the clause respecting the submission of proof of the ownership of contiguous land as being complete in itself, and would not expect it to be subject to a time limitation found in another portion of the regulation. For that reason, I believe that it would be unfair to extend the 30-day limitation, by construction, to the clause relating to the submission of proof of the ownership of contiguous land. It is my conclusion, therefore, that a preference-right claimant is not necessarily required to submit, within the 30-day period allowed for the assertion of preference rights, proof of the ownership of contiguous land, but that such proof may be considered if submitted within a reasonable time after the Bureau of Land Management calls upon a preference-right claimant for it or advises the claimant of a deficiency in this respect. See *Frank E.*

March 10, 1950

Scovil, Carl J. Niebuhr, A-24089 (May 10, 1945); Tollef N. Iverson, Jens J. Hauge, 59 I. D. 108 (1945).

Applying the principle stated in the preceding paragraph to the facts in the present case, it is my view that the abstract of title submitted by the appellant after the expiration of the 30-day period allowed for the assertion of preference rights may properly be considered in determining that the appellant is the owner of the whole title to the contiguous land on which his claim of preference is based.

For the reasons indicated above, it appears that Mr. Hunter, as the only owner of contiguous land to make application within the prescribed period, should be permitted to purchase the isolated tract involved in this proceeding.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the Director's decision of March 25, 1949, is reversed, and the case is remanded to the Bureau of Land Management for further action in accordance with this decision.

MARTIN G. WHITE,
Solicitor.

CLAIM OF SPRINGER TRANSFER COMPANY

Tort Claim—Negligence—Foreseeability of Consequences.

In a situation where liability must be grounded on negligence, a person is liable only for those consequences which he, as an ordinarily prudent person, should reasonably have foreseen as a probable result of his conduct.

The same act of careless conduct may constitute negligence toward one person or article of property and not constitute negligence toward another person or article of property.

Where the driver of a Government vehicle, without having given a signal of his intention to do so, changed his course slightly and invaded the left side of the highway to the extent of 2 feet in order to avoid endangering anyone who might step suddenly into the highway from a truck parked alongside the highway on the Government driver's right, and the Government vehicle was struck from the rear by a privately owned automobile traveling at a high rate of speed and was hurled from the highway into the parked truck, the United States is not liable under the Federal Tort Claims Act to the owner of the parked truck for the damage resulting to it.

T-234a

MARCH 10, 1950.

The Springer Transfer Company, Box 572, Albuquerque, New Mexico, filed a claim about August 10, 1949, against the United States in the amount of \$185.21 for compensation because of damage to its truck, which was struck by a Government-owned pickup truck, Service No. I-4869, assigned to the Bureau of Indian Affairs and operated by W. E. Tecklenburg, an employee of that agency.

The question whether this claim should be paid under the Federal Tort Claims Act (28 U. S. C., sec. 2671 *et seq.*) has been submitted to me for determination. That act authorizes the settlement of any claim against the United States on account of damage to property caused by a negligent or wrongful act or omission of an employee of the Government while acting within the scope of his employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage in accordance with the law of the place where the act or omission occurred.

The events on which this claim is based took place at about 8:30 a. m. on July 12, 1949, at a point on U. S. Highway No. 66, approximately 21 miles east of Gallup, New Mexico. At the place where the Government truck struck the claimant's truck, the highway was 21 feet wide, and it had shoulders of a total width of 14 feet. The highway was straight, dry, and level; and the view of the road ahead was unobstructed.

The Government truck was proceeding west on the highway at a speed of about 40 miles per hour. The automobile of Harold E. Adams, 17613 Ponciana Avenue, Cleveland 11, Ohio, driven by his wife, was proceeding in the same direction at a higher rate of speed. In attempting to pass the Government truck, the Adams automobile struck the truck in the left rear end. This blow caused the Government truck to veer sharply to the right, and it struck and glanced off the front end of the claimant's truck, which was parked alongside the highway.

James H. Meskimon, the driver of the claimant's truck, in his report of the incident, stated that—

The first I noticed was when I heard collision and looked up and saw yellow pickup [Government truck] headed in my direction and driver was trying to miss my truck. I looked to see if anyone was injured and found no one injured. I was delayed 8½ hours.

The Government driver, in his report, stated that—

Was coming to bridge and vehicle parked on side of highway. Pulled slightly to left to avoid any person from parked truck walking into traffic lane. Car #2 [Mr. Adams' automobile] attempting to pass on bridge and hit rear of Govmt. Pickup.

The investigating officer reported that—

Indian Service truck I-4869 driven by Road Foreman W. E. Tecklenburg traveling west on US Hwy. 66 was struck on the left rear by Olds '49 Sedan driven by Mrs. Harold Adams Lic. of Oldsmobile Ohio BT-395 knocking Fed. vehicle into parked Truck N. M. 2-1651 owned by Springer Tfr. Co., Albuquerque * * *

* * * * *
The Olds. Sedan was traveling at a high rate of speed and was endeavoring to pass government vehicle on a bridge. (See photo.) Both vehicles were traveling west. The private vehicle traveled 310 ft. after the first impact. There is no center line markings at this point on highway.

March 10, 1950

The report of the New Mexico State Police covering the incident stated that "Vehicle No. 1 [Government] Truck * * * was two feet over the center line * * *" when the collision occurred.

The courts of New Mexico, in discussing negligence, have declared that a defendant in a case where liability must be grounded on negligence is liable only for those consequences which he, as an ordinarily prudent person, should reasonably have foreseen as a probable result of his conduct. *Pettes v. Jones*, 66 P. 2d 967 (N. M., 1937).

When the Government driver failed to give a signal of his intention to pull slightly to the left in the road as he reached the point where the claimant's truck was parked, in order to avoid the possibility of injuring anyone who might inadvertently step from the parked truck into the highway, he may have been guilty of negligence with respect to automobiles closely following him along the highway or closely approaching from the opposite direction. However, it cannot be said that the Government driver should reasonably have foreseen that a car approaching from the rear would probably strike his vehicle with a blow of such force and direction that the Government vehicle would be caused to veer sharply to the right and collide with the claimant's parked truck, the supposed occupant or occupants of which the Government driver was specifically trying to protect when he changed the course of the Government vehicle slightly to the left.

Therefore, it is my conclusion that, with respect to the parked truck, the Government driver exercised all the care which the law required of him, and, accordingly, that he was not guilty of negligent conduct as to the parked truck or the claimant. See *Lucero v. Harshey*, 165 P. 2d 587 (N. M., 1946); *Pettes v. Jones*, *supra*; *Staples v. L. W. Blinn Lumber Co.*, 275 Pac. 813 (Calif., 1929); *McDonald v. Cantley*, 3 P. 2d 552 (Calif., 1931); *Palsgraf v. Long Island R. Co.*, 162 N. E. 99 (N. Y., 1928).

DETERMINATION

Therefore, in accordance with the provisions of the Federal Tort Claims Act and the authority delegated to me by the Secretary of the Interior (sec. 21, Order No. 2509, as amended; 14 F. R. 4766), I determine that—

(a) The damage to the property of the Springer Transfer Company, on which this claim is based, was not caused by a negligent or wrongful act or omission of an employee of the United States Department of the Interior.

(b) The claim of the Springer Transfer Company must be denied.

MASTIN G. WHITE,
Solicitor.

**EXTRACTION OF GRAVEL FROM THE BEDS OF NAVIGABLE
STREAMS IN ALASKA BY FEDERAL AGENCIES**

Trust Nature of Lands—Meaning of “Public Lands”—Implied Power of the President—Delegation of Authority.

The declaration by Congress that the beds of navigable inland waters in Alaska are held by the United States in trust for the people of any State or States which may be created out of the Territory of Alaska does not preclude the removal and use by Federal agencies, for governmental purposes, of gravel from such lands while the title to them remains in the United States.

The statute which authorizes the Department to dispose of gravel on “public lands” of the United States does not cover the disposition of gravel from lands underlying navigable inland waters within the Territory of Alaska, since the term “public lands” is inapplicable to land situated below the ordinary high watermark of a navigable stream.

The President has the implied power, in the absence of statutory authorization, to permit the extraction and use by Federal agencies, for governmental purposes, of gravel from lands underlying navigable inland waters in the Territory of Alaska.

The President has delegated to the Secretary of the Interior in Executive Order 9337 all his statutory and implied power to make Government-owned lands available for public uses or purposes.

The Secretary of the Interior may, in the exercise under Executive Order 9337 of the President's implied power respecting the utilization of Government-owned lands for public uses or purposes, permit Federal agencies to extract gravel from the beds of navigable Alaskan streams in order to use it for road-construction purposes and other Federal construction projects in the Territory, pending the admission of Alaska to the Union as a State.

M-36024

MARCH 16, 1950.

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT.

You have requested my opinion on the question whether this Department may authorize the Alaska Road Commission and other Federal agencies to remove gravel from the beds of navigable streams in Alaska for use in constructing roads or other Federal projects in the Territory.

Consideration will first be given to the problem of whether the removal and use by Federal agencies, for governmental purposes, of gravel from the beds of navigable streams in Alaska is precluded by virtue of the declaration in section 2 of the act of May 14, 1898 (48 U. S. C., 1946 ed., sec. 411), that the beds of navigable inland waters in Alaska are held by the United States in trust for the people of any State or States which may be created out of the Territory of Alaska. This provision has been held to extend to Alaska, prospectively, the same policy as has obtained in the continental United States with respect to the transfer from the United States to newly created States of the Government's title to lands under navigable inland waters within

March 16, 1950

the boundaries of the new States. See *Conradt v. Miller*, 2 Alaska 433, 441 (1905); *James W. Logan*, 29 L. D. 395 (1900). Indeed, this policy had been held to be applicable in Alaska even prior to the enactment of the 1898 statute. *Carroll v. Price*, 81 Fed. 137 (D. Alaska, 1896).

The basic principles of law relating to the alienation of lands underlying the navigable inland waters of a territory were stated in the leading case of *Shively v. Bowlby*, 152 U. S. 1 (1894). In that case, the Supreme Court declared that the United States has "the entire dominion and sovereignty, national and municipal, Federal and state," over a territory and, therefore, that Congress has the power to make grants of lands situated below the high watermark of navigable inland waters in a territory, "whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." (P. 48.) Hence, congressional action providing for the disposal of lands underlying navigable inland waters in a territory is not prohibited because it is incompatible with the trust under which such lands are held for the future State.

It is to be noted that *Shively v. Bowlby* was concerned only with the question whether land underlying a navigable stream in a territory could be disposed of to a private person under an act of Congress. The question was not presented as to what use agencies of the Federal Government could make of such land while the title to the land remained in the United States. However, it is reasonable to conclude that if the conveyance by the United States to a private person of land in the bed of a navigable stream within a territory would be permissible despite the trust under which the land is held, the mere utilization of resources in the land by agencies of the Federal Government could be permitted by the proper authority.

The Congress, however, has not enacted any statute which authorizes the extraction and use by Federal agencies of gravel from the beds of navigable streams in Alaska. The act of July 31, 1947 (43 U. S. C., 1946 ed., Supp. II, secs. 1185-1187), authorizes the Secretary of the Interior to dispose of gravel and certain other materials on "public lands" of the United States, but the term "public lands" has been generally construed as being inapplicable to land situated below the ordinary high watermark of a navigable stream. Thus, in my memorandum (M-36006) of June 30, 1949, I expressed the opinion, *inter alia*, that the act of July 31, 1947, does not authorize the disposal of seaweed growing on lands beneath navigable inland waters.

The primary question, then, is whether the executive branch of the Government has any implied power to permit the extraction and use by Federal agencies, for governmental purposes, of gravel from the beds of navigable streams in Alaska.

In *Alaska Pacific Fisheries v. United States*, 240 Fed. 274 (9th Cir., 1917), the court declared that the President, in the absence of any statutory authorization, had the power to provide for the use by an Indian tribe of the navigable inland waters and submerged lands surrounding Annette Island, Alaska, and extending for a distance of 3,000 feet from the shore. The court rested its ruling upon the implied power of the President to withdraw and reserve Government-owned lands, which power had been sustained by the Supreme Court as to public lands in *United States v. Midwest Oil Company*, 236 U. S. 459 (1915).¹

With respect to public lands, it is clear that the President's power extends to the withdrawal and reservation of such lands for the purpose of providing materials for the construction and maintenance of public roads and other public projects by the Government. See Executive Orders No. 6902, November 13, 1934; No. 7601, April 7, 1937 (2 F. R. 674); and No. 7883, May 9, 1938 (3 F. R. 913). See also, Public Land Order No. 3, June 23, 1942 (43 CFR, Cum. Supp., App.). All the cited orders were issued pursuant to the act of June 25, 1910, as amended (43 U. S. C., 1946 ed., sec. 141), but it is clear that these withdrawals could also have been made pursuant to the implied power of the President over public lands. 40 Op. Atty. Gen. 73 (1941).

This Department has broadly construed the implied executive power to permit the utilization of the resources of public lands. On September 21, 1933, Assistant Secretary Chapman approved an opinion by Acting Solicitor Fahy, which stated that there was no substantial objection to the continuation of a departmental policy which was quoted in the opinion as follows:

* * * it has been the policy of this Department to interpose no objection to the removal of such material [gravel] from the public domain by State and county officers for road construction purposes as long as there is no substantial damage to the property * * *. [54 I. D. 294.]

At that time, there was no statute authorizing the removal of gravel from the public domain for the construction of State or county roads (as distinguished from Federal-aid highways). The reason behind the policy approved in the 1933 opinion would necessarily be applicable, in even greater degree, to the utilization by Federal agencies of gravel from the public domain for road construction and other activities of the Federal Government.

¹ The decision of the Court of Appeals in the *Alaska Pacific Fisheries* case was sustained by the Supreme Court, 248 U. S. 78 (1918), but upon a ground which did not require a ruling upon the point mentioned here.

March 16, 1950

On the basis of principle and of the decision of the Court of Appeals in the *Alaska Pacific Fisheries* case, there would seem to be no difference between the President's implied power over public lands and his implied power over lands underlying navigable inland waters within a territory, except that the latter power terminates upon the admission of the territory to the Union as a State. Hence, it appears that the implied executive power to permit the extraction and use by Federal agencies, for governmental purposes, of materials from public lands should also extend to the extraction by Federal agencies of gravel from lands underlying navigable inland waters in the Territory of Alaska and its use for road construction and other governmental purposes in the Territory. Such removal and use of the gravel would not affect the Government's title to the lands or the gravel. Moreover, the use of such gravel in the construction of roads and other Federal projects would not only serve a public purpose, but presumably would benefit, not prejudice, the Territory and the future State of Alaska.

The President has made a broad delegation of his powers respecting Government-owned lands to the Secretary of the Interior. In Executive Order 9337 (April 24, 1943; 8 F. R. 5516), the President authorized the Secretary—

* * * to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States to the same extent that such lands might be withdrawn or reserved by the President * * *

The verbs "withdraw" and "reserve," as used in Federal statutes, orders, and regulations relating to lands, are words having well-understood meanings in this field of law. To "withdraw" land is to make it unavailable for appropriation by private persons. To "reserve" land is to make it available, either immediately or prospectively, for some public use or purpose. Hence, Executive Order 9337 delegated to the Secretary all the President's statutory and implied power (1) to make Government-owned lands unavailable for appropriation by private persons, or (2) to make such lands available for public uses or purposes. This delegated power extends not only to public lands, but also to other "lands owned or controlled by the United States," which would include the beds of navigable streams in the Territory of Alaska.

It is my conclusion, therefore, that the Secretary of the Interior may, in the exercise under Executive Order 9337 of the President's implied power respecting the use of Government-owned lands, permit the Alaska Road Commission and other Federal agencies to extract gravel from the beds of navigable Alaskan streams in order to use it for road-construction purposes and for other Federal construction projects in the Territory. This authority will, of course, terminate upon the admission of Alaska to the Union as a State.

The conclusion stated above respecting the authority of the Secretary is not affected by the factor, mentioned in your memorandum, as to whether the gravel that is removed will or will not be replaced by the forces of nature.

MASTIN G. WHITE,
Solicitor.

LIBBY, McNEILL & LIBBY

A-25763

Decided March 17, 1950

Soldiers' Additional Homestead Entry—Valid Settlement—Withdrawal.

An application to enter a tract of public land under the soldiers' additional homestead law, filed after the withdrawal of the land from entry, is not entitled to receive favorable consideration upon the basis of a showing by the applicant of occupancy and use of the land prior to the date of the withdrawal.

Rights under the soldiers' additional homestead law do not attach to a particular tract of land until an application is made under the law to enter the tract, and then only if the tract applied for is subject to entry when the application is filed.

A "valid settlement" sufficient to except a tract of land from a withdrawal order is a settlement made under the authority of some statute. The occupancy and use of public land by a trespasser is not such a settlement.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On October 18, 1948, Libby, McNeill & Libby, a corporation, as the assignee of certain soldiers' additional homestead rights (R. S. 2306; 43 U. S. C., 1946 ed., secs. 271, 274), applied to enter three tracts of land in Alaska. The three applications were rejected by the Acting Manager of the land office at Anchorage, Alaska, because the lands sought under the three applications had, on June 16, 1948, been temporarily withdrawn from entry by Public Land Order No. 487 (13 F. R. 3462).

The applicant appealed to the Director of the Bureau of Land Management, who, on June 23, 1949, affirmed the rejections. The applicant thereupon appealed to the head of the Department.

The appellant alleges that it entered into possession and use of the three tracts, and constructed improvements upon them, long prior to the withdrawal. The appellant contends that the tracts are therefore subject to entry by it notwithstanding Public Land Order No. 487.

Public Land Order No. 487 was issued pursuant to the authority conferred upon the President by the act of June 25, 1910, as amended by the act of August 24, 1912 (43 U. S. C., 1946 ed., secs. 141-143), temporarily to withdraw from settlement, location, sale, or entry any of the public lands of the United States, including those in Alaska, and to reserve the same for public purposes. Under the terms of this

March 17, 1950

legislation, "all lands * * * upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law * * *" are excepted from the force and effect of any withdrawal.

The primary question presented for consideration is whether an application to enter public land under the soldiers' additional homestead law, filed after the withdrawal of the land from entry, may receive favorable consideration, notwithstanding the withdrawal, if the applicant shows occupancy and use of the land prior to the date of the withdrawal.

The soldiers' additional homestead law confers upon certain persons, including the assignees of the original holders, the right to enter unappropriated public lands of the United States. However, rights under the law do not attach to a particular tract of public land prior to the filing of an application under the statute to enter the tract. Moreover, the filing of an application confers no rights in a tract unless the land applied for is subject to entry when the application is filed. *Alaska Commercial Company*, 39 L. D. 597 (1911).

Lands which have been reserved or withdrawn by the Government for some public use or purpose are not subject to entry under the soldiers' additional homestead law. *David B. Morgan, Assignee*, 60 I. D. 266 (1948). Hence, if Public Land Order No. 487 was effective to withdraw the tracts of land involved in this proceeding, the applications which the appellant filed after the date of the withdrawal order could not properly be approved.

The withdrawal statute excepts from the force and effect of an executive withdrawal made under it land on which "any valid settlement" has been made prior to the withdrawal. A "valid settlement," of course, is one made under the authority of some statute. The term does not include the occupancy and use of public land by a trespasser.

It must be concluded that the appellant was a trespasser in occupying and using these three tracts as of the time when Public Land Order 487 was issued. As previously indicated, the appellant had no possessory rights in the tracts by virtue of the fact that it held assignments under the soldiers' additional homestead law, because the appellant did not apply to enter the tracts under that law until after the issuance of the withdrawal order. No other purported authority for the occupancy and use of the tracts has been cited by the appellant. Hence, no "valid settlement" had been made upon these tracts by the appellant prior to the date of the withdrawal order, and the order effectively withdrew the tracts from future appropriation.

No error was made in the rejection of the appellant's applications.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

SUSPENSION OF OPERATIONS AND PRODUCTION UNDER OIL AND GAS LEASE, GREAT FALLS 084862

Effect of Suspension—Extension of Lease Term.

Pursuant to section 39 of the Mineral Leasing Act, the term of a mineral lease is extended by any period of suspension of operations and production that may be in effect under section 39 during the life of the lease, irrespective of whether such suspension occurs during the original term fixed for the lease or during the extended term resulting from a prior suspension.

Where operations and production under an oil and gas lease granted on April 1, 1944, for a 5-year term ending on March 31, 1949, were first suspended under section 39 of the Mineral Leasing Act for a 16-month period from June 1, 1947, to October 1, 1948, thus extending the term of the lease to July 31, 1950, a second suspension of operations and production for a 6-month period from June 1, 1949, to November 30, 1949, would further extend the term of the lease to January 31, 1951.

M-36031

MARCH 24, 1950.

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT.

Your memorandum of January 31, 1950, to the Secretary concerning the request of The Texas Company, lessee, for permission to suspend operations and production under oil and gas lease, Great Falls 084862, presents for consideration a problem of construction respecting section 39 of the Mineral Leasing Act, as amended.

The present version of section 39, which was enacted on August 8, 1946 (60 Stat. 950, 957; 30 U. S. C., 1946 ed., sec. 209), reads, in part, as follows:

* * * 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 under any lease granted under the terms of this Act, any payment of acreage rental or of minimum royalty 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.* * * * [Italics supplied.]

As originally added to the Mineral Leasing Act by the act of February 9, 1933 (47 Stat. 798), section 39 contained language identical with that quoted above, except that the section then applied only to the suspension of operations and production "of coal, oil, and/or gas," and the section did not contain the phrase "or of minimum royalty."

March 24, 1950

The lease presently under consideration was issued to The Texas Company on April 1, 1944, for a 5-year term ending on March 31, 1949. A productive well was completed on the leased area in November 1945. Operations and production under the lease were suspended pursuant to section 39, as amended, for a 16-month period from June 1, 1947, to October 1, 1948, and the term of the lease was therefore extended for 16 months from March 31, 1949, or to July 31, 1950.

By a letter dated April 29, 1949, and received by the Geological Survey on May 4, 1949, the lessee filed a request for a further suspension of operations and production, and you have recommended to the Secretary that a suspension be granted for the 6-month period from June 1, 1949, to November 30, 1949. The legal problem presented is whether this suspension, if granted for a 6-month period subsequent to the expiration of the initial 5-year term of the lease on March 31, 1949, will further extend the term of the lease for 6 months beyond its present expiration date, July 31, 1950. Stating the problem in general terms, it is whether the clause in section 39 of the Mineral Leasing Act that is italicized in the quotation set out above applies only to a suspension of operations and production which occurs prior to the expiration date of the initial term of the lease, or whether the clause also applies to a suspension occurring after the original expiration date and within the extended term of the lease resulting from a prior suspension under section 39.

The language of section 39 seems to be plain with respect to the point outlined above. It states that "the term of such lease shall be extended by adding *any* such suspension period thereto." [Italics supplied.] It does not say that "the ORIGINAL term of such lease shall be extended by adding any such suspension period OCCURRING DURING THE ORIGINAL TERM OF THE LEASE," and I do not believe that there is any sound reason for reading into the plain statutory language, by administrative construction, words of limitation such as those set out in capital letters.

The "term" of a lease is the period which is scheduled to elapse between its effective date and its expiration date. If, during the life of a lease, its expiration date is projected into the future as a result of some occurrence, the lease has a new "term," extending from the effective date of the lease to the new expiration date. The time between the initial expiration date and the new expiration date is as much a part of the "term" of the lease as the time between the effective date of the lease and the initial expiration date.

Hence, under the plain language of section 39, it appears that a suspension of operations and production occurring during the ex-

tended term of a lease resulting from a prior suspension within the initial term of the lease would cause a further extension of the term.

The legislative history of section 39 indicates a congressional purpose that a lessee should have a full lease term for operations, over and above any periods of suspension. In its report on the bill (S. 4509, 72d Cong.) which became the act of February 9, 1933, the Senate Committee on Public Lands and Surveys said:

Where, by reason of the positive directions of the Secretary of the Interior, or by mutual assent of the Secretary and of the lessee, production is prohibited from the leased area, the suspension period surely should not be counted as a part of the prescribed term. Hence the provision that such suspension period shall be added to the life of the lease. [S. Rept. No. 812, 72d Cong., p. 3.]

The report of the House Committee on Public Lands was practically identical. (H. Rept. No. 1737, 72d Cong.)

In the debate on the bill in the House of Representatives, Representative Eaton, who apparently handled the bill on the floor, stated that when a suspension was in effect, "you just push the whole lease along, day for day and year for year, and you cover exactly the same contract during the exact term with a later maturity date." (75 Cong. Rec. 15364.) At another point in the debate, he said that "during the suspended period there will be a moving forward of the whole term of the lease * * *"; and that "this general relief bill * * * would put forward month by month and year by year the exact time for which all these relief measures are applicable * * *." (76 Cong. Rec. 705.)

It is obvious that if a suspension occurring after the expiration of the original term of a lease were not added to the lease term, a lessee might be deprived of the full period of time originally contemplated by the parties for drilling operations and the production of oil. In this connection, it is to be noted that under section 39 the Secretary is authorized to order a suspension of operations and production without the consent of the lessee. It is unlikely that Congress intended to vest in the Secretary power to deprive a lessee of part of his lease term without his consent. Such would be the result of a holding to the effect that a suspension ordered (or permitted) by the Secretary during the extended term of a lease would not effect a further extension of the lease term.

Consideration has been given to the decision of the Commissioner of the General Land Office which was approved by Assistant Secretary Chapman on March 6, 1944, and which permitted a suspension of drilling on a lease, Cheyenne 037868, held by the Chicago Oil Company. That lease had been issued on May 13, 1921, for a 20-year period, and operations and production under the lease had been suspended from a time prior to the enactment of section 39 on February 9, 1933, to May 13, 1943. Thereafter, on December 9, 1943, the lessee

June 9, 1950

requested a further suspension. In the decision of March 6, 1944, the suspension was granted for 1 year commencing on December 13, 1943. The decision mentioned that the 20-year term of the lease had expired, and stated that "Since any suspension now granted * * * will not further extend the life of the lease * * *," it was unnecessary to secure the consent of the lessee's surety to the suspension. There was no discussion of the legal problem involved in the quoted statement, and, for that reason, the pronouncement concerning the ineffectiveness of the 1-year suspension to extend further the term of the lease should not be regarded as a controlling precedent.

It is my opinion that section 39 requires that the term of a lease shall be extended by any period of suspension of operations and production in effect under section 39 during the life of the lease, irrespective of whether such suspension occurs during the original term fixed for the lease or during the extended term resulting from a prior suspension.

In connection with lease, Great Falls 084862, therefore, the granting of permission for a second suspension covering the 6-month period from June 1, 1949, to November 30, 1949, would have the effect of extending the term of the lease for 6 months beyond its present expiration date of July 31, 1950, or until January 31, 1951.

* * * * *

MASTIN G. WHITE,
Solicitor.

CHARLES B. ABBOTT

A-25802

Decided June 9, 1950

Soldiers' Additional Homesteads—Withdrawal.

The pendency of an application for a soldier's additional homestead entry does not cause the land covered by the application to be excepted from the operation of a withdrawal, where the requirements for publication and posting of notice of the application have not been complied with prior to the withdrawal.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Charles B. Abbott has appealed to the head of the Department from the decision of May 20, 1949, by the Associate Director of the Bureau of Land Management, rejecting his soldier's additional homestead application for entry of lot 3, sec. 1, T. 7 S., R. 13 W., S. M., on Homer Spit, Alaska. Mr. Abbott's application was filed on April 3, 1943, pursuant to section 2306 of the Revised Statutes (43 U. S. C., 1946 ed., sec. 274), and is based on an assignment of the soldier's additional homestead right of William Schultz, who is said to have made homestead entry No. 5638 at Winnebago City, Minnesota, in 1869.

The rejection of Mr. Abbott's application was based upon the ground that the land applied for was withdrawn from settlement, location, sale, and entry by Public Land Order 486 of June 15, 1948 (13 F. R. 3462, 43 CFR, p. 723), "in aid of contemplated legislation authorizing use of the land for dock and landing sites or other public purposes * * *." The Associate Director also stated that the unrestricted use of the land applied for was necessary to assure its availability for essential public uses, such as mail and freight routes, important in the development of the Homer area.

In his appeal, Mr. Abbott asserts that his application was not affected by Public Land Order 486 because it was a prior valid application in existence at the time when the withdrawal was made.

The regulations of the Department provide that where an application for a soldier's additional homestead entry is filed for unsurveyed land, the applicant may, upon receipt of a certificate from the manager of the land office, apply to the public survey office for a survey of the land (43 CFR 61.13). Upon the filing of the application for a survey and a deposit to cover costs, the survey is to be made by the Bureau of Land Management not later than the next surveying season (43 CFR 61.14). After the plat and field notes of the special survey have been received by the manager, he is to notify the applicant that, within 60 days from a date to be fixed by the manager, he must furnish evidence that he has published notice of his application for 9 weeks and has posted a copy of the application and of the plat of survey on the land for 60 days (43 CFR 61.15). During the period of publication and posting, or within 30 days thereafter, adverse claims to the land may be filed (43 CFR 61.16).

At the time when Mr. Abbott filed his application for entry, the land on Homer Spit was unsurveyed. He therefore applied for a survey of the land in accordance with the regulations. However, the district cadastral engineer stated that a special survey was not justified under existing conditions, that Mr. Abbott's metes and bounds description of the land applied for should be connected to the rectangular survey, and that a showing should be made as to why Mr. Abbott's application should not be conformed to the rectangular survey. Mr. Abbott was required by the Assistant Commissioner of the General Land Office¹ on December 13, 1943, to meet these requirements. On January 7, 1944, Mr. Abbott apparently requested a copy of a plat of survey of the land for this purpose, but was informed by the district cadastral engineer that the sale and distribution of plats of survey were restricted at the request of the War Department and that the filing of plats of survey was being withheld until the restrictions were

¹ Effective July 16, 1946, the General Land Office was abolished and its functions were transferred to the Bureau of Land Management by section 403 of Reorganization Plan No. 3 of 1946 (11 F. R. 7875, 7876; 7776).

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removed. Nevertheless, on March 3, 1944, Mr. Abbott filed a map purporting to show the land applied for, tied into a rectangular survey made "some years previous."

No special survey of the land included in Mr. Abbott's application was ever made, but on December 20, 1945, an official plat of the township was accepted. The plat, however, was not filed until May 25, 1948. At that time, Mr. Abbott amended his application for entry so as to conform the land description to the plat of survey, but before any steps were taken to publish and post notice of his application, the land applied for was withdrawn from entry by Public Land Order 486 on June 15, 1948.

The Department has indicated that until notice has been published and posted, an applicant for a soldier's additional homestead entry acquires no rights or equitable title in the land. *Skinner v. Fisher*, 40 L. D. 112, 115 (1911); *John C. Barber*, 48 L. D. 165 (1921). In line with this view, the Department has held that the mere filing of an application for a soldier's additional homestead entry does not prevent the later withdrawal of the land pursuant to the act of June 25, 1910, as amended (43 U. S. C., 1946 ed., sec. 141 *et seq.*). *Josephine C. Woolson*, 40 L. D. 235 (1911); *James W. Jones*, 40 L. D. 553 (1912).

Mr. Abbott cites the case of *Donald C. Wheeler*, 48 L. D. 94 (1921), as holding that an application for a soldier's additional homestead entry cannot be defeated by a subsequent withdrawal of the land under the act of June 25, 1910, *supra*. In that case, however, it was pointed out that long prior to the withdrawal, the applicant had complied with all the requirements prescribed by law and the departmental regulations. The *Wheeler* case, therefore, is not inconsistent with the cases cited in the preceding paragraph.

It is probably true that Mr. Abbott's failure to comply with the publication and posting requirements was caused by the 5-year delay in filing the plat of survey of the township. It seems also that, instead of waiting for the township plat to be accepted and approved, the district cadastral engineer should have made a special survey of the land applied for by Mr. Abbott, as required by the Department's regulations. The request of the War Department for the withholding of the filing, sale, or distribution of plats of survey apparently extended only to regular surveys and not to special surveys made in order to enable individual claims to proceed to patent. The plat of survey which was filed on May 25, 1948, shows that the survey was actually completed on the ground in 1940. Apparently, no further action was taken to complete the plat of survey and to have it accepted during the period from December 24, 1942, to July 20, 1944, when the security restrictions were in effect. But because the ground work on the survey had been completed at the time when Mr. Abbott filed his application,

the district cadastral engineer apparently did not believe that a further special survey need be made. This probably explains also why Mr. Abbott was required to tie his land description to the rectangular survey and to conform his application to the rectangular survey. It would appear that this requirement was improperly made upon Mr. Abbott, in view of the fact that the township plat had not then been accepted and filed and there was consequently no way in which Mr. Abbott could conform his application to the rectangular survey.

Despite the considerations mentioned in the preceding paragraph, however, publication and posting are essential requirements which must be met by an applicant for a soldier's additional homestead entry, and until they are met, the applicant acquires no rights in the land which would except it from a withdrawal.

As Public Land Order 486 did not in terms except any application or entry from the withdrawal, and as Mr. Abbott had not fully complied with all the requirements of the Department's regulations at the time when the withdrawal was made, it must be concluded that his application was defeated by the withdrawal.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Associate Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

M. P. CUNNINGHAM ET AL.

A-25867

Decided July 5, 1950

Alaskan Oil and Gas Leases—Waiver or Suspension of Rental.

A waiver or suspension of the first year's rental on noncompetitive Alaskan oil and gas leases will not be granted solely for the reasons that costs of operations in Alaska are high, that the area included in the leases is highly inaccessible to shipping, that an unsuccessful test well drilled in the area has discouraged the investment of capital in further development of the area for oil and gas purposes, and that payment of the first year's rental will require a deferment of geophysical work in the area.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This is an appeal to the head of the Department from a decision dated October 14, 1949, of the Associate Director of the Bureau of Land Management, which affirmed the action of the manager of the Anchorage land office in rejecting the joint application filed by the appellants under section 39 of the Mineral Leasing Act, as amended (30 U. S. C., 1946 ed., Supp. III, sec. 209), for a waiver of the first

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year's rental on oil and gas leases for which the appellants have filed applications under section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1946 ed., sec. 226).

The appellants originally filed 24 applications for noncompetitive oil and gas leases on approximately 275,565 acres (430 square miles) of land in the vicinity of Cape Yakataga, Alaska. Because each application embraced more than 2,560 acres of land, the appellants, pursuant to a requirement in the Associate Director's decision of October 14, 1949, amended their original applications and filed new applications, so that they now have on file 89 applications embracing 191,280 acres (300 square miles) of land. As the first year's rental on noncompetitive oil and gas leases covering land in Alaska is 25 cents per acre, the first year's rental for leases on the 191,280 acres of land would amount to \$47,820. It is this amount that the appellants ask the Department to waive.

The departmental policy regarding the waiver of rentals on Alaskan oil and gas leases was set forth in *Iniskin Bay Association et al.*, A-25423, and *Cornelius Kroll et al.*, A-24803, both dated January 19, 1949. In those cases, it was recognized that oil and gas operations in Alaska may generally be more expensive and more difficult to undertake than similar operations in the States because of the high cost of transporting materials and equipment to Alaska, the shortness of the operating season, and the inaccessibility of the lands proposed to be developed. It was pointed out, however, that these factors were compensated for by the establishment of the first year's rental for Alaskan leases at one-half of the first year's rental rate for noncompetitive leases on land in the States. It was also indicated that a rental charge in some amount is desirable in order to discourage the speculative holding of land under oil and gas leases without development and to furnish an incentive to lessees to conduct operations with due diligence.

The appellants concede that the disproportionate cost of operating in Alaska is not a sufficient ground in itself for granting a waiver of the first year's rental. They contend, however, that in addition to that factor, there are two other factors involved in this case which warrant the granting of the waiver: (1) The inaccessibility of the Yakataga area, and (2) the unsuccessful drilling of a well in the area in 1937, which, it is alleged, has had the effect of discouraging the further investment of capital in the exploration of the area for oil and gas. With respect to these points, it may be noted that, in the *Cornelius Kroll* case, one of the grounds advanced for requesting a waiver was that the lands involved in the case are far distant from any area of oil and gas development, and that they are difficult of access. In the *Iniskin Bay Association* case, it was stated by the appli-

cants for a waiver that an unsuccessful test well had been drilled in the area involved in that case. Therefore, the factors relied upon by the appellants in the present case are similar to those which were considered in the *Kroll* and *Inishkin Bay Association* cases and were held to be insufficient to justify a waiver of rental.

In their appeal, the appellants ask that, if a waiver of the first year's rental is not granted, the payment of the rental be suspended for a period of at least 18 months. The appellants state that they have spent \$30,000 in preliminary work on the land, that they have moved in heavy equipment, that they have made preparations for the landing of supplies and for the housing of field workers, and that they are prepared to spend an additional sum of at least \$30,000 immediately for a geophysical survey of the Yakataga area. They state that the survey is necessary in order to determine the oil and gas possibilities of the area and to induce the investment of capital in the development of the area for oil and gas purposes if the survey results are favorable. They assert that they can obtain the capital with which to commence drilling immediately if the geophysical survey should prove to be favorable. The appellants claim, however, that if they are required to pay the first year's rental in advance, they will be compelled to postpone the geophysical survey until a later year.

Section 39 of the Mineral Leasing Act, as amended, provides, in part, as follows:

The Secretary of the Interior, for the purpose of encouraging the greatest ultimate recovery of coal, oil, gas, * * * and in the interest of conservation of natural resources, is authorized to waive, suspend, or reduce the rental, * * * whenever in his judgment it is necessary to do so in order to promote development, or whenever in his judgment the leases cannot be successfully operated under the terms provided therein. * * * [Italics supplied.]

It will be noted that, when the authority granted in this section is exercised, it should be for the purpose of "encouraging the greatest ultimate recovery" from the mineral deposit or deposits covered by the particular lease and "in the interest of conservation of natural resources." It is difficult to see how a waiver or a suspension of the first year's rental on the leases applied for by the appellants would encourage "the greatest ultimate recovery" from the oil or gas deposits, if any, in the leased lands and aid in the "conservation of natural resources." Consequently, the present case does not appear to meet the standard prescribed by law for a waiver or suspension of rental.

Moreover, practical considerations cannot be disregarded in passing upon the appellants' request for a suspension of the first year's rental. The appellants' submission indicates that, if they were to carry out the geophysical exploration in accordance with their tenta-

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tive plan and the results of the survey were unfavorable, it would then be difficult, and perhaps impossible, for the appellants to obtain the funds with which to pay the suspended first year's rental of \$47,820. In other words, the ultimate collection of the suspended rental might well depend upon the favorable outcome of the survey. For the Department to suspend rental under such circumstances would not appear to be in the public interest.

In the circumstances presented, there appears to be no substantial justification for granting either a waiver of the first year's rental or a suspension of that rental for a period of 18 months.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Associate Director of the Bureau of Land Management is affirmed, and the request for a suspension of the first year's rental is denied.

MASTIN G. WHITE,
Solicitor.

FLORENCE E. GALLIVAN ET AL.¹

A-25815
A-25817
A-25824

Decided July 6, 1950

Mineral Leasing Act—Ceded Indian Lands—Shoshone or Wind River Indian Reservation.

The phrase "lands * * * owned by the United States," as used in the Mineral Leasing Act of 1920, refers only to lands in which all rights are held by the United States, including the unrestricted right to use or dispose of the proceeds derived from the use of such lands.

The Indians of the Shoshone or Wind River Indian Reservation are the beneficial owners of the undisposed-of lands which they ceded to the United States for disposition under an agreement whereby the proceeds derived from the disposition of the ceded lands shall be utilized for the use and benefit of the Indians; and any proceeds that may be derived from the use of such lands, including their development for oil and gas, belong to the Indians rather than to the United States.

The Mineral Leasing Act of 1920 is not applicable to the ceded but undisposed-of lands of the Shoshone or Wind River Indian Reservation.

Oil and gas leases on the ceded but undisposed-of lands of the Shoshone or Wind River Indian Reservation may be issued only under the act of August 21, 1918.

Frank A. Kemp, 47 L. D. 560 (1920), and *Christ C. Prange and William C. Braasch*, 48 L. D. 448 (1922), not followed.

¹ Together with 15 other applicants whose names have been omitted for purposes of brevity. [Editor.]

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The appellants filed applications for oil and gas leases covering lands ceded to the United States by the Indians of the Shoshone or Wind River Indian Reservation in Wyoming. The applications were filed under the Mineral Leasing Act of February 25, 1920, as amended (30 U. S. C., 1946 ed., sec. 181 *et seq.*). All the applications were rejected by the manager of the district land office at Cheyenne. On appeal, the rejection of the applications was affirmed by the Associate Director of the Bureau of Land Management in decisions dated September 23 and November 9, 1949. The applicants thereupon appealed to the head of the Department from the Associate Director's decisions.

As all the appeals involve the same issue, they are being considered together.

The lands for which the applications were filed are part of the lands that were ceded to the United States by the Indians of the Shoshone or Wind River Indian Reservation in Wyoming under the terms of the agreement of April 21, 1904. The agreement was ratified by the act of March 3, 1905 (33 Stat. 1016).

Legal title to the ceded but undisposed-of Shoshone lands is in the United States. Article II of the agreement of April 21, 1904, provides that the United States shall dispose of the ceded Shoshone lands "under the provisions of the homestead, town-site, coal, and mineral land laws, or by sale for cash * * *." However, Article VIII of the agreement expressly states that the proceeds derived from the disposition of the ceded lands shall be utilized for the use and benefit of the Indians. Therefore, the Indians of the Shoshone or Wind River Indian Reservation are the beneficial owners of the ceded lands which have not been disposed of by the United States, and any proceeds that may be derived from the use of such lands, including their development for oil and gas, belong to the Indians rather than to the United States.²

The Mineral Leasing Act of 1920, pursuant to which the applications presently under consideration were filed, authorizes, *inter alia*, the issuance of oil and gas leases on "lands * * * owned by the United States" (30 U. S. C., 1946 ed., sec. 181). Section 35 of that act (30 U. S. C., 1946 ed., sec. 191) provides that 10 percent "of all money received from sales, bonuses, royalties, and rentals" under the act shall be deposited in the Treasury to the credit of miscellaneous receipts, that 52½ percent of such proceeds shall go into the Federal reclamation fund, and that 37½ percent of such proceeds shall be paid to the respective States within the boundaries of which the leased

² See *Ash Sheep Co. v. United States*, 252 U. S. 159 (1920).

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lands are located. When the mandatory directive in section 35 regarding the disposition of the proceeds received under the Mineral Leasing Act is considered in relation to the statutory description of the lands which are subject to leasing under the act, it seems clear that the phrase "lands * * * owned by the United States," as used in the Mineral Leasing Act, is at least limited to lands in which all rights are held by the United States, including the unrestricted right to use or dispose of any proceeds derived from such lands. Under this construction, the ceded but undisposed-of lands of the Shoshone or Wind River Indian Reservation do not come within the category of "lands * * * owned by the United States," because the beneficial interest in these lands is vested in the Indians of the Shoshone or Wind River Indian Reservation and they are entitled to any proceeds that may be derived from the use of these lands, including their development for oil and gas. It must be held, therefore, that the Mineral Leasing Act of February 25, 1920, is not applicable to these lands.

To the extent that the decisions in *Frank A. Kemp*, 47 L. D. 560 (1920), and in *Christ C. Prange and William C. Braasch*, 48 L. D. 448 (1922), are in conflict with the construction of the Mineral Leasing Act of 1920 stated in the preceding paragraph, those decisions are regarded as unsound and are not followed. The decision in the *Kemp* case held that the Mineral Leasing Act of 1920 was applicable to lands which had been ceded to the United States by the Confederated Bands of Ute Indians, and the decision in the case of *Prange and Braasch* held that the Mineral Leasing Act of 1920 was applicable to ceded lands which formerly had comprised part of the Fort Berthold Indian Reservation. Both cases involved lands which had been ceded by Indian groups to the United States under agreements whereby the proceeds from the disposition of the lands were to be used for the benefit of the Indians.

There is another reason for holding that the provisions of the general Mineral Leasing Act of 1920 are not applicable to the leasing of the ceded lands of the Shoshone or Wind River Indian Reservation for oil and gas development. The subject of the issuance of oil and gas leases on lands within the ceded portion of the Shoshone or Wind River Indian Reservation is specifically covered by another statute, namely, the act of August 21, 1916 (39 Stat. 519). Departmental regulations supplementing the 1916 statute are contained in 25 CFR, Part 192. It has been the uniform administrative practice in the Department to issue oil and gas leases on the ceded lands of the Shoshone or Wind River Indian Reservation only in accordance with the provisions of the act of August 21, 1916. The Mineral Leasing Act of 1920 has never, during the 30-year period that has elapsed since its enactment, been utilized by the Department for that purpose. Apart

from other considerations, the long-standing administrative interpretation of the 1916 act as providing the exclusive authority for the issuance of oil and gas leases on the ceded lands of the Shoshone or Wind River Indian Reservation should not be disturbed in the absence of a showing that the interpretation is clearly erroneous. No such showing has been made in this case.

It appears that some of the ceded lands involved in the present proceedings were patented pursuant to the act of July 17, 1914 (38 Stat. 509, 30 U. S. C., 1946 ed., secs. 121-122), with a reservation to the United States of the minerals underlying the patented lands. It has been held that, in such a situation, the United States holds the reserved minerals in trust for the Indian tribe which ceded the lands.³ Consequently, such minerals are no more subject to leasing under the provisions of the Mineral Leasing Act of 1920 than ceded lands which have not been patented.

For the reasons stated above, the rejection of the appellants' applications was proper.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Associate Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

UNITED STATES v. CALIFORNIA ROCK SALT COMPANY

A-25825

Decided July 18, 1950

Placer Mining Claims—Saline Act—Contests.

The act of January 31, 1901, is applicable to public land only if, at the time of the location of claims under that act, valuable deposits of salt have been discovered on such land and the land is chiefly valuable for salt.

Where land contains valuable deposits of salt and valuable deposits of another mineral, the test as to whether the land is to be located under the act of January 31, 1901, or under the general mining law is the comparative commercial value of the respective minerals at the time of location.

Where the Government institutes a contest against a number of placer mining claims on the ground that they were located in violation of the proviso to the act of January 31, 1901, the Government has the burden of proving that the claims were located for salt.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This appeal to the head of the Department by the California Rock Salt Company concerns the validity of 38 contiguous placer mining

³ See "Ownership of Minerals in Patented Lands Within the Uintah and Ouray Indian Reservation, Utah," M-34836, January 27, 1947, 59 I. D. 393; A. A. Brigman, A-24678, March 30, 1948; John H. Trigg, A-25530, January 24, 1949.

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claims situated in the bed of Bristol Dry Lake, San Bernardino County, California. The claims are designated as Saltus Nos. 1 to 19, inclusive, Chloride Nos. 1 to 7, inclusive, and Crystal and Crystal Nos. 1 to 11, inclusive. Each claim, except Saltus No. 15 and Crystal No. 10, comprises 160 acres, and the two claims last named contain 80 acres each.

On October 14, 1942, adversary proceedings were filed against the 38 claims, and the California Rock Salt Company was named as the interested party. The proceedings were based upon the following allegations: (1) That the claims are invalid because they were located in violation of the proviso to the act of January 31, 1901 (31 Stat. 745; 30 U. S. C., 1946 ed., sec. 162); and (2) that the claims are invalid because they are held by one company in violation of the proviso to the act of January 31, 1901.

The company filed an answer, asserting (among other things) that "each and all of said locations were made under the general provisions of the United States mining laws and were not located under the provisions of the Act of January 31, 1901"; that "none of said claims * * * has since been held and operated under the provisions of said Act of January 31, 1901"; and that "said placer mining locations are, and each of them is, chiefly valuable for minerals other than salt."

The act of January 31, 1901, reads as follows:

That all unoccupied public lands of the United States containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, are hereby declared to be subject to location and purchase under the provisions of the law relating to placer-mining claims: *Provided*, That the same person shall not locate or enter more than one claim hereunder.

An extensive hearing was held in the case during April 1945. At the outset of the hearing, the Company stated that it asserted no claim to Chloride Nos. 4 and 5. On July 17, 1946, the manager of the district land office recommended that Chloride Nos. 4 and 5 be declared null and void and that the proceedings be dismissed as to the remaining 36 claims. On September 26, 1949, the Associate Director of the Bureau of Land Management held that all the claims, except Saltus Nos. 1, 8, and 18, and Crystal, had been located in violation of the proviso to the 1901 act, and that, with respect to the four claims enumerated, the Company was not qualified to hold them as it had previously acquired the ownership of the Snow Drift claim, a salt claim patented under the 1901 act. This appeal to the head of the Department followed.

A stipulation of the parties in the record shows that the Crystal and Crystal Nos. 1-11 claims were located in March 1906 by a group of eight individuals; that the Saltus Nos. 1 to 15 claims were located on August 8, 1908, and the Saltus Nos. 16 to 19 claims and all the

Chloride claims were located on September 5, 1908, by a second group of eight individuals; that in April 1913 the Saltus No. 8 claim was relocated by a third group of eight individuals, the Saltus No. 18 claim was relocated by a fourth group of eight individuals, and the Crystal claim was relocated by a fifth group of eight individuals; and that the patented Snow Drift claim was located on August 15, 1908, by a sixth group of eight individuals, four of whom, however, were members of the group that located the Saltus and Chloride claims.

The primary question for determination is whether the 36 claims held by the appellant are governed by the act of January 31, 1901. No consideration of the Chloride Nos. 4 and 5 claims is necessary in view of the appellant's disclaimer of any interest in those two claims.

The 1901 act provides that land "chiefly valuable" for salt deposits shall be subject to "location and purchase" under the placer mining laws, but that the same person shall not locate more than one salt placer mining claim. It seems clearly to follow that the answer to the question whether a mining location is subject to this act depends upon whether, at the time of the location, valuable salt deposits have been discovered on the land and the land is known to be chiefly valuable for such salt deposits. This is the view indicated in 2 Lindley on Mines (3d ed.), sec. 425B, where it is stated that the test as to whether a deposit which contains both salt and potash should be located under the 1901 act (which limits an individual to one location) or under the general placer mining law (under which the number of locations is unlimited) will depend on the comparative commercial value of the two substances. Obviously, this has reference to the comparative value of the substances as known at the time when the location is to be made. Cf., also, *United States v. Primrose Coal Co.*, 216 Fed. 553 (D. Colo., 1914).

We turn, then, to the evidence in the record as to the mineral character of the land comprised in the 36 claims at the time of their respective locations. In this connection, it is noted that, with the exception of the notice of location relating to the Snow Drift claim (the validity of which is not involved in these proceedings), the record contains no information regarding the representations as to discoveries of minerals that were made in the various notices of locations pertaining to the claims previously mentioned. Consequently, it is not known whether the locators made in the notices respecting the 36 claims any assertions which would be inconsistent with the appellant's contention that the claims were located under the general mining laws for minerals other than salt.

T. W. Brotherton, one of the original locators of the Saltus and Chloride claims, testified that the claims were located in 1908 "practically altogether for salt." (Tr. 91.) He stated that the locations were made just a few years after the Salton Sea plant (which ap-

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parently produced salt) had been drowned out by an overflow; that at the time of the locations there were open pits on the property, one of which showed two strata of salt about 4 feet thick; that for a period of a year and a half or 2 years salt was mined from an acre of ground (on which claim he did not remember) and transported by rail for about a mile to a mill, where it was crushed, washed, and shipped to market; that an average of four to five carloads of salt were marketed per day; but that the Crystal Salt Company, which had been organized to operate the property, finally went broke.

The testimony of a Mr. Jones, who did not appear at the hearing, was stipulated by counsel, who agreed that, if he were present, he would testify that he was one of the original locators of the Snow Drift claim and of the 38 Saltus, Chloride, and Crystal claims;¹ that the claims were located "for the purpose of protecting the Crystal Salt Company in its operations on Snowdrift Placer Claim" (Tr. 414); and that the Crystal Salt Company mined and sold approximately 500 tons of rock salt per month for 4 years from the Snow Drift claim, but the operations were not profitable.

C. C. Spicer, a third original locator of the Saltus and Chloride claims, testified that he did the legal work in connection with the filing of the claims; and that they were located for calcium, magnesium, and other minerals, and not for salt.

It appears that in 1916 the Consumers Salt Company took over the operation of the claims and, during the next 2 years, produced about 4,000 tons of salt and 2,000 tons of calcium chloride, most of it from the Snow Drift claim. In 1923, the appellant took over the property, and the appellant has produced both salt and calcium chloride from the land since that date. Detailed figures were given by the appellant for the tonnage mined and sold and the net profit realized on the sales for the years 1933 to 1944, inclusive. For the 8 pre-war years of 1933-1940, these figures show an average annual salt production of approximately 7,150 tons, with a net profit of \$1.42 per ton, or an average annual net profit of \$10,365. For the same years, the average annual production of calcium chloride approximated 1,990 tons, with a net profit of \$2.27 per ton, or an average annual net profit of \$4,570. However, the evidence does not show the extent to which the respective substances have been produced by the appellant from each of the 36 claims involved in this case.

¹ The stipulation in the record referred to previously gives the name of one of the locators of the Saltus and Chloride claims as "Chas. T. B. Jones," and the name of one of the locators of the Crystal claims as "C. J. B. Jones." A copy of the location notice of the Snow Drift claim carries the name of "L. B. Jones" as one of the locators. However, the departmental record on the Snow Drift claim (Los Angeles 03205; Patent No. 165166) contains an affidavit by L. B. Jones stating that she is the wife of Chas. T. B. Jones. It is assumed, therefore, that Chas. T. B. Jones is not the same person as C. J. B. Jones.

The great bulk of the testimony relates to examinations of the claims that were made in 1920, 1943, 1944, and 1945. According to this testimony, Bristol Dry Lake is a dry desert lake containing a bed or beds of rock salt laid down as a result of precipitation from water draining into the lake, and covered with an overburden of clay ranging from a few feet to several feet in thickness. The beds of salt and the clay overburden are relatively uniform. The claims lie in an elongated block with a southwest-northeast axis, the Crystal claims comprising the northeast portion of the block, which touches on the shore of the lake, the Chloride claims fringing the southwest corner of the block, and the Saltus claims lying between. In the center of eight Saltus claims is the Snow Drift claim.

The preponderance of the testimony respecting the data developed as a result of the investigations in 1920, 1943, 1944, and 1945 was to the effect that there were no excavations or wells on the Crystal claims and no disclosure of any salt on those claims; that there was no disclosure of salt, or, at most, a disclosure of only a trace of salt, on the Saltus Nos. 4, 7, and 15 claims; that there was no evidence of salt on the Saltus Nos. 5, 6, 8, and 12 claims or on the Chloride Nos. 1 and 7 claims; but that salt was disclosed on the Saltus Nos. 1, 2, 3, 9, 10, 11, 17, 18, and 19 claims, and on the Chloride Nos. 2 and 3 claims. In short, according to the weight of the evidence, the investigations revealed that there was no disclosure of salt in 21 of the 36 claims, but that there was a disclosure of salt in 11 of the 36 claims.

I do not believe that the Government has sustained the burden which it necessarily assumed, under the allegations in the present adversary proceedings, of proving that the respective claims were located or re-located for salt under the 1901 act. The direct testimony of Mr. Brotherton to that effect, insofar as the Saltus and Chloride claims are concerned, and the supporting inference to be drawn from the stipulation regarding Mr. Jones' testimony, are contradicted by Mr. Spicer's testimony regarding the purpose for which the Saltus and Chloride claims were located. Moreover, the circumstantial evidence does not throw sufficient light on the purpose of the locations to warrant factual findings that the claims were located for salt.

Since the Government has failed to prove that the claims involved in these proceedings were located for salt and, hence, are subject to the proviso contained in the 1901 act, the basis for the present proceedings is untenable.

The conclusion stated above should not be construed as favorable to the validity of the 36 claims with which we are concerned. Indeed, the record in the present proceedings indicates that new adversary proceedings, based on the alleged absence of discoveries of valuable mineral deposits, as required for the acquisition of rights on public

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lands under the mining laws, would probably be justified as to at least a substantial number of these claims.

With respect to the Chloride Nos. 4 and 5 claims, in which the appellant disclaimed any interest at the hearing, it is not clear whether the appellant formerly had an interest in these locations but decided to let it go by default, or whether the appellant has never claimed a property interest in these locations. If the latter is true, no interest held by any other person in the two claims could be affected by the present proceedings. If the former is true, the decision of the Associate Director with respect to these two claims was proper.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Associate Director of the Bureau of Land Management is reversed and the proceedings are dismissed, except that the decision is affirmed as to the Chloride Nos. 4 and 5 claims and they are declared to be null and void insofar as any interest of the California Rock Salt Company in either of those claims is concerned.

MASTIN G. WHITE,
Solicitor.

SIDNEY J. ARMSTRONG
G. C. DUNFORD

A-25827

Decided July 18, 1950

Preference-Right Oil and Gas Lease.

In order to qualify for a preference-right oil and gas lease under section 1 of the act of July 29, 1942, the holder of the base lease must have maintained it in good standing.

Where the fifth year's rental on the base lease is payable in advance but remains unpaid at the time of the expiration of the lease, such a lease is not in good standing and cannot be the basis for the issuance of a preference-right lease under section 1 of the act of July 29, 1942.

This Department cannot waive a statutory requirement respecting the issuance of a preference-right oil and gas lease.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

G. C. Dunford was the holder of a 5-year noncompetitive oil and gas lease (Sacramento 035260) covering the E $\frac{1}{2}$ SE $\frac{1}{4}$ and the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of sec. 22, T. 29 S., R. 20 E., M. D. M., California, which was scheduled to expire on May 31, 1949. In a letter which was received by the district land office at Sacramento on May 27, 1949, Mr. Dunford stated that he wished to renew his lease, and he requested application blanks for use in this connection. The district land office

replied on May 27, stating that, "We have no blank forms for filing the application. Follow instructions, contained in the marked paragraphs of the enclosed circular * * *" On June 2, 1949, Mr. Dunford filed with the district land office a formal application (Sacramento 040687) to extend his lease on this land.

On June 1, 1949, Sidney J. Armstrong filed an application (Sacramento 040634) for a noncompetitive oil and gas lease on the same land involved in Mr. Dunford's lease and application.

In a decision dated June 10, 1949, the manager of the district land office held that Mr. Armstrong's application was entitled to priority over Mr. Dunford's application. Mr. Dunford appealed from this decision to the Director of the Bureau of Land Management.

In a decision dated September 14, 1949, the Associate Director of the Bureau of Land Management reversed the manager's decision. Subsequently, on October 24, 1949, the manager rejected Mr. Armstrong's application and issued a new lease (Sacramento 040687) to Mr. Dunford as of November 1, 1949.

Thereupon, Mr. Armstrong appealed to the head of the Department.

This case requires a construction of section 1 of the act of July 29, 1942, as amended (56 Stat. 726, 57 Stat. 608, 58 Stat. 755, 59 Stat. 587; repealed, with saving clause, by sections 14, 15, of the act of August 8, 1946, 60 Stat. 950, 958), which provides, in part, as follows:

That upon the expiration of the five-year term of any noncompetitive oil and gas lease issued [prior to August 8, 1946] * * * and maintained in accordance with the applicable statutory requirements and regulations, the record title holder shall be entitled to a preference right over others to a new lease for the same land * * * if he shall file an application therefor within ninety days prior to the date of the expiration of the lease. * * *

The validity of Mr. Dunford's claim of a preference right to a new lease depends not only upon whether he filed "an application therefor within ninety days prior to the date of the expiration" of the old lease, but also upon whether the base lease had been "maintained in accordance with the applicable statutory requirements and regulations." In this connection, the regulations issued pursuant to the 1942 act require that the earlier lease upon which the assertion of a preference right to a new lease is based must have been maintained in good standing. 43 CFR 192.130.

The record indicates that on May 31, 1949, the date of the expiration of Mr. Dunford's base lease, Sacramento 035260, the fifth year's rental on that lease, amounting to \$30 and payable at the beginning of that lease year (43 CFR, Cum. Supp., 192.52, now designated as 43 CFR 192.80), had not been paid. Consequently, Mr. Dunford's base lease was not in good standing at the time when it expired on May

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31, 1949, and it had not been "maintained in accordance with the applicable * * * regulations," as required by the governing statutory provision. Accordingly, Mr. Dunford was not a qualified applicant for a preference-right lease under section 1 of the act of July 29, 1942. It is not necessary, therefore, to consider the question whether Mr. Dunford's letter, which was received by the district land office on May 27, 1949, constituted an application for a new lease under section 1 of the act of July 29, 1942.

After the expiration of Mr. Dunford's lease, Sacramento 035260, on May 31, 1949, the first person to apply for an oil and gas lease on this land was Mr. Armstrong, whose application was submitted on June 1, 1949. His application was thus entitled to priority over the application which Mr. Dunford submitted on June 2, 1949.

The fact that Mr. Dunford's lease 035260 had not been maintained in such a way as to entitle him to a preference right for a new lease on the same land under section 1 of the act of July 29, 1942, was apparently overlooked in the decision by the Associate Director, for only the question whether Mr. Dunford had filed a preference-right application within the period prescribed by law was considered. The issuance to Mr. Dunford of a new lease (Sacramento 040687) on the basis of the Associate Director's decision was erroneous, because the requirements of the statute respecting the issuance of preference-right leases had not been satisfied. Under such circumstances, cancellation of the erroneously issued lease is proper. *Russell Hunter Reay v. Gertrude H. Lackie*, 60 I. D. 29 (1947); see *Roscoe L. Patterson v. Craig S. Thorn*, 60 I. D. 11 (1947).

The erroneous issuance of the new lease (Sacramento 040687) to Mr. Dunford could not amount to a waiver of the requirement in the act of July 29, 1942, that the base lease must have been "maintained in accordance with the applicable * * * regulations," because there is no authority in any official of the Interior Department to waive this statutory requirement. See *Keith C. Morton*, A-23621, August 6, 1943.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of September 14, 1949, by the Associate Director is reversed, and the case is remanded to the Bureau of Land Management to take the necessary steps to cancel Mr. Dunford's lease and to take further action upon Mr. Armstrong's application in accordance with the views expressed in this decision.

MASTIN G. WHITE,
Solicitor.

STATE OF CALIFORNIA

A-25411

Decided August 4, 1950

Delegation of Authority—Appeals—Estoppel—Valid Claims.

The fact that a power vested in the Secretary of the Interior by law may be quasi-judicial in nature does not necessarily preclude the Secretary from delegating such power to another officer of the Department.

The Secretary's order delegating to the Solicitor the power to decide public-land appeals is authorized by section 161 of the Revised Statutes.

Where a portion of the land selected by a State in an application for an exchange under section 8 (c) of the Taylor Grazing Act is subsequently withdrawn for reclamation purposes, the fact that the Department may have delayed in acting upon the State's application and thus prevented the State from fully complying, prior to the withdrawal of the selected land, with the requirements of the Department's regulations on State exchanges could not prevent the withdrawal order from becoming effective as to such land.

A pending exchange application from a State under section 8 of the Taylor Grazing Act, as amended, constitutes a "valid claim" to the selected land within the meaning of the act of March 19, 1948.

SUPPLEMENTAL DECISION

The State of California has requested a reconsideration of the Department's decision of June 2, 1949, which affirmed the rejection in part of an application filed by the State under section 8 (c) of the Taylor Grazing Act, as amended (43 U. S. C., 1946 ed., sec. 315g), for an exchange of 43,000 acres of State-owned land for an approximately equal acreage of public land. The State's application, which was filed on February 19, 1942, was rejected as to some 16,000 acres of selected land for the reason that the land was withdrawn on November 6, 1947, for reclamation purposes.

The Department of Agriculture has also requested a reconsideration of the portion of the Department's decision which held that approval of the State's application with respect to 6,000 acres of selected land (not included in the withdrawal of November 6, 1947) was not barred by the act of March 19, 1948 (62 Stat. 83).

I

The decision of June 2, 1949, was rendered by the Solicitor of the Department, acting pursuant to a delegation of authority to him from the Secretary of the Interior "to exercise all the authority of the Secretary of the Interior with respect to the disposition of appeals to the Secretary from decisions of the Director of the Bureau of Land Management." (Sec. 23, Order No. 2509; 14 F. R. 307.) The delegation of authority was made pursuant to section 161 of the Revised Statutes (5 U. S. C., 1946 ed., sec. 22). The State of California contends that the delegation of authority is unauthorized, and that the State is entitled to a decision by the Secretary on its appeal. The

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State bases its contention upon the assertion that the power to act upon appeals to the head of the Department in public-land matters is a judicial power, and that, as such, it must be exercised personally by the officer in whom the deciding authority is vested by statute.

Assuming, for the purpose of discussion, that the rendering of a decision upon the appeal of the State in this case is an exercise of a quasi-judicial power, it does not necessarily follow that the Secretary of the Interior is precluded from delegating such power to another officer of the Department and must personally consider and decide the questions involved in the appeal.

Section 161 of the Revised Statutes provides, in part, that—

The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, * * * the distribution and performance of its business * * *.

This section is broad in scope and expresses no limitation respecting the types of functions (i. e., quasi-judicial, quasi-legislative, or administrative) which the head of a department may authorize officers of the Department to perform. As the Acting Attorney General stated years ago with respect to section 161, "it is quite clear that a head of a Department has * * * the right to say what duties the officers and clerks under him shall do or not do, so long as he does not go counter to any law." 19 Op. Atty. Gen. 401, 403 (1889).

Moreover, the problem of the delegability of the Secretary's power to decide appeals taken to the head of the Department from bureau decisions in public-land proceedings was considered many years ago by the Attorney General. 19 Op. Atty. Gen. 133 (1888). The specific question discussed was "Whether the consideration and determination of appeals to the Secretary of the Interior from the action of the Commissioner of the General Land Office [now the Director of the Bureau of Land Management] * * * may be made by the First Assistant Secretary of the Interior, or by the Assistant Secretary of the Interior, by and under his proper designation of office in either case, if the Secretary of the Interior shall by regulation prescribe the performance of such duty to either * * *." An affirmative answer to the question was given by the Attorney General.

Although the Attorney General, in rendering the opinion mentioned in the preceding paragraph, referred to section 439 of the Revised Statutes (5 U. S. C., 1946 ed., sec. 483, first sentence) as the basis for the delegation of authority over public-land appeals to the First Assistant Secretary and the Assistant Secretary, that section actually related only to the Assistant Secretary and had no bearing on the question whether the authority to decide appeals taken to the head of the Department from bureau decisions in public-land proceedings could properly be delegated by the Secretary to the First Assistant Secre-

tary. (See Solicitor's opinion M-35051, June 1, 1948, 60 I. D. 192.) Insofar as the delegation of such authority to the First Assistant Secretary was concerned, it rested solely on section 161 of the Revised Statutes, which is the basis for the present delegation of similar authority from the Secretary to the Solicitor.

If, as the Attorney General held in 1888, the Secretary could properly delegate to the First Assistant Secretary the authority to consider and dispose of appeals taken to the head of the Department from bureau decisions in public-land proceedings, the Secretary is similarly authorized to delegate such authority to the Solicitor of the Department. The Solicitor is in the category of "Officers of the United States" (Constitution, Art. II, Sec. 2, Cl. 2), as was the First Assistant Secretary of the Interior, and may be the recipient, under section 161, Revised Statutes, of delegated Secretarial powers to the same extent as any other officer of the Department who is appointed by the President, with the advice and consent of the Senate.

It perhaps should be mentioned in passing that, in addition to the broad power conferred upon the Secretary of the Interior by section 161 of the Revised Statutes to effect delegations of authority to departmental officials, the Secretary now has a further basis for such delegations of authority in section 2 of Reorganization Plan No. 3 of 1950 (15 F. R. 3174).

For the reasons stated above, there is no reason to doubt the validity of section 23 of Order No. 2509 (14 F. R. 307), in which the Secretary of the Interior authorized the Solicitor to decide appeals taken to the head of the Department from bureau decisions in public-land proceedings.

The only authority cited by the State in support of its contention that it is entitled to receive a decision from the Secretary of the Interior is *Morgan v. United States*, 298 U. S. 468 (1936). That case was a suit to restrain the enforcement of an order of the Secretary of Agriculture which fixed the maximum rates to be charged by market agencies for buying and selling livestock at the Kansas City stockyards. The fixing of rates was authorized by a provision of the Packers and Stockyards Act (7 U. S. C., 1946 ed., sec. 211) which states that the Secretary of Agriculture may fix just and reasonable rates after a "full hearing." The question whether the Secretary of Agriculture could properly delegate to another officer of that Department the authority to issue rate orders was not involved in the *Morgan* case, since the particular order considered by the Court had been issued by the Secretary of Agriculture. The question before the Court was whether the Secretary of Agriculture had given the parties a "full hearing," as required by the statute.

The State contends, secondly, that the Department is estopped from holding that, because the State had not fully complied with all the

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requirements of the Department's regulations on State exchanges at the time when the reclamation withdrawal was made, the State had acquired no vested right in the withdrawn land which would except the land from the withdrawal. The State asserts that after September 19, 1945, and until the date of the withdrawal, November 6, 1947, its application was pending in the Department, and that, until publication of the exchange was authorized by the Department, the State could take no action toward publishing notice of the exchange and complying with the remaining requirements of the Department's regulations.

The United States ordinarily cannot be estopped by the action of its officers or employees. *Utah Power & Light Co. v. United States*, 243 U. S. 389, 408 (1917). Moreover, the record does not indicate that there was any unreasonable delay in handling the State's application prior to the issuance of the reclamation withdrawal on November 6, 1947. As the decision of June 2, 1949, points out, it was not until December 17, 1946, that proceedings to cancel an alleged mining claim on land selected by the State were terminated. After that, it was necessary to complete a check of the status of the land applied for, a task of considerable difficulty because of the vast acreage of land selected by the State.

II

The request for reconsideration by the Department of Agriculture is based upon the contention that the State's application does not constitute such a "valid claim" to 6,000 acres of selected land as would exclude that land from addition to the Shasta National Forest by the act of March 19, 1948, *supra*.

The Department of Agriculture recognizes that in *Stockley v. United States*, 260 U. S. 532 (1923), and *Ben S. Miller*, 55 I. D. 73 (1934), which were cited in the decision of June 2, 1949, it was held that the phrase "valid claim" means something less than a vested right. However, the Department of Agriculture asserts that a "valid claim" may result only from a bona fide attempt to initiate a right in public land, where the assertion of right is coupled with possession and with the expenditure of money or effort for the purpose of developing the land, and that a "mere privilege of establishing a right to land" does not constitute a "valid claim."

The Department of Agriculture cites the cases of *State of Idaho v. Northern Pacific Ry. Co.*, 39 L. D. 343 (1910), and *Work v. Braffet*, 276 U. S. 560 (1928), in support of its position. However, the decisions in those cases did not discuss problems analogous to the question which we are presently considering in this proceeding.

In *State of Idaho v. Northern Pacific Ry. Co.*, there was involved the construction of a provision in the act of August 18, 1894 (28 Stat.

372, 394), to the effect that, for the purpose of satisfying the public-land grants to certain designated Western States, the governor of a designated State could apply for a survey of any township of public land remaining unsurveyed in the State, whereupon the land should "be reserved" from adverse appropriation by settlement or otherwise until 60 days after the filing of the township plat of survey, and, during the 60-day period, the State could select any of the surveyed land in satisfaction of the grants to the State. The statute provided that, within 30 days from the date of applying for a survey, the governor of the State should publish notice of the application for survey. In the case cited, the State of Idaho applied for a survey of certain land but failed to publish the required notice. The land was thereafter included in a national forest by a Presidential proclamation which excluded "lands withdrawn or reserved" at the date of the proclamation and lands which might be covered by "any prior valid claim." Almost 3 years later, the State of Idaho applied for an indemnity selection of land included in the national forest. It was held by this Department that as the State had not published the notice required by the statute, the State's application for a survey had not effected a reservation of the land and, therefore, that the land was not excluded from the national forest.

There was no discussion in the *State of Idaho* decision as to whether the State's application for survey constituted a "prior valid claim" within the meaning of the Presidential proclamation. In this connection, it seems to be plain that the phrase "any prior valid claim," as used in the proclamation, referred only to claims respecting specified tracts of land. An application for a survey under the 1894 act merely gave a State a preferential right over other persons to initiate a claim to land in a township following the completion of the survey. It was necessary for the State, in order to assert a claim to specific land in the township, to file a second application for that purpose. See 28 Op. Atty. Gen. 587; 39 L. D. 482 (1911). The decision in the *State of Idaho* case, therefore, does not provide a precedent on the point now under consideration.

The case of *Work v. Braffet*, *supra*, involved an application filed in 1918 to purchase coal land which had been included as nonmineral land in a school-land grant to the State of Utah. Under the practice of this Department, such an application constituted a contest against the validity of the school-land grant, on the ground that the grant embraced mineral land and not nonmineral land. While the contest was proceeding, the Mineral Leasing Act of February 25, 1920 (41 Stat. 437), was enacted. Section 37 of that act (30 U. S. C., 1946 ed., sec. 193) provided that coal lands should thereafter be subject to disposition only as provided in the act, except as to "valid claims"

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in existence on the date of the act and thereafter maintained in compliance with the laws under which the claims were initiated.

The applicant for the purchase of the coal land involved in the *Work* case asserted that he had a "valid claim" under section 37 of the Mineral Leasing Act by reason of his application. The Supreme Court held that as the success of the applicant in the contest would not have conferred upon him any interest in the land or any preferential right over anyone else to acquire an interest in the land, he did not have a "valid claim" to the land within the meaning of section 37 of the Mineral Leasing Act. The Court said that the language of the exception suggested that it embraced "only such substantial claims as would on compliance with the provisions of the [law under which initiated] * * * ripen into ownership." (276 U. S. at p. 566.) This language, if the case is pertinent at all to the issue presently under consideration, supports the position taken in the decision of June 2, 1949, because, under the mandatory language used in section 8 (c) of the Taylor Grazing Act, *supra*, respecting State exchanges, it clearly appears that a State exchange application constitutes a substantial claim to public land which will ripen into ownership upon compliance with the requirements of that act and of the applicable regulations.

That the phrase "any valid claim" was used in the act of March 19, 1948, to mean something less than a vested right seems unquestioned, and that it includes an application filed by a State to acquire public land by means of an exchange under the Taylor Grazing Act seems entirely reasonable in view of the nature of the statute conferring upon States the right to make such exchanges. I am unable, therefore, to ascribe to the phrase "any valid claim" the limited meaning which the Department of Agriculture urges as the proper interpretation of the phrase.

III

For the reasons indicated above, I find no basis for modifying the decision of June 2, 1949, and the requests for reconsideration are denied.

MASTIN G. WHITE,
Solicitor.

WARWICK M. DOWNING

A-25798

Decided August 16, 1950

Oil and Gas Lease—Application—Receipt of Offer to Lease—30-Day Period.

The first qualified applicant for a noncompetitive oil and gas lease on a tract of public land which is outside any known geological structure of a producing

field does not, by the submission of his application, acquire a vested right to a lease, but only an inchoate right to be offered a lease before one is offered to a subsequent applicant in the event that the Secretary of the Interior decides, in his discretion, to lease the land for oil and gas development.

When lease forms are sent by registered mail to a successful applicant for a noncompetitive oil and gas lease, together with a notice from the manager of the district land office that failure to execute and return the lease forms and to make the required rental payment within a 30-day period of time will result in the rejection of the application, and the papers are received by the receptionist employed in the applicant's office, the period specified for the acceptance of the offer of a lease begins to run on the date of the receipt of the papers in the applicant's office, irrespective of whether the matter was brought to the personal attention of the applicant.

There is no provision of law or of the pertinent regulations which requires that an application for a noncompetitive oil and gas lease must be rejected because of the failure of the applicant to accept an offer of a lease within the time prescribed by the issuing district land office for such acceptance, and, accordingly, the time limit may be waived in an appropriate case.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Warwick M. Downing has appealed to the head of the Department from the decision dated September 23, 1949, of the Associate Director of the Bureau of Land Management in connection with his application (Salt Lake City 066007) for an oil and gas lease under the Mineral Leasing Act (30 U. S. C., 1946 ed., sec. 181 *et seq.*) on sec. 15, T. 23 S., R. 22 E., and sec. 31, T. 22 S., R. 23 E., S. L. M., Utah.

Mr. Downing applied for the lease on June 12, 1946. On September 8, 1948, the lease forms were sent to him by registered mail for execution, together with a notice from the manager of the district land office at Salt Lake City that failure to execute and return the forms, or to pay the balance due on the first year's rental, within 30 days "from notice hereof" would "result in the final rejection of the application without further notice." These papers were received in Mr. Downing's office on September 11, 1948. The registry receipt was signed by J. Nelson, the receptionist in the applicant's office. The lease forms were not returned and no additional rental payment was made by the applicant, and on February 8, 1949, the manager of the district land office entered an order closing the case.

On March 21, 1949, Mr. Downing filed with the district land office a petition requesting that the order of February 8, 1949, be vacated, that lease forms be sent to him again for execution, and that he be permitted to pay the balance of the rental due. This petition was denied by the manager of the district land office on March 21, 1949, and, on appeal to the head of the Bureau of Land Management, the denial was affirmed by the Associate Director of the Bureau on September 23, 1949.

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Mr. Downing asserts that it was a long time after the expiration of the 30-day period following the delivery to his office of the lease forms and notice on September 11, 1948, when he personally received his first information regarding the receipt of the lease forms and notice; that he was ill and in a hospital at Washington, D. C., on September 11, 1948; that his secretary was sick and absent from the office on that day; that J. Nelson, the receptionist who signed for the communication from the Department, had no authority, express or implied, to sign for registered mail addressed to him; and that, in fact, it was not until the early part of March 1949 that he learned of the action taken by the manager of the district land office on his application.

The qualified person first making application for an oil and gas lease on public land which is not within any known geological structure of a producing oil or gas field is entitled to priority over other persons in obtaining a lease on such land, without competitive bidding (30 U. S. C., 1946 ed., sec. 226), if the land is leased for oil and gas development. He does not, however, acquire a vested right to a lease through the making of such application, since the determination as to whether the land will or will not be leased for oil and gas development is in the discretion of the Secretary of the Interior. The applicant acquires only an inchoate right to be offered a lease on the land before a lease is offered to a subsequent applicant, if it is decided by the Secretary, in the exercise of his discretion, to lease the land and action is taken to effectuate the decision.

Such an offer was made to Mr. Downing in the way best designed to reach him—i. e., by registered mail. The offer was received at his address by one of his office employees. The Department cannot be expected to know the scope of the authority which an applicant for an oil and gas lease has granted to each of the persons employed in his office, or to guarantee that an applicant's employees will inform him fully regarding communications received from the Department. Consequently, Mr. Downing received all that he was entitled to demand under the statute, and, since he did not accept the offer within the 30-day period specified in it, the Department would be on sound legal ground if, as proposed in the decisions below, Mr. Downing's application were to be rejected.

On the other hand, there is no provision in the Mineral Leasing Act or in the pertinent departmental regulations which requires, as a matter of law, that Mr. Downing's application be rejected because of his failure to execute and return the lease forms, and to pay the balance due on the rental, within the 30-day period specified by the manager of the district land office.

If Mr. Downing's application were to be rejected, it appears that such action would merely have the effect of entitling another person to priority respecting a lease on this land. The record in the present proceeding indicates that at least one other application for an oil and gas lease on this land, filed subsequent to the date of Mr. Downing's application, is presently pending in the district land office, and that, upon the rejection of Mr. Downing's application, the other application (or the one first in time, if two or more applications from other persons are pending) would thereupon attain priority as the first application on file for the land involved in this proceeding. As between Mr. Downing and any other applicant for an oil and gas lease on this land, there seems to be no particular reason why, in the circumstances reflected by the present record, the Department should reject Mr. Downing's application in order to permit the other person's junior application to supersede Mr. Downing's senior application in connection with the leasing of this land.

Accordingly, I conclude that, under the circumstances of this case, the Department would be justified in waiving the 30-day requirement previously imposed by the manager of the district land office. This conclusion is without prejudice to the imposition of another similar time limit in connection with any future offer of a noncompetitive oil and gas lease that may be made respecting this land.

Therefore, in pursuance of the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Associate Director of the Bureau of Land Management is reversed, the order dated February 8, 1949, of the manager of the district land office closing the case is revoked, and the case is remanded to the Bureau of Land Management for further action in accordance with this decision.

MASTIN G. WHITE,
Solicitor.

AUTHORITY OF THE DEPARTMENT TO ENGAGE IN SOIL CONSERVATION ACTIVITIES

Reorganization Plan No. IV—Government-Owned Lands—Privately Owned Lands—Delegation of Authority—Interdepartmental Cooperation.

This Department cannot properly conduct soil and moisture conservation activities on lands under its jurisdiction where the primary purpose of such operations is to benefit privately owned lands.

This Department may conduct soil and moisture conservation activities on lands under its jurisdiction for the purpose of protecting reservoirs, irrigation works, or other related watershed improvements under the jurisdiction of this Department.

August 28, 1950

This Department does not have authority to conduct soil and moisture conservation activities on lands under its jurisdiction for the purpose of protecting federally constructed reservoirs, irrigation works, and other related improvements which are under the jurisdiction of Federal agencies other than this Department.

The Soil Conservation Service of the Department of Agriculture is authorized to perform soil and moisture conservation work on lands owned or controlled by the United States, including lands under the jurisdiction of this Department, where the primary purpose of such work is the conservation of privately owned lands.

Neither the Interior Department nor the Department of Agriculture may delegate to the other Department its responsibility under the Soil Conservation and Domestic Allotment Act, as modified by Reorganization Plan No. IV, for the performance of soil and moisture conservation activities.

The Departments of the Interior and Agriculture may agree to assist and cooperate with each other in carrying out their respective functions in the field of soil and moisture conservation; and either Department may place with the other, under the Economy Act, orders for the performance of soil and moisture conservation work falling within the scope of the requesting Department's responsibility.

M-36047

AUGUST 28, 1950.

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT.

This responds to your memorandum of June 15, wherein you presented for my opinion four questions relating to the authority of the Department in connection with soil and moisture conservation activities.

1. Your first question is whether the Department of the Interior may properly perform soil conservation work on lands under its jurisdiction if the sole or chief benefit from such work will accrue to privately owned lands contiguous to, or situated in the same watershed with, the lands on which the work is done.

As this office pointed out in an opinion dated October 25, 1941 (M-30997; 57 I. D. 382), the Soil Conservation Service of the Department of Agriculture, prior to the issuance of Reorganization Plan No. IV (54 Stat. 1234), was vested with broad functions under the Soil Conservation and Domestic Allotment Act (16 U. S. C., 1946 ed., sec. 590a *et seq.*) respecting soil and moisture conservation activities. In order to accomplish the policy declared by Congress in the act, the Soil Conservation Service could, among other things, carry out measures to prevent soil erosion on any lands, including lands owned or controlled by the United States, as well as privately owned lands. In performing such activities on lands owned or controlled by the United States, the Soil Conservation Service could act only with the consent and cooperation of the agency having jurisdiction of the lands, and, insofar as privately owned lands were concerned, it was,

of course, necessary to obtain the consent of or appropriate rights from the landowners.

Section 6 of Reorganization Plan No. IV transferred to this Department "The functions of the Soil Conservation Service in the Department of Agriculture with respect to soil and moisture conservation operations conducted on any lands under the jurisdiction of the Department of the Interior * * *"

Although a literal reading of the language quoted in the preceding paragraph might lead to the conclusion that all soil and moisture conservation activities on lands under the jurisdiction of this Department, including operations for the benefit of privately owned lands nearby or in the same watershed, are to be performed by agencies of this Department, I am of the opinion that it was the purpose of section 6 of the plan to transfer to this Department only those functions which relate to the protection of lands under the jurisdiction of this Department. Section 6, it seems to me, was designed to divide the authority for performing soil and moisture conservation activities between the two Departments on the following basis: Operations looking toward the protection of all lands other than those under the jurisdiction of this Department are to be performed by the Department of Agriculture, while operations for the protection of lands under the jurisdiction of this Department are to be performed by the Department of the Interior. This is borne out by the President's message in submitting the plan to Congress.¹

The same principles which led the Acting Solicitor in 1941 to conclude that this Department has authority to conduct soil and moisture conservation activities on privately owned lands (with the consent of the owners) only in those situations where the primary purpose of the operations is to protect lands under the jurisdiction of this Department lead me to conclude that this Department could not properly conduct soil and moisture conservation activities on lands under its jurisdiction if the primary purpose of such operations were to benefit privately owned lands.

I do not mean to imply that soil and moisture conservation activities conducted by this Department must be solely for the benefit of lands under the jurisdiction of this Department and that such activities cannot be carried on by the Department if it appears that any benefits, however slight, will flow to privately owned lands. However, the chief objective of any soil and moisture conservation activities conducted by this Department on lands under its jurisdiction must be the protection of the Department's lands. The test, therefore, is not the quantum of benefits that may flow to privately owned lands, but the purpose for which the activities are conducted.

Your first question is answered accordingly.

¹ H. Doc. 692, 76th Cong., 3d sess.

August 28, 1950

2. Your second question is whether the Department may conduct soil conservation work on lands under its jurisdiction if the sole or chief beneficial result of such work will be reduction in the siltation of federally constructed reservoirs, irrigation works, or other watershed improvements in connection with such reservoirs or irrigation projects.

As section 6 of Reorganization Plan No. IV vests in this Department authority to conduct soil and moisture conservation activities for the protection of lands under its jurisdiction, it necessarily follows that the Department may conduct soil and moisture conservation activities on lands under its jurisdiction for the purpose of protecting reservoirs, irrigation works, or other related watershed improvements under the jurisdiction of this Department.

Your question, however, is broader in scope than the response made in the preceding paragraph. You inquire whether such activities may be conducted for the benefit of "federally constructed" reservoirs, etc. Many such structures have, of course, been constructed and are maintained by agencies of the Federal Government other than the Interior Department.

In view of the previous construction of section 6 of the plan as vesting in this Department only the function of protecting the lands under its jurisdiction, I must conclude that this Department does not have authority to conduct soil and moisture conservation activities on lands under its jurisdiction for the purpose of protecting federally constructed reservoirs, irrigation works, and other related improvements which are under the jurisdiction of Federal agencies other than this Department. The residual authority to conduct soil and moisture conservation activities for the protection of lands under the jurisdiction of agencies of the Federal Government other than the Interior Department remains in the Soil Conservation Service of the Department of Agriculture.

3. Your third question is whether, if the conservation of privately owned lands requires the performance of soil conservation work on Government-owned lands, the Soil Conservation Service is authorized to perform such work on the Government-owned lands, subject to the agreement of the Federal agency administering such lands.

My answer to your first question necessarily implies an affirmative answer to your third question.

Prior to the issuance of Reorganization Plan No. IV, the Soil Conservation Service was authorized to perform soil and moisture conservation work on lands owned or controlled by the United States, including lands under the jurisdiction of this Department, where the primary purpose of such work was the conservation of privately owned lands. It was, of course, required to obtain the cooperation of

the agency having jurisdiction over the lands on which the work was performed. As previously indicated, I do not believe that this authority was affected by section 6 of Reorganization Plan No. IV.

4. Your fourth question is whether the Bureau of Land Management may, jointly with the Soil Conservation Service, engage in soil and moisture conservation work on the same lands under the situation presented by the first question in your memorandum or under the situation discussed in opinion M-30997.

This question evidently contemplates joint activities by the Bureau of Land Management and the Soil Conservation Service for (a) the protection of privately owned lands by the conduct of soil and moisture conservation activities on lands under the jurisdiction of this Department, and (b) the protection of lands under the jurisdiction of this Department by the conduct of such activities on privately owned lands.

Under section 6 of Reorganization Plan No. IV, two departments of the Government have authority to perform soil and moisture conservation work under the Soil Conservation and Domestic Allotment Act. The responsibility for the conduct of such activities in order to protect privately owned lands remains in the Department of Agriculture, while the responsibility for the conduct of such activities in order to protect the lands under the jurisdiction of the Interior Department has been transferred to this Department. It is fundamental that neither Department may delegate to the other its responsibility for the performance of the functions assigned to it.²

On the other hand, nothing in the plan prevents the two Departments from agreeing to assist and cooperate with each other in carrying out their respective functions in the field of soil and moisture conservation. In fact, the two Departments have been operating under such an agreement for the past 8 years. On April 20, 1942, the Secretary of Agriculture and the Secretary of the Interior entered into a Memorandum of Understanding³ which states, in part, as follows:

* * * When such lands are intermingled or the projects are interrelated attainment of the ultimate goals set forth by the Congress necessitates coordinated and integrated action programs on lands subject to the respective authorities of the two Departments. Recognition is accorded the fact that operating conditions are so varied that a specific agreement setting forth in detail the cooperative relations that are necessary would be impracticable but that it is advisable for the two Departments to agree in broad general terms on the basic principles necessary and desirable to effectuate the fullest possible cooperation in the performance of soil and moisture conservation operations. Therefore, it is mutually agreed:

1. That the two Departments, and the representatives thereof, will, under the legal, fiscal, and other limitations respectively governing each, endeavor to cooperate fully and freely in the exchange of information relative to soil and

² See Solicitor's opinion M-35078, October 4, 1948, 60 I. D. 232.

³ Departmental file 1-315 (Part 2).

September 5, 1950

moisture conservation and in all soil and moisture conservation operations in joint territory, and that in such cooperation the basic purposes of the Congress will be kept in mind and will be the guiding influence in initiating and carrying through such cooperation as may be required.

2. That in bringing about this desired cooperation the Department of the Interior and the Department of Agriculture will authorize their respective bureaus and agencies concerned with land use to enter into field agreements or other appropriate arrangements providing for collaboration and cooperation in the solution of conservation problems of mutual concern, to the end that unnecessary duplication of effort be avoided and that the activities of the two Departments be supplemental in the conservation of two of the Nation's greatest resources, soil and water, and thereby assist in the promotion of human welfare.

Moreover, either Department may place with the other, under section 601 of the Economy Act of June 30, 1932 (31 U. S. C., 1946 ed., sec. 686), orders for the performance of soil and moisture conservation work falling within the scope of the requesting department's responsibility.

The principles stated above govern the answer to your fourth question. A more specific answer cannot be given in the absence of a statement from you outlining in detail the nature and extent of the joint activities which may be contemplated.

MASTIN G. WHITE,
Solicitor.

APPLICABILITY OF THE MINERAL LEASING ACT FOR ACQUIRED LANDS TO LAND IN THE NATCHEZ TRACE PARKWAY

National Parks—National Monuments—Discretionary Power.

The Natchez Trace Parkway is not a national park or a national monument and, hence, is not within the exception, "national parks or monuments," stated in section 3 of the Mineral Leasing Act for Acquired Lands.

The Mineral Leasing Act for Acquired Lands is applicable to all acquired lands, other than those expressly excepted in the act.

The lands within the Natchez Trace Parkway, not being within any category of acquired lands expressly excepted from the scope of the Mineral Leasing Act for Acquired Lands, are subject to leasing under that act.

The Mineral Leasing Act for Acquired Lands merely grants to the Secretary of the Interior a permissive power to issue leases on the lands that are subject to the act; and, therefore, the determination as to whether lands of the Natchez Trace Parkway will or will not be leased under that act is discretionary with the Secretary.

M-36049

SEPTEMBER 5, 1950.

TO ASSISTANT SECRETARY DOTY.

This responds to your request for my opinion on the question whether lands included in the Natchez Trace Parkway are subject to

leasing under the Mineral Leasing Act for Acquired Lands, which was enacted on August 7, 1947 (30 U. S. C., 1946 ed., Supp. III, secs. 351-359).

Section 3 of the Mineral Leasing Act for Acquired Lands (30 U. S. C., 1946 ed., Supp. III, sec. 352) provides, in part, as follows:

* * * all deposits of coal, phosphate, oil, oil shale, gas, sodium, potassium, and sulfur which are owned or may hereafter be acquired by the United States and which are within the lands acquired by the United States (exclusive of such deposits in such acquired lands as are (a) situated within incorporated cities, towns and villages, *national parks or monuments*, (b) set apart for military or naval purposes, or (c) tidelands or submerged lands) may be leased by the Secretary under the same conditions as contained in the leasing provisions of the mineral leasing laws * * *. [Italics supplied.]

The lands within the Natchez Trace Parkway are "acquired lands," as that term is defined in section 2 of the Mineral Leasing Act for Acquired Lands (30 U. S. C., 1946 ed., Supp. III, sec. 351). Accordingly, the question to be determined is whether the Natchez Trace Parkway is a national park or a national monument within the meaning of the italicized phrase in the quotation set out above and is thereby excepted from the provisions of the Mineral Leasing Act for Acquired Lands.

Certain areas in the United States and its Territories have been set aside and designated as national parks by acts of Congress, e. g., 16 U. S. C., 1946 ed., secs. 21-21a (Yellowstone National Park), 91 (Mount Rainier National Park), 121 (Crater Lake National Park). Certain other areas have been set aside and designated as national monuments. The great majority of the national monuments have been established by proclamations of the President issued pursuant to the general authorization contained in section 2 of the act of June 8, 1906 (16 U. S. C., 1946 ed., sec. 431). However, some national monuments have been established by Presidential proclamations issued pursuant to special acts of Congress, e. g., 16 U. S. C., 1946 ed., secs. 433a, 441e, 445. Still other national monuments have been directly created by acts of Congress, e. g., 16 U. S. C., 1946 ed., secs. 433g, 433k, 442.

Thus, each national park has been specifically designated as such by an act of Congress, and each national monument has been specifically designated as such by a Presidential proclamation or an act of Congress.

All the national parks and national monuments are administered by the National Park Service.

In addition to the national parks and national monuments, the National Park Service also administers other areas. These include national historic sites established under the act of August 21, 1935 (16 U. S. C., 1946 ed., secs. 461-466), national historical parks (e. g., 16 U. S. C., 1946 ed., secs. 81, 159, 211), national military parks (16

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U. S. C., 1946 ed., sec. 411 *et seq.*), and national parkways. The Natchez Trace Parkway was established by the act of May 18, 1938 (16 U. S. C., 1946 ed., sec. 460), which provided that the parkway should be administered by the Secretary of the Interior through the National Park Service pursuant to the act of August 25, 1916 (16 U. S. C., 1946 ed., secs. 1, 2-4).

It is clear that the terms "national parks" and "national monuments" have definite meanings and include only certain classes of areas, i. e., those areas which have been expressly declared by statutes or by Presidential proclamations to be national parks or national monuments. Obviously, these terms do not include national parkways.

It must be concluded, therefore, that the Natchez Trace Parkway does not fall within the exception, "national parks or monuments," stated in section 3 of the Mineral Leasing Act for Acquired Lands.

Moreover, I do not believe that there is any sound legal basis for a ruling to the effect that the Natchez Trace Parkway, though not expressly excepted from the provisions of the Mineral Leasing Act for Acquired Lands, is nevertheless removed by implication from the scope of that statute.

The enactment of the Mineral Leasing Act for Acquired Lands was occasioned by an opinion of the Attorney General to the effect that the Mineral Leasing Act of 1920, as amended and supplemented (30 U. S. C., 1946 ed., sec. 181 *et seq.*), was not applicable to lands acquired by the War Department in the course of its rivers and harbors improvement program, inasmuch as that act "had peculiar application to the public domain." 40 Op. Atty. Gen. 9, 13 (1941). The purpose of the Mineral Leasing Act for Acquired Lands was clearly stated by the Committee on Public Lands of the House of Representatives in its report on the bill (H. R. 3022, 80th Cong.) which later became the statute under consideration here. The Committee said that—

* * * The proposed legislation extends the mineral leasing laws now applicable to public domain lands, to *all acquired lands*, with certain exceptions.
* * * [H. Rept. 550, 80th Cong., p. 2; italics supplied.]

In view of the clear congressional statement of purpose, I do not believe that this Department would be warranted in reading into the Mineral Leasing Act for Acquired Lands any exceptions to its provisions, other than those expressly stated by the Congress in section 3 of the act.

For the reasons indicated above, it is my opinion that the Natchez Trace Parkway is subject to leasing under the Mineral Leasing Act for Acquired Lands.

Perhaps attention should be called, however, to the point that the authority of the Secretary to issue leases under the Mineral Leasing Act for Acquired Lands is merely permissive. The Congress has not

imposed upon the Secretary any mandatory requirement that he exercise the power thus conferred upon him. Section 3 of the act states that the lands which are subject to the provisions of the act "*may* be leased by the Secretary." [Italics supplied.]

Therefore, the determination of the question whether a leasing program respecting lands within the Natchez Trace Parkway will or will not be undertaken by the Department under the Mineral Leasing Act for Acquired Lands is left to the discretion of the Secretary.

MASTIN G. WHITE,
Solicitor.

IDAHO POWER COMPANY

A-25936

Decided September 19, 1950

Right-of-Way for Electrical Transmission Line.

No right in or to a right-of-way under the act of March 4, 1911, arises until the granting of an easement by the head of the department having jurisdiction over a particular area of land.

It is within the discretionary power of the Secretary of the Interior to impose the conditions embodied in paragraphs (r) and (v) of 43 CFR 245.21 among the terms and conditions required to be agreed to by all applicants for rights-of-way for transmission lines across lands under the control of this Department.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This proceeding involves an application of the Idaho Power Company for an electric transmission line right-of-way across public lands in Oregon under the act of March 4, 1911 (43 U. S. C., 1946 ed., sec. 961). In the course of the proceeding, the Company objected to being bound by certain regulations, namely, paragraphs (r) and (v) of 43 CFR 245.21, as a condition of the approval of its application.

Paragraph (v) of 43 CFR 245.21¹ provides, in substance, (1) that the grantee of a right-of-way for a power transmission line having a voltage of 33 kv. or more must agree to allow the Department to utilize for the transmission of electric power any surplus capacity of the line not needed by the grantee, and to allow the Department to increase the capacity of the line at the Department's expense and to utilize the increased capacity for the transmission of electrical power; (2) that the Department will bear the expense of making interconnections and of increasing the capacity of the line and will bear the proportionate cost of maintaining and operating the line after interconnection; (3) that if, at any time subsequent to the certification by the

¹ Amended July 18, 1949 (14 F. R. 4620), Cumulative Pocket Supp., 1949 ed., 43 CFR.

September 19, 1950

easement holder that surplus capacity is available for utilization by the Department, the easement holder needs the whole or any part of the capacity previously certified as being surplus to its needs, it may revoke or modify the previous certificate by giving the Secretary of the Interior 30 months' notice in advance of its intention in this respect; and (4) that after the revocation of a certificate under the circumstances summarized in (3), the Department's utilization of the particular line will be limited to the increased capacity, if any, provided by the Department at its expense. The paragraph also provides for reciprocal accommodations, in that the easement holder may transmit electrical power over the interconnecting system of the Department. Finally, paragraph (v) provides that the terms and conditions embodied in the paragraph may be modified at any time by means of a supplemental agreement negotiated between the parties.

The Company asked that its application be granted with the understanding that if at any time paragraph (v) "should be revoked in whole or in part by the Secretary of the Interior, or if at any time the invalidity of said paragraph in whole or in part should be established as a result of judicial proceedings, paragraph (v) shall no longer be binding upon the Company to the extent of such revocation or invalidity."

Paragraph (r) of 43 CFR 245.21 provides, in substance, that the surrender of the easement to the United States or the transfer of the same to a State or municipal corporation may be required in the event that any of them shall have acquired such works, equipment, structures, and other property of the easement holder as are on the lands subject to the easement and shall have paid the easement holder for the reasonable value of such works and other property.

By a letter dated December 7, 1949, the Secretary of the Interior overruled the objections of the Company to paragraph (v) of 43 CFR 245.21 and denied the Company's request that the right-of-way be granted subject to the understanding quoted above. Thereafter, a decision dated June 8, 1950, by the Associate Director of the Bureau of Land Management formalized the determination announced in the Secretary's letter of December 7, 1949, and, in addition, overruled the objection of the Company to paragraph (r) of 43 CFR 245.21 and denied a request for a waiver of both paragraphs (r) and (v). The Company thereupon took an appeal to the head of the Department.

So far as relevant to this proceeding, the act of March 4, 1911, *supra*, provides:

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 * * * of the United States for electrical poles and lines for the transmission and distribution of electrical power * * *.

This language is permissive, not mandatory. The Secretary of the Interior, as the head of the Department administering the lands involved in this proceeding, has the discretionary power to grant or to deny the easement requested by the Idaho Power Company. In offering an easement to the Company, he may attach such conditions to the proffered grant as he believes to be in the public interest. The applicant, in turn, may accept or reject the proffered easement with conditions attached, as its interests may dictate.²

An applicant acquires no right under the act of March 4, 1911, by the mere filing of an application for an easement. A right under that act arises only upon the granting of an easement by the head of the department having jurisdiction over a particular area of land.

Although the condition imposed by paragraph (v) of 43 CFR 245.21 may reduce the quantum of the estate which the Congress authorized to be granted under the act of March 4, 1911, I believe that such a condition is within the permissive limits of the 1911 act. The Congress fixed the maximum limit of the estate which may be granted, i. e., an unconditional easement covering the exclusive use of a right-of-way for a term of 50 years. It left for determination by the Secretary, in his discretion, the extent of the estate, within that maximum limit, which is to be granted in a particular case. The requirement in paragraph (v) that applicants who seek rights-of-way across the public lands for the transmission of electrical power shall agree to permit the Department to use the surplus capacity of their lines, with no additional cost to the applicants, is a reasonable requirement designed to protect the public interest, in my opinion.

With regard to paragraph (r) of 43 CFR 245.21, the Department has held that the power in this paragraph to require the transfer of an easement is limited to instances in which the easement is essential to the use of property previously transferred by the easement holder, and that, in such instances, the provisions of paragraph (r) are intended to ensure that the new owner of the property may acquire the right-of-way along with the improvements upon the right-of-way.³ The imposition of this condition is clearly within the scope of the Secretary's authority under the 1911 act, in my opinion. It is in the public interest that the public lands shall not be burdened with easements which can no longer be used effectively.

For the reasons indicated above, it appears that no error was committed by the Associate Director of the Bureau of Land Management.

² Solicitor's memorandum of June 15, 1949, "Rights-of-way for power lines across public land."

³ *California Electric Power Co.*, 58 I. D. 607 (1944), modified on rehearing, 58 I. D. 621.

October 5, 1950

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Associate Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

FRANK C. CHURCHILL

A-25946

Decided October 5, 1950

Homestead Entry—Noncontiguity of Lands.

When an Alaska homestead entry is allowed prior to August 10, 1949, in justifiable ignorance of the fact that it is bisected by a highway right-of-way reservation, the entryman, when he submits final proof, should not be required to select one of the two portions of land into which the tract is divided, and relinquish the other, but should be issued a patent to the entire tract, exclusive only of the land covered by the highway reservation.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Frank C. Churchill has appealed to the head of the Department from a decision of the Assistant Director of the Bureau of Land Management requiring him to select one portion of the land included within his homestead entry for which to receive a patent.

Mr. Churchill made homestead application (43 U. S. C., 1946 ed., sec. 161) for the SW $\frac{1}{4}$ sec. 29, T. 20 N., R. 6 E., S. M., Alaska, on June 20, 1949. He submitted final proof on February 27, 1950. This was deemed to be satisfactory except the field report disclosed that the land concerned was crossed by the Glenn Highway, the right-of-way of which—100 feet on each side of the center line of the highway—was withdrawn by Executive Order No. 9145 of April 23, 1942 (7 F. R. 3067).¹ This withdrawal was not indicated on the tract books when the entry was allowed. Final certificate was issued by the acting manager of the district land office with the right-of-way excepted from the grant of land. It was decided, when the final certificate was sent to the Bureau of Land Management, that the land on either side of the highway was noncontiguous, and, consequently, that Mr. Churchill's offer of final proof could be accepted only as to one portion of the land on either side of the highway, but not for both.

The homestead law under which Mr. Churchill's entry was made provides that land entered under it is "to be located in a body in conformity to the legal subdivisions of the public lands. * * *." 43 U. S. C., 1946 ed., sec. 161; see *Hugh Miller*, 5 L. D. 683. The Depart-

¹ This withdrawal was revoked by Public Land Order No. 601 of August 10, 1949 (14 F. R. 5048), which withdrew from all forms of appropriation under the public-land laws the public lands lying within 150 feet on each side of the center line of the Glenn Highway.

ment has in the past decided, however, that when a homestead entry is made in good faith of a tract of land which is later discovered to be divided into two parts by a strip of land which is unavailable for homestead entry, it is not required that a patent be denied to the entryman because of noncontiguity. *Lannon v. Pinkston*, 9 L. D. 143; *Akin v. Brown*, 15 L. D. 119; *B. F. Bynum et al.*, 23 L. D. 389; *De Simas v. Pereira*, 29 L. D. 721. It has also been decided that a power line right-of-way which bisected a tract of land applied for under the homestead law did not render the two portions into which the tract was divided noncontiguous. *George F. Wunsch*, 43 L. D. 551. In that case it was said:

* * * considering the purpose and effect of said withdrawal and the expressed willingness of the applicant to make entry and take patent exclusive of the strip reserved by Executive Order, the Department believes that the proper solution of the difficulty rests in the allowance of the entry and the issuance of patent thereon, exclusive of the 180-foot strip reserved and withdrawn for the transmission line.

In the light of these cases, it cannot reasonably be said that the Department is required in the circumstances of this case to issue a patent for only one portion of the entry bordering the highway. Mr. Churchill's entry was allowed, and he entered the land and made improvements on it, in ignorance of the highway reservation and the effect that it might have on his entry. To some extent, responsibility for his ignorance is attributable to the Bureau of Land Management. It is true that regulations adopted March 28, 1950, formulate a policy of restricting entries to one side of the Glenn Highway. But, apart from other considerations, the regulations expressly apply to "a right or claim to public land in the territory * * * initiated on or after August 10, 1949 * * *." 43 CFR 74.28; 15 F. R. 1874. The entry in this case was allowed on June 20, 1949.

A patent to the entire tract of land entered by Mr. Churchill, excluding only the land covered by the highway reservation, should be issued to him.

Therefore, in pursuance of the authority delegated to me by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Assistant Director of the Bureau of Land Management is reversed.

W. H. FLANERY,
Acting Solicitor.

REORGANIZATION PLAN NO. 3 OF 1950

Delegation of Authority—Availability of Official Records.

Section 1 (a) of Reorganization Plan No. 3 of 1950 transferred to the Secretary of the Interior on May 24, 1950, all the functions which were, as of that

December 6, 1950

date, vested in other officers of the Interior Department or in departmental employees or agencies.

Functions vested in subordinate officers of the Department or in departmental employees or agencies by legislation enacted after May 24, 1950, are not affected by section 1 (a) of Reorganization Plan No. 3 of 1950.

Subordinate officers of the Department having custody of official records are authorized by the act of August 3, 1950 (64 Stat. 402), to furnish copies of such records to persons outside the Department, and to authenticate such copies when appropriate, and this authority is not affected by section 1 (a) of Reorganization Plan No. 3 of 1950.

Subordinate officers of the Department having custody of official records are subject, in the exercise of the authority vested in them by the act of August 3, 1950, to the supervision of the Secretary of the Interior and to the pertinent regulations issued by the Secretary.

M-36060

DECEMBER 6, 1950.

TO THE SECRETARY.

I do not believe that it is necessary, or that it would be advisable, for you to issue the proposed order entitled "Delegation of authority to authenticate copies of records of Bureau of Mines," which the Director of the Bureau of Mines submitted to you with his memorandum of November 22.

The proposed order was prepared on the basis of an assumption that, as a result of subsection (a) of section 1 of Reorganization Plan No. 3 of 1950 (15 F. R. 3174), all authority to authenticate copies of official records of the Department is concentrated in the Secretary of the Interior, and that a delegation of such authority must be obtained from the Secretary before a subordinate officer of the Department can properly execute an authentication.

It was provided in subsection (a) of section 1 of Reorganization Plan No. 3 of 1950 that—

* * * there are *hereby transferred* to the Secretary of the Interior all functions of all other officers of the Department of the Interior and all functions of all agencies and employees of such Department. [Italics supplied.]

The italicized words in subsection (a) plainly implied that the transfer of functions to the Secretary of the Interior from other officers of the Department and from departmental employees and agencies was to be accomplished on the effective date of Reorganization Plan No. 3 of 1950. Therefore, all the functions which were vested in departmental officers other than the Secretary of the Interior and in departmental employees and agencies as of the effective date of Reorganization Plan No. 3 of 1950—which was May 24, 1950—were automatically transferred on that date to the Secretary of the Interior.

Conversely, any functions which may have been vested in subordinate officers or employees of the Department, or in departmental agencies, by legislation enacted subsequent to May 24, 1950, are not affected by subsection (a) of section 1 of Reorganization Plan No. 3 of 1950.

It is provided in the act of August 3, 1950 (64 Stat. 402),¹ that—

The Secretary of the Interior, or *any of the officers of that Department* may, when not prejudicial to the interests of the Government, furnish authenticated or unauthenticated copies of any official books, records, papers, documents, maps, plats, or diagrams *within his custody* * * *. [Italics supplied.]

As indicated above, the authority conferred by this statute on subordinate officers of the Department is not affected by subsection (a) of section 1 of Reorganization Plan No. 3 of 1950, because the act of August 3, 1950, was enacted after the effective date of the Reorganization Plan. Therefore, any officer of this Department having custody of official records is authorized by the act of August 3, 1950, to furnish, under the limitations prescribed in that statute, authenticated or unauthenticated copies of such records to persons outside the Department. The authority to furnish authenticated copies necessarily carries with it, in my opinion, the related power to execute appropriate authentications. It is not necessary for such an officer to obtain from the Secretary of the Interior, or from any other official, a delegation of authority with respect to the furnishing or authentication of copies of official records in his custody.

Of course, all the subordinate officers of this Department are subject to the general supervision of the Secretary of the Interior in the performance of their functions (5 U. S. C., 1946 ed., sec. 22). Hence, any subordinate officer of the Department having custody of official records is not only subject to the limitations prescribed in the act of August 3, 1950, with respect to the furnishing of copies of such records to persons outside the Department, but he is also subject to such departmental regulations respecting this matter as may be issued by the Secretary of the Interior from time to time. The Secretary's current regulations covering this field are found in 43 CFR, Part 2.² These regulations are applicable to, and seem to provide adequate guidance for, subordinate officers of the Department in the exercise of the functions vested in them by the act of August 3, 1950.

MASTIN G. WHITE,
Solicitor.

¹ This statute revised and reenacted the provisions of law codified in 5 U. S. C., 1946 ed., Supp. III, sec. 488.

² One of the sections, 43 CFR 2.4, was amended on August 30, 1950 (15 F. R. 5956), and three of the sections, 43 CFR 2.2, 2.6, and 2.20, were amended on November 24, 1950 (15 F. R. 8186).

DAMAGE DONE BY WATER ESCAPING FROM AGENCY VALLEY RESERVOIR, VALE PROJECT, OREGON

Irrigation Claims—Activities of the Bureau of Reclamation—Period of Limitations.

Claims for property damage caused by the flooding of downstream lands when spillway gates at a Bureau of Reclamation dam gave way may properly be regarded as "arising out of activities of the Bureau of Reclamation."

The authority in the Interior Department Appropriation Act, 1951, for the use of Bureau of Reclamation funds to pay claims for property damage "arising out of activities of the Bureau of Reclamation" does not extend to claims based upon tortious acts or omissions by Bureau of Reclamation personnel. Irrigation claims which arose on May 7, 1942, may be paid out of funds appropriated to the Bureau of Reclamation in the Interior Department Appropriation Act, 1951.

The payment of irrigation claims under the Interior Department Appropriation Act, 1951, is discretionary with the Secretary of the Interior; and no claimant has a legal right to demand compensation for property damage arising out of nontortious activities of the Bureau of Reclamation.

M-36064

DECEMBER 26, 1950.

TO MR. HOWARD R. STINSON, REGIONAL COUNSEL, REGION 1, BUREAU OF
RECLAMATION.

This responds to your request of December 13 for advice on the question whether payments may properly be made under the Interior Department Appropriation Act, 1951 (64 Stat. 595, 679), upon claims for compensation because of property damage which occurred under circumstances summarized by you in the following language:

On May 7, 1942, two spillway gates at the Agency Valley Dam on the Vale reclamation project gave way at a time when excess inflow into the Agency Valley Reservoir was being permitted to flow over the top of the gates, rather than underneath as is the recognized operating practice.

The spillway of the Agency Valley Dam is a rectangular concrete opening at one side of the dam with a lower elevation than the dam itself. Three steel radial gates are mounted there to control releases of water from the reservoir. Each gate is a curved sheet of steel, placed upright in the spillway area with the convex side opposed to the stored water in the reservoir. The gates are held in place by means of steel anchor bolts set in the concrete abutment of the spillway crest. Thus one bolt holds each of the outer sides of the outer gates, and a single bolt holds in place the right side of the left gate and the left side of the center gate and another single bolt holds in place the right side of the center gate and the left side of the right gate. Please refer to the attached sketch of the spillway gates. Under normal procedures, the gates are raised vertically to permit water being released from the reservoir to flow under them. There seems to be evidence that in some instances, however, flood water was allowed to flow over the top of the gates because of a desire to avoid the possibility of having the reservoir only partially full after release of flood water. This was being done on May 7, 1942.

The failure of the gates seems attributable to the breaking of an anchor bolt made of steel alloy which was common to two of the gates. A close examination of the pieces of this bolt later, in the Bureau's testing laboratory at Denver, showed a flaw or crack with some crystallization of the metal. The failure of the gates increased the release of water which caused the breaking of a canal and the flooding of privately owned land with consequent damage to crops.

The portion of the Interior Department Appropriation Act, 1951, that is pertinent to your inquiry provides that sums appropriated in that act to the Bureau of Reclamation "shall be available for * * * payment of claims for damage to or loss of property * * * arising out of activities of the Bureau of Reclamation * * *."

Upon applying this statutory provision to the factual situation outlined in the quotation set out above, it seems obvious that the flooding of the privately owned downstream lands when the spillway gates at the Agency Valley Dam gave way was clearly and directly attributable to the maintenance and operation by the Bureau of Reclamation of the Agency Valley Dam and Reservoir. The relationship between cause and effect in this situation is plain and cannot be avoided. Hence, I conclude that the claims for property damage in this case can properly be characterized as "arising out of activities of the Bureau of Reclamation."

The conclusion stated in the preceding paragraph does not, however, dispose of the legal question presented by you. The broad language used in the pertinent provision of the appropriation act cannot properly be construed as authorizing the payment of all claims for property damage "arising out of activities of the Bureau of Reclamation." Since the Federal Tort Claims Act provides the exclusive means for the administrative settlement of claims submitted by members of the public against the Government for property damage "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred" (28 U. S. C., 1946 ed., Supp. III, sec. 2672), the provision of the Interior Department Appropriation Act, 1951, with which we are concerned here must be construed as being inapplicable to claims based upon property damage caused by a negligent or wrongful act or omission upon the part of personnel of the Bureau of Reclamation.

It is necessary, therefore, to consider whether the present record shows that personnel of the Bureau of Reclamation was negligent (1) in failing to detect the defective condition of the anchor bolt and to replace it before May 7, 1942, or (2) in permitting water to flow over the spillway gates.

December 26, 1950

As to the first point, I note that the Chief Engineer, in his memorandum of September 30, 1942, to the Commissioner of Reclamation, expresses the following conclusion:

* * * the fact that the defect in the bolt was such that it probably would not be evident, even on close inspection, would tend to negative the existence of negligence on the part of the Government in operating the gate.

This conclusion appears to be a reasonable one, and I am inclined to agree with it.

With regard to the second point, the record submitted to me is not adequate to permit an unequivocal determination to be made on the question whether the action of Bureau of Reclamation personnel in permitting water to flow over the spillway gates constituted negligence. Additional information of a technical nature on this point is needed. For the purpose of discussion, however, it will be assumed that the action of the Bureau of Reclamation personnel in permitting water to flow over the spillway gates was not inconsistent with the duty of due care that such personnel owed to downstream landowners respecting the inundation of their lands and, accordingly, that the present claims are not in the category of tort claims.

There remains, then, the question whether claims based upon property damage that occurred as long ago as May 7, 1942, may properly be paid from funds appropriated to the Bureau of Reclamation in the Interior Department Appropriation Act, 1951.

I believe that the question stated in the preceding paragraph should be answered in the affirmative. In this connection, it will be noted that the Congress has not limited the authority under the statutory provision involved here to the payment of claims based upon property damage occurring in the fiscal year 1951. Since Congress has not prescribed any period of limitations respecting the exercise of this authority, I believe that the matter of fixing a limitation as to time is discretionary with the Secretary of the Interior (or his designee). With regard to this phase of the problem, I do not perceive any policy consideration which would make it advisable, in administering the provision of the Interior Department Appropriation Act, 1951, discussed above, to reject claims for property damage arising out of activities of the Bureau of Reclamation as long ago as May 7, 1942.

For the reasons stated above, and on the basis of an assumption that Bureau of Reclamation personnel acted with reasonable prudence in allowing water to flow over the spillway gates, I conclude that the claims mentioned in your memorandum may properly be paid under the provision of the Interior Department Appropriation Act, 1951, which makes Bureau of Reclamation funds available for the

“payment of claims for damage to or loss of property * * * arising out of activities of the Bureau of Reclamation.”

Perhaps it should be mentioned that the payment of claims under this statutory provision is discretionary with, and not mandatory upon, the Secretary of the Interior. No claimant has a legal right to demand compensation for property damage arising out of nontortious activities of the Bureau of Reclamation. Congress has merely granted a permissive power to pay such claims if it seems desirable to do so as a matter of policy. Consequently, an important consideration in this case is the view of the administrative officials of the Bureau of Reclamation as to whether, when the various policy considerations are weighed, they believe that the United States should or should not assume the risk of property damage arising out of nontortious activities of the Bureau of Reclamation under circumstances similar to those outlined in your memorandum.

MASTIN G. WHITE,
Solicitor.

WILLIAM R. BREWER
CASWELL SILVER

A-25939

Decided January 25, 1951

Rules of Practice—Reinstatement of Applications—Registered Mail.

The provisions of the Department's Rules of Practice relating to notices of appeal in contest cases do not apply to appeals in other types of proceedings.

In considering an appeal in a noncontest case, the Director of the Bureau of Land Management may obtain and consider evidence which was not before the subordinate bureau official from whose decision the appeal was taken, and may decide the appeal on the basis of such evidence.

In order to charge an addressee of undelivered registered mail with constructive notice of such mail, it is necessary that such mail must have been held in the post office at the destination for the full period of time directed by the sender, excluding the day on which the communication was received in the post office and the day on which the post office returned it to the sender.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

William R. Brewer has appealed to the head of the Department from a decision of the Associate Director of the Bureau of Land Management which reinstated the application (Buffalo 039900) of Caswell Silver for an oil and gas lease on certain land in Wyoming.

Mr. Silver made application for a noncompetitive oil and gas lease (30 U. S. C., 1946 ed., sec. 226) on September 11, 1946. Two years later, on September 17, 1948, lease forms were sent to Mr. Silver for

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execution. The forms were sent by registered mail to the Albuquerque, New Mexico, address which Mr. Silver had given in his application, but the forms were returned by the post office, undelivered, with a notation indicating that delivery had been attempted, but that no one of that name lived at that address. Mr. Silver's application was finally rejected on November 3, 1948.

On November 8, 1948, Mr. Brewer made application for a noncompetitive oil and gas lease on the same land.

On December 6, 1948, Mr. Silver formally protested the cancellation of his application and requested that it be reinstated. He stated that the address given in his application was his mother's address; that she had moved from it, but the regular postman had been given a forwarding address and had consistently forwarded the mail sent to that address; and that the reason why the lease forms had not been forwarded was that the regular postman was on vacation when they were received in Albuquerque and the substitute postman did not know about the forwarding address.

Mr. Silver's request for reinstatement was denied by the Regional Chief of Adjudication in a decision dated February 2, 1949. Mr. Silver appealed from this decision, and it was reversed by the Associate Director of the Bureau of Land Management.

The decision of the Associate Director was based on the fact that the lease forms arrived in the Albuquerque post office at 3:15 a. m. on September 20, 1948, and were returned by that post office to the land office at 12:50 p. m. on October 20, 1948. It was held that this did not constitute sufficient legal service to justify rejecting Mr. Silver's application, as the lease forms had been held in the post office for only 29 days, excluding the day on which the forms were received in the post office and the day on which they were returned to the land office.

Mr. Brewer's appeal from the Associate Director's decision is based on several points. First, he contends that Mr. Silver's appeal from the decision of the Regional Chief of Adjudication did not comply with the provisions of the Rules of Practice relating to notices of appeal (43 CFR 221.47-221.50), and, consequently, that the appeal should have been dismissed. He also contends that the Associate Director erred in considering evidence which was not presented below (the times of arrival and departure of the lease forms in Albuquerque, which information was obtained by writing a letter to the postmaster there), and in deciding the appeal on a ground (the sufficiency of the notice) which was not raised by the decision appealed from or by the briefs on Mr. Silver's appeal to the Director.

These contentions seem to be based primarily on a misapprehension as to the nature of this proceeding. This is not a "contest" (43 CFR

221.1) initiated by Mr. Brewer to prevent Mr. Silver from obtaining an oil and gas lease, or a contest by the Government to force Mr. Silver to vacate his claim (43 CFR, Part 222). This is simply a proceeding to consider Mr. Silver's petition asking the Department to revise its action rejecting his application. Mr. Brewer was permitted to appear in the proceeding and to file briefs because his interests would be affected by the administrative action, but his appearance did not render the proceeding a contest.

The difference is recognized in the Rules of Practice. Appeals from actions of the manager in rejecting applications to enter land, and the like, are regulated by different rules (43 CFR 221.63, 221.64) from those regulating appeals in "contests" (43 CFR 221.47-221.52). Consequently, it was not necessary that Mr. Silver's notice of appeal comply with the requirements for notices of appeal from decisions in "contests." Furthermore, since this is not a contest, it was proper for the Associate Director to obtain and to consider all the available evidence bearing on the issues, in order to determine whether the action of his subordinate was correct. The primary purpose of such proceedings is to ensure that the law is properly administered, and not to adjust the rights of adverse parties. Consequently, the Director can, and should, examine all aspects of the situation which he believes to be pertinent, irrespective of whether they were previously considered by the subordinate official.

Mr. Brewer next contends that the statute does not require that the offer of a lease be held in the post office for 30 full days in order to constitute notice, and that, even if it should be decided that the lease forms must be so held for 30 days, there is no requirement that the days of receipt and return must be excluded in the computation of this period.

The Associate Director's decision was apparently based upon the fact that the envelope in which the lease forms were mailed carried a direction to the postmaster that the letter should be returned to the land office "If not delivered within 30 days." The Associate Director construed this as meaning that the letter should be held in the post office for a full 30 days, excluding the day on which it was received in the post office and the day on which it was to be returned. He ruled that since the letter in this case was returned before it had been held in the post office for a full 30 days, as so computed, the addressee should not be charged with having received constructive notice of the letter.

The Associate Director's ruling appears to be reasonable. The purpose of directing the postmaster to hold registered mail for 30 days is obviously to give the addressee that minimum period of time in which to call for it. Because the times of arrival and departure of mail at any given post office may fall at any point within a 24-hour

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period, it seems only proper that the day on which registered mail arrives in the post office and the day on which it is returned to the land office should be excluded in the computation of the 30-day period.

It is true, as Mr. Brewer contends, that there is no statute or departmental regulation which requires that the method of computation adopted by the Associate Director be followed. See 43 CFR 220.12; *cf.* 43 CFR 220.14. On the other hand, there is no statute or departmental regulation which bars the adoption of this method of computation. It was early stated in *McGraw v. Lott*, 44 L. D. 367 (1915), that where a notice sent by registered mail carries a direction to the postmaster to hold it for 30 days unless sooner delivered, then, in order to charge the addressee with constructive notice of the letter, "the letter must have remained in the post office, subject to his call, during the entire period it was required to be so held; and must be returned to the local office as uncalled-for at the end of that period, as evidence of that fact." (44 L. D. at p. 371.) Although the *McGraw* case did not consider the precise method of computing the time that registered mail must be held in the post office, it clearly expressed the Department's view that such requirements should be generously construed in order to give the addressee the full amount of time stated in which to call for his mail.

I conclude that no error was made by the Associate Director.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Associate Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

JOHN ROBERT CLAUS
RICHARD H. YODER

A-25937

Decided January 29, 1951

Commuted Homestead Entry—Second Homestead Entry—Cultivation.

An application to make a second homestead entry can be allowed only where the applicant lost his prior homestead entry because of matters beyond his control.

The cultivation requirements for a commuted homestead entry are the same as those for an ordinary homestead entry, i. e., the entryman must cultivate one-sixteenth of his entry in the second year of the entry and one-eighth of the entry in the third year of the entry and until the submission of final commutation proof.

If the holder of a second homestead entry shows that he lost a prior commuted entry solely because, in reliance upon ambiguous departmental regula-

tions, he cultivated only one-sixteenth (instead of one-eighth) of his former entry in the third year of the entry, he may be deemed to have lost his former entry because of matters beyond his control and, therefore, to be entitled to make a second entry.

An application for a homestead entry should be rejected where the land applied for is included in an entry of record.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

On May 12, 1945, an application by John Robert Claus to make a homestead entry on lot 11, sec. 11, T. 1 S., R. 1 E., F. M., Alaska, was allowed. On October 22, 1947, Mr. Claus submitted a commutation final proof on his entry (see 43 CFR 65.19).

Mr. Claus asserted in his commutation proof that he had resided on the land for more than 1 month in 1945, more than 7 months in 1946, and almost 7 months in 1947 (up to the date of the final proof), making a total residence of more than 15 months. Only 14 months' residence is required for a commuted entry (43 CFR 65.19).

With respect to cultivation, Mr. Claus stated that he had cleared 2 acres of trees and brush in 1945, that he had cleared 6 acres and planted 2 acres in 1946, and that he had cleared 7 acres and planted $4\frac{1}{2}$ acres in 1947. The 2 acres alleged to have been planted in 1946, the second year of the entry, constituted almost one-sixteenth of the 36.93 acres in the entry; the $4\frac{1}{2}$ acres alleged to have been planted in 1947, the third year of the entry, constituted one-eighth of the acreage of the entry.

On March 10, 1949, the Regional Administrator of the Bureau of Land Management rejected the final proof for insufficiency of cultivation and residence, but the rejection was without prejudice to the submission by Mr. Claus of satisfactory commutation or ordinary final homestead proof within the statutory life of the entry, which would expire on May 12, 1950. The decision was based upon a field examination of the entry which was made on December 17, 1948. The field examiner reported that only 2.004 acres of the entry had ever been cultivated; that a one-room habitable house, without sanitary facilities or a water supply, had been constructed on the entry; that Mr. Claus owned two modern homes and a department store in Fairbanks, Alaska; and that utility company records, which separated charges made for electric cooking stoves and charges made for other electric appliances and equipment, showed that, during the months of Mr. Claus' alleged residence on the entry, he was billed at his Fairbanks home for the average amount of electricity used by a normal family in preparing meals.

Following the Regional Administrator's decision, the case was discussed by Mr. Claus and the manager of the Fairbanks land office and by the latter and the Regional Administrator. As a result, the Regional Administrator notified the manager on March 23, 1949, that if

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Mr. Claus should relinquish his entry, he could be allowed to make a second entry, in the absence of any objection of record, without further approval from the Regional Administrator. Acting upon this advice, Mr. Claus filed a relinquishment of his entry on May 10, 1949, and an application to make a second entry on the same day. Mr. Claus stated in his second-entry application that he had relinquished his original entry because his commutation proof had been rejected because of a "technicality" as to his period of residence on the entry. Mr. Claus' application was allowed on May 11, 1949.

On May 12, 1949, Richard H. Yoder applied to make a homestead entry on the same land. His application was rejected by the manager for the reason that Mr. Claus' application had been allowed on the previous day.

Mr. Yoder appealed to the Director of the Bureau of Land Management from the manager's decision, asserting that Mr. Claus had made false and fraudulent statements in his commutation proof with respect to his cultivation and residence under his original entry and that he should not be allowed to make a second entry.

On June 12, 1950, the Director of the Bureau of Land Management canceled Mr. Claus' second entry for the reason that there was nothing in the record to show that he had lost his original entry because of matters beyond his control. The Director stated, however, that because the decision rejecting Mr. Claus' commutation proof had been based upon a field examiner's report, which does not afford a proper basis for canceling an entry, Mr. Claus should be given an opportunity to apply for the reinstatement of his original entry, with the understanding that, upon the reinstatement, adverse proceedings would be directed against the original entry for failure of Mr. Claus to meet the residence and cultivation requirements. The Director also denied Mr. Yoder's appeal.

Mr. Claus and Mr. Yoder have each appealed to the head of the Department from the Director's decision.

The act of September 5, 1914 (43 U. S. C., 1946 ed., sec. 182), provides that any person who makes an entry under the homestead law and who, "through no fault of his own," may lose, forfeit, or abandon the entry shall be entitled to the benefits of the homestead law as though the former entry had not been made, "Provided, That such applicant shall show to the satisfaction of the Secretary of the Interior that the prior entry or entries were made in good faith, were lost, forfeited, or abandoned because of matters beyond his control, and that he has not speculated in his right nor committed a fraud or attempted fraud in connection with such prior entry or entries."

Except for a question involving the cultivation requirements of a commuted entry, there is nothing in the record to indicate that Mr.

Claus lost his original entry "because of matters beyond his control." In his appeal, he contends vigorously with respect to the question of residence that he did comply with the residence requirement. In support of this contention, he has submitted six letters in which the writers say that he did not live in his Fairbanks house except in the winters of 1945, 1946, and 1947, and that he did live on his entry. There is, therefore, a direct conflict of evidence on the issue of residence. If in fact Mr. Claus did not meet the residence requirements, his original entry was invalid for that reason alone and he would be in no position to say that he had lost his entry because of matters beyond his control.

With respect to the issue of cultivation, Mr. Claus apparently concedes, on his present appeal, that, contrary to the statement made in his final proof, he never cultivated more than $2\frac{1}{2}$ acres at any time. However, he states that the commutation law requires that only one-sixteenth of the entry be cultivated.

The Department's regulations on the commutation of entries in Alaska and the continental United States state that only one-sixteenth of the entry must be cultivated (43 CFR 65.19, 166.27). This statement was apparently made in the regulations because it was expected that final proof of a commuted entry would be submitted at the end of the 14 months' residence required on the entry or, in any event, not later than the end of the second year of the entry. Within that time, only one-sixteenth of the entry would have to be cultivated, and that requirement would relate to the second-entry year. But where the commutation proof is not submitted until after a substantial portion of the third entry year has elapsed, it seems clear that the statutory requirement of cultivation of one-eighth of the entry in the third year, which is applicable to regular entries (43 U. S. C., 1946 ed., sec. 164), would also apply to a commuted entry. There is nothing in the statutory provisions on the commutation of entries with respect to the extent of the cultivation required (43 U. S. C., 1946 ed., secs. 164, 173), so it seems clear that the general cultivation requirements of the statute are applicable.

However, notwithstanding the statutory requirement mentioned above respecting cultivation in the third-entry year, the Department's regulations on the commutation of entries appear to state generally that only one-sixteenth of a commuted entry need be cultivated. (See, in this connection, *Claude E. Halstead*, A-25723 (November 29, 1949), where the final commutation proof was filed in the middle of the third-entry year, and it was implied that only one-sixteenth of the entry need be cultivated.) It would appear, therefore, that if Mr. Claus' original entry complied in all respects with the requirements of the law for the commutation of homesteads, except that only one-sixteenth (instead of one-eighth) of the entry had been cultivated in the third year, and that if Mr. Claus relied upon a literal reading of the regulations for his

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failure to cultivate more than one-sixteenth of his entry in the third year, it could properly be said that he had lost his original entry because of matters beyond his control.

The situation comes down to this:

1. If in fact Mr. Claus failed to meet the residence requirements of his original entry, it could not be said that he had lost that entry because of matters beyond his control. Consequently, his second entry would have to be canceled for that reason. It would be immaterial whether the cultivation requirements had been met.

2. If in fact Mr. Claus met the residence requirements and also met the cultivation requirements except for the fact that he cultivated only one-sixteenth (instead of one-eighth) of his entry in the third year, and if his failure to meet the cultivation requirement in that respect was caused by his reliance upon the Department's regulations, it could be held that his original entry had been lost because of matters beyond his control, and his second entry could be allowed to stand.

In order to determine the validity of Mr. Claus' second entry, it is necessary to ascertain the facts with respect to his compliance with the residence and the cultivation requirements of his original entry. The case will, accordingly, be remanded for that purpose.

After the allowance of his second entry, Mr. Claus constructed a large modern house on his entry at an asserted cost of \$7,000. If it should be decided that Mr. Claus' second entry must be canceled, such cancellation should be without prejudice to the submission by Mr. Claus of an application for 5 acres of the land covered by his entry as a homestead under the act of May 26, 1934 (48 U. S. C., 1946 ed., sec. 461), or to apply for a lease on 5 acres of the land under the Small-Tract Act of June 1, 1938, as amended (43 U. S. C., 1946 ed., sec. 682a), and thus protect his investment. Of course, if Mr. Claus wishes, he may acquiesce in the cancellation of his second homestead application and apply immediately under one of the acts mentioned in the preceding sentence. Such action on his part would obviate any necessity for making a further investigation of his original entry in order to determine the validity of his second entry.

We turn now to the rejection of Mr. Yoder's application. It is a well-settled rule in the Department that land which is segregated from the public domain by an entry of record is not subject to any other form of appropriation until its restoration to the public domain is noted on the records of the land office. *California and Oregon Land Co. v. Hulen and Hunnicutt*, 46 L. D. 55 (1917); *Hiram M. Hamilton*, 38 L. D. 597 (1910); *Young v. Peck*, 32 L. D. 102 (1903). Mr. Yoder contends, however, that Mr. Claus' second-entry application contained false and fraudulent statements as to his residence and cultivation under his original entry, and that Mr. Claus' second appli-

ation was, therefore, null and void *ab initio*. The alleged falsity of any statements made by Mr. Claus has not been established by any competent evidence. Moreover, even if it should be determined that Mr. Claus' second entry must be canceled, the Department's rule that no application for the land may be received until the cancellation is noted on the land office records would still be applicable.

As Mr. Claus' second homestead application had been allowed and was in effect at the time when Mr. Yoder filed his application, Mr. Yoder's application was properly rejected.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the Director's decision is affirmed insofar as it provides for the cancellation of Mr. Yoder's application; and the case is otherwise remanded to the Bureau of Land Management for a determination of the facts concerning Mr. Claus' residence and cultivation under his original entry and, upon the basis of such facts, for a determination of the validity of Mr. Claus' second entry, in accordance with the discussion in this decision.

MASTIN G. WHITE,
Solicitor.

L. N. HAGOOD

A-25912

Decided February 7, 1951

Oil and Gas Lease—Authority to Cancel.

When the land sought in an application for a noncompetitive oil and gas lease is included in a lease based upon a prior application, the application first mentioned should be rejected, and not merely suspended.

The inclusion in another lease of land sought in an application for a noncompetitive oil and gas lease does not nullify such application, but merely lays a predicate for its rejection.

Where the land sought in an application for a noncompetitive oil and gas lease is included in a lease based on a prior application, and such lease is subsequently relinquished, and a lease is thereupon issued in response to the application first mentioned, the circumstance that this application should have been rejected during the interim does not make the lease void or voidable.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

L. N. Hagood has appealed to the head of the Department from a decision dated January 18, 1950, by the Associate Director of the Bureau of Land Management which affirmed the cancellation of his noncompetitive oil and gas lease (Sacramento 035262) as to lot 11, sec. 9, T. 10 N., R. 25 W., S. B. M., California.

On May 8, 1943, Mr. Hagood applied for an oil and gas lease on land which included lot 11, sec. 9. On the same day, his application

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was suspended as to lot 11, sec. 9, because that tract was included in a prior oil and gas lease application (Sacramento 035234) which had been filed by the Richfield Oil Corporation. A lease which included lot 11, sec. 9, was issued to the Richfield Oil Corporation on April 1, 1944. On March 13, 1946, the Richfield Oil Corporation filed a relinquishment of its lease. The lease was canceled, and the land was reopened for further leasing on November 5, 1946.

The issuance to Mr. Hagood, on the basis of the suspended application which had been filed on May 8, 1943, of a lease that included lot 11, sec. 9, was authorized in a decision dated October 8, 1947, by the Director of the Bureau of Land Management. Lease forms were sent to Mr. Hagood for execution within 30 days and were received by him on November 17, 1947.

Thereafter, Sam Howard filed on January 6, 1948, an application for an oil and gas lease on, among other land, lot 11, sec. 9. Upon being notified that his application was being suspended with respect to lot 11, sec. 9, because that tract was included in Mr. Hagood's prior application, Mr. Howard wrote the acting manager on January 12, 1948, that Mr. Hagood's application should be rejected as to that tract because of the issuance of the Richfield lease.

Mr. Hagood returned the lease forms, executed, on March 12, 1948, and the forms were sent by the acting manager to the Director of the Bureau of Land Management on the same day. In the transmittal memorandum, the acting manager stated that Mr. Hagood's application should be rejected as to lot 11, sec. 9, prior to the issuance of the lease. However, the lease was subsequently issued by the acting manager as of February 1, 1949, without excluding lot 11, sec. 9.

On February 24, 1949, the manager of the Sacramento land office canceled Mr. Hagood's lease as to lot 11, sec. 9, for the reason that Mr. Hagood's application should have been rejected as to that tract after it was leased to the Richfield Oil Corporation. This decision was affirmed by the Associate Director of the Bureau of Land Management.

The Department has ruled that when an oil and gas lease is issued, pending applications to lease the same land should be rejected. *Margaret Scharf*, A-25835 (March 30, 1950); *Anna Mable Liebold*, A-25759 (September 23, 1949). In accordance with this rule, Mr. Hagood's application should have been rejected with respect to lot 11, sec. 9, after the Richfield lease was issued. However, Mr. Hagood's application was not in fact rejected with respect to that tract after the Richfield lease was issued. Instead, his application was permitted to remain in a suspended condition, and it subsequently formed the basis for the issuance to Mr. Hagood of a lease on lot 11, sec. 9, after the relinquishment of the Richfield lease. The Hagood application

as to lot 11, sec. 9, was thus handled in a manner which contravened the established departmental practice.

The question presented on this appeal is whether the Department can cancel Mr. Hagood's lease with respect to lot 11, sec. 9, on the ground that his application should have been rejected when the land was leased to the Richfield Oil Corporation.

As previously stated, Mr. Hagood's application could have been, and should have been, rejected as to lot 11, sec. 9, after the inclusion of this tract in the Richfield lease. However, there does not appear to be any provision in the Mineral Leasing Act, as amended (30 U. S. C., 1946 ed., sec. 181 *et seq.*), or in the regulations of the Department issued under that act (43 CFR, Part 192), which requires or warrants the conclusion that the issuance of a lease covering lot 11, sec. 9, to the Richfield Oil Corporation *ipso facto* nullified Mr. Hagood's outstanding application for that land and rendered void or voidable the subsequent lease issued to Mr. Hagood for lot 11, sec. 9, following the cancellation of the Richfield lease.

The Department's power to cancel noncompetitive oil and gas leases after their issuance is limited. One proper basis for the cancellation of a lease is that the requirements of the statute governing the issuance of such leases have not been satisfied. *Russell Hunter Reay v. Gertrude H. Lackie*, 60 I. D. 29 (1947). A lease may also be canceled if the lessee fails to comply with the provisions of the statute, the applicable regulations, or the terms of the lease, and such default continues after notice has been given (43 CFR 192.161). However, none of these grounds for cancellation seems to be available in the present case.

It appears that the failure to reject Mr. Hagood's application as to lot 11, sec. 9, following the inclusion of this tract in the Richfield lease in 1944, and the issuance of the lease on lot 11, sec. 9, to Mr. Hagood in 1949 on the basis of his suspended application, violated an established administrative practice in the Department, but that the issuance of the lease to Mr. Hagood did not violate any provision of the Mineral Leasing Act. Moreover, the record does not indicate that Mr. Hagood has failed to discharge any of his obligations following the receipt of the lease. Under these circumstances, there does not appear to be any sound legal basis for canceling Mr. Hagood's lease as to lot 11, sec. 9. *Cf. Antonia Ziegler, Charles Vaclav Ziegler, A-24537* (September 18, 1947).

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Associate Director of the Bureau of Land Management is reversed.

MASTIN G. WHITE,
Solicitor.

STATE OF ALABAMA

A-25955

Decided February 21, 1951

Color of Title Act—State—Citizen.

A State may properly be regarded as a "citizen of the United States" within the meaning of that term as used in the Color of Title Act, and may apply for the benefits of the act.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The State of Alabama has appealed to the head of the Department from a decision dated July 20, 1950, by the Assistant Director of the Bureau of Land Management rejecting the State's application to purchase under the Color of Title Act (43 U. S. C., 1946 ed., sec. 1068) about 30 acres of land described as the NE $\frac{1}{4}$ NE $\frac{1}{4}$, less 10 acres on the south end thereof, sec. 16, T. 19 N., R. 4 E., S. S. M., Alabama.

The State's application was rejected because of the Assistant Director's conclusion that a State is not "a citizen of the United States" and, hence, is not eligible to acquire land under the Color of Title Act, which provides that—

Whenever it shall be shown to the satisfaction of the Secretary of the Interior that a tract of public land, not exceeding one hundred and sixty acres, has been held in good faith and in peaceful, adverse possession by a citizen of the United States his ancestors or grantors, for more than twenty years under claim or color of title, and that valuable improvements have been placed on such land, or some part thereof has been reduced to cultivation, the Secretary may, in his discretion, * * * cause a patent to issue for such land to any such citizen * * *.

A State is obviously not a citizen of the United States within the meaning of the definition of citizenship contained in the Constitution (Amendment XIV, Sec. 1). However, the term "citizen of the United States" is often used in statutory provisions to include legal entities other than natural persons who meet the constitutional test of citizenship prescribed in the Fourteenth Amendment to the Constitution.

For example, a private corporation created under the laws of Minnesota was held to come within the scope of the term "citizens of the United States" as used in a statute (act of March 3, 1891, 26 Stat. 851) conferring jurisdiction upon the Court of Claims to adjudicate claims for property of "citizens of the United States" taken or destroyed by Indians under the circumstances specified in the act. *United States v. Northwestern Express Co.*, 164 U. S. 686 (1897).

Also, a private corporation created under the laws of Pennsylvania was held to come within the scope of the term "citizens of the United States" as used in a statutory provision (sec. 5, act of March 3, 1887, 24 Stat. 556, 557) granting certain benefits respecting public lands to

"citizens of the United States, or * * * persons who have declared their intention to become such citizens." *Ramsey v. Tacoma Land Co.*, 196 U. S. 360 (1905).

This Department, in the administration of the Color of Title Act, has not restricted the benefits of the act to natural persons upon the theory that only such a person may be regarded as a "citizen of the United States" within the meaning of this term as used in the act. This statute was enacted on December 22, 1928. Ever since April 15, 1929, the regulations promulgated by the Department pursuant to the Color of Title Act have contained a provision indicating that a corporation is a qualified applicant under the statute. (Par. 9, Circ. No. 1186, 52 L. D. 611, 613; 43 CFR 140.9.) Moreover, applications of corporations under the act have been granted.¹

In the light of the apparently consistent administrative construction of the term "citizen of the United States" in the Color of Title Act as not being limited to natural persons, but as including corporations, it appears that the term should also be construed as including a State. There is certainly as much reason for granting the benefits of the act to a State as there is for granting such benefits to a corporation created by a State.

It follows that the application of Alabama in this case should not be denied merely on the ground that Alabama is not a "citizen of the United States" within the meaning of that term as used in the Color of Title Act.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Associate Director is reversed, and the case is remanded to the Bureau of Land Management for appropriate action consistent with this decision.

MASTIN G. WHITE,
Solicitor.

APPEAL OF HENDRIE & BOLTHOFF COMPANY

CA-79

Decided March 9, 1951

Contract Appeal—Liquidated Damages—Discrepancy Between Contract Price and Amount of Damages Assessed.

A strike which was in existence at the time when a bidder on a supply contract submitted its bid to the Government and which thereafter interfered with the performance of the contract is not among the "unforeseeable causes," as used in Standard Form No. 32, which would justify the contracting officer in extending the time of performance.

¹ See, for example, *Avondale Mills*, B. L. M. 011889-K (November 19, 1947); *The Ladies Town Hall Ass'n of Centerville*, Sacramento 032859-K (May 20, 1940).

March 9, 1951

The reasonableness of a provision for liquidated damages in a contract is to be judged as of the time of making the contract.

If a provision for liquidated damages in a contract is a reasonable one, it is not necessary for a party enforcing the provision to show that any actual damage was sustained.

Where a supply contract contains a provision empowering the contracting officer, in the event of a delay in shipment, to terminate the right of the contractor to ship the material in question and to buy it on the open market, and where the contracting officer fails to exercise the power of termination but, instead, permits the contractor to pile up liquidated damages that are more than three times greater in amount than the total contract price, the case should be referred to the Comptroller General with a recommendation that it would be just and equitable to remit that portion of the liquidated damages which accrued because the contracting officer failed to exercise the power of termination within a reasonable time.

ADMINISTRATIVE DECISION

Hendrie & Bolthoff Company (formerly Hendrie & Bolthoff Manufacturing & Supply Company), Denver, Colorado, filed an appeal dated March 11, 1950, from a decision of the contracting officer dated February 14, 1950, denying, in part, the contractor's request for an extension of time under Contract No. I2r-15769 with the Bureau of Reclamation. The contracting officer found that only part of the delay occasioned in the shipping of materials under the contract had resulted from unforeseeable causes beyond the control and without the fault or negligence of the contractor, and he decided that the time for performance should be extended accordingly.

The contract, which was entered into on February 20, 1946, provided for the furnishing and delivering of nine items of ventilating and air-cooling equipment for installation in the Boulder Power Plant, under Schedules Nos. 1 and 2 of Specifications No. 1141, Boulder Canyon Project, "Arizona-California-Nevada." By article 1 of the contract, the specifications and the contractor's letters dated January 25, 1946, and February 13, 1946, were made part of the contract.

By agreement between the contractor and the Government, paragraph 20 of the specifications, "Delays—liquidated damages," was substituted for article 5, "Delays—Damages," of Standard Form No. 32. Paragraph 20 of the specifications provided, in part:

Delays—liquidated damages.—The article "Delays—liquidated damages" given in paragraph 5 of the directions for preparation of contract, on the back of the standard Government form of contract for supplies (Standard Form No. 32), as amended herein, will by this reference be substituted for article 5 of the contract. This article as amended reads as follows:

"ARTICLE —. Delays—Liquidated Damages.—If the contractor refuses or fails to make shipment of the materials or supplies within the time specified in Article 1, or any extension thereof, the actual damage to the Government for the delay will be impossible to determine, and in lieu thereof the contractor shall pay to the Government, as fixed, agreed, and liquidated damages for each

calendar day of delay in making shipment, the amount as set forth in the specifications or accompanying papers, and the contractor and his sureties shall be liable for the amount thereof: *Provided, however,* That the Government reserves the right to terminate the right of the contractor to proceed with shipment or such part or parts thereof as to which there has been delay, and to purchase similar material or supplies in the open market or secure the manufacture and delivery thereof by contract or otherwise, charging against the contractor and his sureties any excess cost occasioned the Government thereby, together with liquidated damages accruing until such time as the Government may reasonably procure similar material or supplies elsewhere: *Provided further,* That the contractor shall not be charged with liquidated damages or any excess cost when the delay in shipment is due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, * * * strikes, freight embargoes * * *"

The amount of liquidated damages to be charged for failure to ship the materials, or any part thereof, under any item of either schedule, within the period specified will be five dollars (\$5) for each such item for each calendar day of delay.

Paragraph 19 of the specifications provided, in part:

Delivery—urgency of.—Time of delivery is important and complete shipment from the shipping point or points is desired within one hundred and twenty (120) calendar days after date of receipt by the contractor of notice of award of contract, and all bids specifying complete shipment of each item within the number of calendar days stated above will be considered on an equal basis as regards time of delivery. Bidders are required to state, in the blanks provided therefor in the schedules, definite periods of time within which shipment will be made. Where the time of shipment, from the shipping point or points, as specified by the bidder for any item of the schedules is greater than the number of calendar days stated above, each day in excess thereof will be evaluated at five dollars (\$5) for each such item, and bids will be compared on this basis for award of contract. * * *

Under Schedules Nos. 1 and 2 of the specifications, the contractor specified that complete shipment of each of the nine items would be made within 120 days after the date of the receipt of the notice of award of the contract. This notice was received by the contractor on February 25, 1946, thus establishing the final date of shipment for each of the items as June 25, 1946.

The table below shows the respective dates on which the several items were shipped and also the number of calendar days' delay in shipping each item:

Items	Shipping date	Calendar days' delay
7 and 8.....	Nov. 30, 1946	158
9.....	Dec. 4, 1946	162
3, 4, and 6.....	Apr. 19, 1947	298
1, 2, and 5.....	Aug. 25, 1947	426

The contracting officer found that shipment of each of the nine items was delayed 21 calendar days by a railroad embargo and a railroad

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strike, and that shipment of each of the items 1 through 6, inclusive, was delayed 60 calendar days and that shipment on each of the items 7, 8, and 9 was delayed 43 calendar days because of strikes in the coal industry. Accordingly, he granted an extension of a total of 81 calendar days for each of the items 1 through 6, inclusive, and a total of 64 calendar days for each of the items 7, 8, and 9, in the time of performance under the contract beyond the completion date of June 25, 1946.

The duration of the strikes in the coal industry and of the railroad strike and embargo are set out below :

	From—	To (inclusive)—
Coal strikes.....	Apr. 1, 1946 Nov. 21, 1946	May 13, 1946 Dec. 7, 1946
Railroad strike.....	May 23, 1946	May 25, 1946
Railroad embargo.....	May 10, 1946	June 3, 1946

There is nothing in the record to indicate that these strikes and the embargo were foreseeable on January 25, 1946, when the contractor submitted its bid, or on February 13, 1946, when the contractor wrote to the Bureau of Reclamation that "We hereby extend the acceptance time of our proposal through and including February 28, 1946."

It will be noted that the railroad strike occurred during the period when the railroad embargo was in force, and that the first coal strike was in progress during the first 4 days of the railroad embargo. It appears, therefore, that the delay occurring during the first coal strike, the railroad strike, and the railroad embargo is excusable for the period beginning April 1, 1946, through June 3, 1946, or a total of 64 days. It also appears that liquidated damages should not be assessed for delays caused by the second coal strike, which lasted from November 21, 1946, through December 7, 1946, a period of 17 days.

As items 7, 8, and 9, were shipped during the progress of the second coal strike, it cannot be presumed that the second strike contributed to the delay in making shipment of these items. Accordingly, only delays attributable to the first coal strike, to the railroad strike, and to the railroad embargo, covering a total of 64 days, are excusable with respect to those items.

Shipment of the remaining items was not made until sometime after the cessation of the second coal strike. Accordingly, delays caused by both coal strikes, by the railroad strike, and by the railroad embargo, covering a total of 81 days, are excusable for items 1 through 6, inclusive.

In its appeal, the contractor makes several contentions.

In the first place, the appellant states that the contracting officer erred in finding that a strike at the General Electric Company, which was in effect from January 25, 1946, to March 13, 1946, was not an unforeseeable cause within the meaning of paragraph 20 of the specifications.

As to the first contention, the contracting officer found that a strike closed the plants of the General Electric Company, which furnished the motors for some of the items, from January 15, 1946, to March 13, 1946, and that a strike in the steel industry stopped production from January 21, 1946, to February 19, 1946.

The contractor's bid was received on January 25, 1946, and on February 13, 1946, the contractor extended the time for the acceptance of its bid until February 28, 1946. Thus, the strikes, which the contractor now contends were unforeseeable, were actually in progress both at the time when the contractor bid for the work and on the date when the parties entered into the contract. Clearly, therefore, these strikes were not among the "unforeseeable causes" provided for in paragraph 20 of the specifications.

The contractor asserts, however, that "A 'strike' under Paragraph 22 [sic] of the Specifications is defined as an excusable cause of delay, whether foreseeable or not." As to the contention that any strike which delays a contractor or a subcontractor is "an excusable cause of delay, whether foreseeable or not," the rule is otherwise. See *United States v. Brooks-Callaway Co.*, 318 U. S. 120, 123 (1943).

The contractor also maintains that the contracting officer was in error in failing to take into account the fact that delays in production caused by the coal strikes, the railroad strike, and the railroad embargo continued for a longer time than the duration of the several periods when the workmen in the respective industries were idle. On page 2 of its letter dated June 22, 1948, to the Bureau of Reclamation, the contractor stated with respect to the effects of the strikes on two of its suppliers:

The Trane Company operated at less than one-half capacity throughout the period from February through July, 1946. The relative priority which both Trane Company and Buffalo Forge Company assigned internally to their commitments is, of course, not known to us and undoubtedly could not be made available without resort to litigation. We are convinced, however, that both subcontractors under all the circumstances did as well as other suppliers of similar equipment during the period involved.

On page 2 of its appeal the contractor is more specific as to the time lost by one of these suppliers because of the strikes in 1946. It states:

* * * the work stoppages referred to in the first half of 1946 forced one of the subcontractors involved to operate at less than one-half capacity for a period of approximately 180 days. The Contracting Officer should have found that work stoppages in the first half of 1946 together caused an excusable delay of at least 180 days in all items involved.

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As the record stands, there is insufficient evidence before the Department to warrant a further extension of time on the basis of the contractor's letter dated June 22, 1948, or on the basis of its statement in the appeal.

In view of the fact that this appeal has been before the Department for an extended period, and also because of the manner in which I intend to dispose of it, I do not believe that the record should be held open any longer for the inclusion of additional evidence concerning the delays experienced by suppliers of the contractor.

The contractor contends further "That the liquidated damages called for, paragraph 20, *supra*, are unenforceable and void by reason of the fact that they constitute a penalty and not compensatory damages * * *."

There appears in the record a copy of a Comptroller General's decision B-80576 dated February 17, 1949, in which the Comptroller had before him the question whether the liquidated damages provided for in the present contract and also in another contract which the Bureau of Reclamation had with the same contractor were in the nature of penalties. The Comptroller General concluded that—

* * * I find nothing in the facts submitted with respect to the two contracts involved which would require or authorize the liquidated damages provisions contained therein to be construed as penalties.

As the reasonableness of a provision for liquidated damages in a contract is "to be judged as of the time of making the contract" (*Priebe & Sons v. United States*, 332 U. S. 407, 412 (1947)), and as there is nothing in the present record to show that the reasonableness of liquidated damages in the amount of \$5 per day per item, as provided for in paragraph 19 of the specifications, was questioned by the contractor at the time when the contract was entered into, the conclusion reached by Comptroller General appears to be sound.

Another contention of the contractor is—

* * * That the Government in fact suffered no damages at all and as late as September 1948, had not made use of all the equipment involved * * *

With regard to this point, there is a clear line of authority holding that if a provision for liquidated damages is a reasonable one, it is not necessary for the party enforcing it to show that any actual damage was sustained. See *United States v. Bethlehem Steel Co.*, 205 U. S. 105, 120-121 (1907); *Wise v. United States*, 249 U. S. 361, 364-367 (1919); 28 Comp. Gen. 435 (1949).

Finally, the contractor contends—

* * * That in any event the Government failed to mitigate damages by an effort to purchase the equipment in the open market and is, therefore, estopped to enforce paragraph 20, *supra*.

It is submitted that under the circumstances the liquidated damages here are wholly unjust and inequitable, and it is requested that the question be submitted to the Comptroller General under Public Laws June 30, 1949, C. 288, Title III, Sec. 306, 63 Stat. 396, Title 41, U. S. Code, Sec. 256,¹ with a recommendation that the damages be remitted as a whole.

Paragraph 20 of the specifications, after making provision for liquidated damages, contains the following proviso:

* * * That the Government reserves the right to terminate the right of the contractor to proceed with shipment or such part or parts thereof as to which there has been delay, and to purchase similar material or supplies in the open market or secure the manufacture and delivery thereof by contract or otherwise, charging against the contractor and his sureties any excess cost occasioned the Government thereby, together with liquidated damages accruing until such time as the Government may reasonably procure similar material or supplies elsewhere * * *.

Thus, the parties wrote into their agreement the usual rule which gives to the party not in default a power to terminate the contract and to charge the defaulting party by way of damages with any cost in excess of that specified in the contract which might arise in obtaining performance of the contract elsewhere. The contract does not, of course, make mandatory the execution of this power. However, the proviso should be read in the light of the well-established equitable principle that a party to a contract, who is not in default, is under a duty to mitigate the amount of damages which the defaulting party may be required to pay.

In the present instance, the total contract price for the nine items under the two schedules was \$3,018.50. The liquidated damages assessable for a total of 2,650 calendar days' delay amounted to \$13,250.² There is nothing in the present record to show that the Bureau of Reclamation ever attempted to procure in the open market the items covered by the contract.

This Department, unfortunately in the present instance, does not possess the authority to relieve a contractor of liquidated damages which accrued, at least in part, because a contracting officer failed to exercise a power of termination contained in a contract. However, the Comptroller General has the authority to grant relief in such a case under section 10 (a) of the Federal Property and Administrative Services Act of 1949, as amended by the act of September 5, 1950 (64 Stat. 578, 591). In the circumstances of the present case, and particu-

¹ The Comptroller General has held that the authority to remit liquidated damages conferred on him by section 306 of the original Federal Property and Administrative Services Act of 1949 was limited to contracts entered into pursuant to Title III of that act. 29 Comp. Gen. 387 (B-92044, March 23, 1950). However, the statute was amended (sec. 10 (a), act of September 5, 1950, 64 Stat. 578, 591) to authorize the Comptroller General, in a proper case on the recommendation of the head of the Federal agency involved, to remit to the contractor liquidated damages under "any contract made on behalf of the Government" which contains a provision for liquidated damages.

² As reduced by the decision of the contracting officer, the liquidated damages assessed against the contractor amounted to \$9,960.

May 16, 1951

larly in view of the wide discrepancy between the contract price and the amount of liquidated damages assessed, I am transmitting to the Comptroller General the file covering this appeal and a copy of this decision, with a recommendation that he grant relief to the contractor.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 24, Order No. 2509; 14 F. R. 307), the decision of the contracting officer dated February 14, 1950, is affirmed, and the case will be referred to the Comptroller General with a recommendation that relief be granted to the contractor under section 10 (a) of the Federal Property and Administrative Services Act of 1949, as amended.

MASTIN G. WHITE,
Solicitor.

UNITED STATES *v.* M. W. MOUAT ET AL.

A-26181

Decided May 16, 1951

Placer Mining Claim—Valuable Mineral Deposits.

Where it appears that the minerals discovered on a placer mining claim are not marketable commodities, such minerals do not constitute "valuable mineral deposits" within the meaning of that phrase as used in the mining laws.

A valid location of a mining claim can be made only if a valuable mineral deposit has been discovered within the limits of the claim itself. The presence of a valuable mineral deposit on adjacent land, plus geological indications that the deposit probably extends beneath the surface of the claim, does not warrant a finding that the claim is valid.

The usefulness of the area of a claim in connection with the development of mineral deposits on nearby lands is not sufficient to validate the claim.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This is an adversary proceeding which was instituted on behalf of the United States to cancel the Lake Placer mining claim in sec. 20, T. 5 S., R. 15 E., P. M., Montana. The case was before the head of the Department in 1949 on an appeal (A-25527) from a decision by the Assistant Director of the Bureau of Land Management against the validity of the claim. At that time, the decision of the Assistant Director, insofar as it held the second amended location of the claim to be invalid, was affirmed, but the case was remanded to the Bureau of Land Management for a further hearing on the question whether the minerals discovered on the claim, as originally located and as amended for the first time, constitute "valuable mineral deposits," as that phrase is used in the mining laws.¹

A supplementary hearing on this question was held before the manager of the land office at Billings, Montana, on November 8, 9,

¹ See 30 U. S. C., 1946 ed., secs. 22, 35.

and 10, 1949. Thereafter, on March 14, 1950, the manager held that a valid discovery of valuable mineral deposits had not been made; and on October 31, 1950, the Acting Director of the Bureau of Land Management, in a decision which reviewed at some length the evidence offered at the second hearing, affirmed the decision of the manager and declared the Lake Placer mining claim, as represented by the original location and the first amended location, to be null and void.

M. W. Mouat, individually and as administrator of the estate of May Paula Mouat, deceased, and as trustee under an express trust, thereupon appealed to the head of the Department.

With regard to the evidence presented at the second hearing, that which appears to be significant from the standpoint of determining whether "valuable mineral deposits" have been discovered on the Lake Placer claim relates to the presence (or possible presence) on the claim of (1) olivine, (2) chromohercynite, and (3) pyrrhotite.

I

The record shows that the claim contains large quantities of olivine and other related magnesium-bearing rocks (Tr. 8-10, 63, 96, 195, 217).²

The testimony of the Government's expert witnesses indicates, however, that there is no demand or market for any of these minerals (Tr. 11, 64), that they have no economic value (Tr. 68, 98), and that there is no practicable method of using them for commercial purposes (Tr. 99).

The only evidence in the record tending to cast doubt upon the testimony of the Government's witnesses regarding the lack of value in these magnesium-bearing minerals consists of information respecting the use of olivine (because of its magnesium content) in connection with the manufacture of fertilizer at two plants, one operated in the T.V.A. region and the other in the State of Washington (Tr. 10, 12, 33, 222), and general statements indicating that some use has been made of olivine as a refractory material (see pp. 223, 224 of transcript of first hearing). However, the fact that some economic use has been made of certain olivine in other parts of the United States would not warrant a finding that the olivine on the Lake Placer claim has value, particularly since different deposits of olivine vary widely in chemical composition (Government's exhibit A), and there is nothing in the record to indicate that the olivine on the Lake Placer claim is similar in composition to the few deposits of olivine in other parts of the country which have been used for the purposes previously mentioned.

² All transcript references in this decision relate to the hearing which was held on November 8-10, 1949, unless otherwise indicated.

May 16, 1951

On the basis of the record, I conclude that the olivine and other magnesium-bearing rocks on the Lake Placer claim do not constitute "valuable mineral deposits."

II

A chromium-bearing mineral, which is sometimes referred to loosely as "chromite" but which is technically designated as chromohercynite (Tr. 10, 143, 144, 231), has also been found on the Lake Placer claim. The chromohercynite discovered on the claim has varied in size from small crystals to large boulders (Tr. 10, 16, 62, 63, 100, 149, 153, 154, 167, 175, 196, 212-14, 221).

Government witnesses characterized the chromohercynite on the claim as comprising, in the aggregate, small deposits (Tr. 19) that are insignificant in quantity (Tr. 102).

On the other hand, witnesses for the defendants testified that the fragments and boulders of this chromium-bearing mineral on the claim are very numerous (Tr. 149, 175, 213, 214, 221, 222).

Even if the defendants' evidence as to the substantial quantity of chromohercynite on the Lake Placer claim is correct, there still remains the question whether these fragments and boulders constitute "valuable mineral deposits."

The Government's evidence on this point was to the effect that there is no available market for the chromohercynite on the Lake Placer claim, and, accordingly, that the chromohercynite on the claim does not have any economic value (Tr. 18). It was also brought out by the Government that the percentage of chromium in the chromohercynite on the Lake Placer claim is insufficient for this mineral to be regarded as a practicable source of chromium (Tr. 18, 241, 242).

With respect to the issue of the value or lack of value of the chromohercynite on the Lake Placer claim, the defendants introduced evidence regarding the development in Australia of a new process for the production of chromic acid from "low-grade chromite" (Tr. 229-231), and general statements were made by witnesses for the defendants regarding placer mining for "chrome" in California (Tr. 207) and on the Oregon coast (Tr. 239). However, the record contains no evidence indicating that the chromohercynite fragments and boulders on the Lake Placer claim are similar to the substances involved in the Australia, California, or Oregon operations and could probably be developed into a profitable enterprise along those lines.

It must be held on the basis of the record that the fragments and boulders of chromohercynite on the Lake Placer claim are not "valuable mineral deposits."

III

The record indicates that there is a deposit of pyrrhotite on land adjacent to the Lake Placer claim, and that this formation, as observed on the nearby land, dips toward the Lake Placer claim (Tr. 182, 208-10).

There is a conflict in the evidence as to whether the pyrrhotite on the adjacent land has value as a source of sulphuric acid (Tr. 216, 242, 243). Assuming for the purpose of discussion that the pyrrhotite on the adjacent land does come within the category of "valuable mineral deposits," the existence of this mineral deposit cannot be regarded as establishing the validity of the Lake Placer claim. The presence of a valuable mineral deposit near a mining claim, plus geological indications that the deposit probably extends beneath the surface of the claim, does not warrant a finding that the claim is valid. A valid location of a mining claim can be made only if a valuable mineral deposit has been discovered within the limits of the claim itself.³

IV

Perhaps it should be stated that the area of the Lake Placer claim seems clearly to have value for use as a camp site and means of access in connection with the mining and development of adjacent lode claims (Tr. 19, 67, 185-187). This circumstance, however, would not support a finding in favor of the validity of the Lake Placer claim.

As indicated above, it is only the discovery of a valuable mineral deposit within the boundaries of a claim that makes the location of the claim valid under the mining laws. Consequently, the usefulness of the area of a claim in connection with the development of mineral deposits on nearby lands is not sufficient to meet the statutory test by which the validity or invalidity of a mining claim is determined.

V

After having carefully considered the record in this proceeding, it is my conclusion that the evidence in the record warrants a finding that the minerals discovered on the Lake Placer claim are of such a nature that they lack value as marketable commodities,⁴ and, accordingly, that such minerals do not come within the category of "valuable mineral deposits" which would "justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine."⁵ This being so, the Acting Director of the Bureau of Land Management was correct in holding the Lake Placer mining claim to be invalid.

³ *Waskey v. Hammer*, 223 U. S. 85, 90-91 (1912); *United States v. Telluride Holding Corp., and Telluride Mines, Inc.*, A-25727 (January 18, 1950).

⁴ See *Big Pine Mining Corp.*, 53 I. D. 410 (1931).

⁵ *Cameron v. United States*, 252 U. S. 450, 459 (1920).

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Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Acting Director is affirmed.

MARTIN G. WHITE,
Solicitor.

ISSUANCE OF PATENTS UNDER THE RECREATION ACT

Administrative Discretion—Racial Discrimination.

Where a statute places upon this Department the mandatory duty of conveying lands to persons who meet certain requirements prescribed in the legislation, the Department cannot impose upon such persons additional requirements or convey to them rights less than those provided for by Congress.

Where a statute vests in an administrative officer the discretionary power to grant or deny requested benefits, he may qualify grants of such benefits by making them subject to conditions deemed by him to be in the public interest.

The Secretary of the Interior has authority to insert in patents issued under the Recreation Act a provision barring racial discrimination in the use of the land.

M-36071

MAY 16, 1951.

TO THE SECRETARY.

This responds to the request for my opinion on the question whether the Secretary of the Interior has authority to insert in patents issued pursuant to the Recreation Act of June 14, 1926 (43 U. S. C., 1946 ed., sec. 869), a provision barring racial discrimination in the use of the land.

The Recreation Act confers upon the Secretary of the Interior the power, *inter alia*, to convey to States under exchange or sale arrangements, and to sell to counties and municipalities, public lands classified as chiefly valuable for recreational purposes. It expressly provides that any patent issued under the statute shall—

* * * contain a reservation to the United States of all mineral deposits in the land conveyed and of the right to mine and remove same, under regulations to be established by the Secretary, and a provision for reversion of title to the United States upon a finding by the Secretary of the Interior that for a period of five consecutive years such land has not been used * * * for park or recreational purposes, or that such land or any part thereof is being devoted to other use * * *.

It is difficult to furnish a categorical answer to the inquiry stated above. The difficulty arises from the fact that two pertinent legal principles point the way to different conclusions.

In the first place, consideration must be given to the well-established rule stated by the Supreme Court in the following language:

* * * the officers of the Land Department, being merely agents of the government, have no authority to insert in a patent any other terms than those of

conveyance, with recitals showing compliance with the conditions which the law prescribes. Could they insert clauses in patents at their own discretion they could limit or enlarge their effect without warrant of law. The patent * * * carries with it such rights to the land * * * as the law confers, and no others, and these rights can neither be enlarged nor diminished by any reservations of the officers of the Land Department, resting for their fitness only upon the judgment of those officers. * * *¹

This language seems to indicate that the Secretary of the Interior can insert in a patent issued under the Recreation Act only those restrictive provisions which are expressly authorized in that act. Under that approach to the problem now under consideration, a negative answer to the question stated at the outset of this memorandum would be necessary, inasmuch as the Recreation Act does not expressly authorize the inclusion in patents of a provision prohibiting racial discrimination in the use of the land.

However, the situation with which we are concerned at the present time can be distinguished from the problems before the Supreme Court in the case from which the above quotation was taken and in the other cases where the Court has adhered to the same rule.² In those cases, the Court was dealing with statutory provisions which placed upon this Department the mandatory duty of conveying public lands to persons who met certain requirements prescribed in the controlling legislation. Obviously, in such a situation the personnel of this Department could not, in effect, amend the particular statutes by imposing upon persons who met the statutory requirements further conditions not prescribed by Congress, or by conveying to them rights less than those which the Congress had stated they should receive.

The Recreation Act is not such a statute. It imposes no mandatory duty upon the Secretary of the Interior to convey lands to States, counties, or municipalities. Instead, the Recreation Act expressly states that the Secretary of the Interior is authorized, "in his discretion," to exchange land with States, and that the sale of land to States, counties, and municipalities is also "in the discretion" of the Secretary.

This leads to the second of the two legal principles previously mentioned. It is to the effect that where a statute vests in an administrative officer the discretionary power to grant or deny requested benefits, he may qualify grants of benefits by making them subject to conditions deemed by him to be in the public interest, so long as such conditions are not prohibited by law.³ This rule extends to

¹ *Davis's Administrator v. Weibbold*, 139 U. S. 507, 527-528 (1891).

² *Deffebach v. Hawke*, 115 U. S. 392, 406 (1885); *Burke v. Southern Pacific R. R. Co.*, 234 U. S. 669, 699-705 (1914).

³ *Southern Pacific Co. v. Olympian Co.*, 260 U. S. 205, 208 (1922); *Sunderland v. United States*, 266 U. S. 226, 235 (1924); *Lupo v. Zerbst*, 92 F. 2d 362, 365 (5th Cir., 1937); *United States v. Wright*, 56 F. Supp. 489, 492 (E. D. Ill., 1944).

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the exercise of discretionary power to grant interests in Government-owned lands.⁴

Whether proposals for the exchange of land with States, or for the sale of land to States, counties, and municipalities, under the Recreation Act shall be consummated on behalf of the United States is wholly discretionary with the Secretary of the Interior. This being so, I believe that the Secretary could, if he desired, condition his approval of such proposals upon the inclusion in patents issued under the Recreation Act of a provision prohibiting racial discrimination in the use of the land. Such a provision is not prohibited by any Federal statute, and it would, I believe, be upheld by the courts⁵ if it were to be inserted by the Secretary in patents issued under the Recreation Act.

The fact that Congress, in the Recreation Act, has specifically provided for the inclusion in patents of provisions respecting the reservation of mineral rights, the failure of the patentee during a 5-year period to use the land for park or recreational purposes, and the use of the land by the patentee for other purposes does not, in my judgment, indicate an intention upon the part of Congress to exclude from patents issued under the act other restrictive provisions deemed by the Secretary of the Interior to be in the public interest. In view of the complete discretion that is vested in the Secretary to determine whether public land shall or shall not be conveyed to States, counties, and municipalities under the Recreation Act, the provisions prescribed by Congress for inclusion in patents issued under the act are evidently intended to be a minimum, rather than an exclusive, list of restrictions to be imposed upon patentees.

As indicated above, I believe that the question stated in the first paragraph of this memorandum should be answered in the affirmative.

MASTIN G. WHITE,
Solicitor.

APPEAL OF MORRISON-KNUDSEN COMPANY, INC.

CA-80

Decided June 4, 1951

Contract Appeal—Delay—Articles 4 and 9 of Standard Construction Contract—Finality of Contracting Officer's Interpretation of Specifications.

In an area where rocky terrain and down timber are apt to be encountered in any clearing operation, the fact that, after the disappearance of a snow

⁴ *United States v. Golden Gate Bridge and Highway Dist.*, 37 F. Supp. 505, 510 (N. D. Calif., 1941).

⁵ See *Air Terminal Services, Inc. v. Rentzel et al.*, 81 F. Supp. 611, 612 (E. D. Va., 1949).

blanket covering the site of a transmission line right-of-way which a contractor had agreed to clear, it was revealed that the site contained more down timber and rocks than the contractor had anticipated would not bring the case within the scope of article 4 of the standard form of construction contract.

Article 9 of the standard form of construction contract, in making provision for delays due to unforeseeable causes, does not relate to happenings which have already occurred, or to conditions already in existence, as of the time when a bid on the work is submitted.

Where the operations of a contractor under a construction contract were halted for 128 days due to a "stop order" from the Government, the granting of an extension of 10 days in the time for performance, to cover the delay incident to the reassembling of its labor force by the contractor, would be proper.

Where a contract with an agency of the Department contains a provision stating that "On all questions regarding * * * the interpretation of these specifications, the decision of the contracting officer shall be final," this office is without authority to review an interpretation of a specification that has been made by a contracting officer.

ADMINISTRATIVE DECISION

This is an appeal dated April 17, 1950, by the Morrison-Knudsen Company, Inc., Boise, Idaho, from the findings of fact and decision of the contracting officer of the Bonneville Power Administration dated March 20, 1950, under Contract No. Ibp-5571, Specifications No. 4149. The contract provided for clearing the right-of-way for the Scenic-Index section of the Grand Coulee-Snohomish 230 kv. transmission line, approximately 16.4 miles in length, located in King County, Washington, together with the construction of certain access roads.

Invitations to bid on the work were sent out on March 1, 1948, and the appellant's low bid of \$354,912 was accepted by the Government. The formal contract was dated April 12, 1948, and the notice to proceed was received by the contractor on April 26, 1948.

The standard form of construction contract (U. S. Standard Form No. 23, revised April 3, 1942) was utilized in making the contract.

Paragraph 102 (1) of the specifications provided for completion of performance by the contractor within 210 days from the date of the receipt of the notice to proceed, or on or before November 22, 1948. By Change Order A dated October 25, 1948, and Change Order B dated August 26, 1949, the contract price was revised upward to \$365,387, and the contractor was granted a 14-day extension of time to December 6, 1948, for the completion of the work. The Government ordered the contractor to stop work at the close of business on December 3, 1948, and ordered the resumption of work on April 11, 1949. Performance under the contract was not completed until October 18, 1949.

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Paragraph 102 (4) of the specifications fixes liquidated damages at \$50 for each day of delay by the contractor beyond the final date specified for performance.

By a letter to the Bonneville Power Administration dated January 16, 1950, the contractor requested an extension of time sufficient to cover all the delay.

The contracting officer, in his findings of fact and decision, determined that the contractor was entitled to an extension of 128 days to cover the period while the stop order was in force (December 3, 1948, to April 11, 1949), a 14-day extension due to the two change orders, an extension of 31 days for the unusually rainy weather of the 1948 construction season, and a 3-day extension in connection with the contractor's cooperation with other contractors. Thus, the time for performance was extended 176 days from the original completion date of November 22, 1948. Liquidated damages for the remainder of the delay (154 days) were assessed by the contracting officer in the total amount of \$7,700.

The contractor, in its letter dated April 17, 1950, notifying the Secretary of the Interior of its appeal, requested additional time in which to amplify the appeal. This request was granted and the amplified appeal reached the Office of the Solicitor on August 21, 1950. As the Bonneville Power Administration had expressed a desire to comment on the additional material furnished by the contractor, this office held the record open for that purpose until March 14, 1951.

I

One of the contentions made by the appellant on this appeal is that the contracting officer should have granted it an additional extension of time, to the extent of 50 calendar days, for the delay allegedly attributable to encountering unexpected conditions in the performance of the work.

This contention is based upon the fact that, according to the appellant, the site of the work was covered by a heavy blanket of snow during the period that was available to the appellant for the examination of the site (i. e., between the date of the issuance by the Government of its invitation for bids and the date on which the submission of bids on the work was required), with the result that the appellant was unable to make an adequate examination of the site.

The appellant states (p. 2 of amplified appeal) with regard to this point that—

* * * There can be no dispute that the presence of this heavy snow pack was such that it effectively concealed the actual condition of the terrain and down timber on the terrain. Because of this concealment by the snow pack,

it was impossible for the contractor to exactly ascertain the ground conditions as they actually existed and the contractor was forced to rely by its mature and experienced knowledge of the conditions generally existent in the area, in judging and evaluating the expected conditions of the terrain and down timber at the particular site and the effect of these conditions on the prosecution of the work covered by the contract.

The appellant indicates (p. 4 of amplified appeal) that the subsequent disappearance of the snow revealed—

* * * the presence of a greater than reasonable expected amount of down timber and * * * larger than usual area of rough, rugged and bare rock which caused the construction of access roads to the site to be more costly, both as to time and money, then [sic] should have obtained.

The appellant relies upon articles 4 and 9 of the contract to support its request for an extension of time because of the conditions which were revealed as to the nature of the terrain and the extent of the down timber after the disappearance of the snow blanket.

Article 4 of the contract relates to "Changed conditions," and it provides that—

Should the contractor encounter * * * during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. * * *

It is clear at the outset that the clause in article 4 relating to "sub-surface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications" is inapplicable to the facts of the present case. The appellant has not pointed to any inconsistency between the representations on the drawings or in the specifications, on the one hand, and the conditions discovered during the progress of the work, on the other hand.

Moreover, rocky terrain and down timber are conditions that are apt to be encountered in any clearing operations within the area covered by this contract. Hence, they are not "conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications"; and they are not made so by the circumstance that the contractor in this case allegedly encountered more of each than it had expected to encounter.

In addition, it may be noted that the contractor did not follow the procedure plainly required in article 4 for the assertion of a claim under that article.

Article 9 of the contract provides, *inter alia*, that the contractor shall not be—

* * * charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without

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the fault or negligence of the contractor, including, but not restricted to, acts of God, * * * floods, * * * and unusually severe weather * * *

It is plain that this portion of article 9, in referring to "unforeseeable causes," speaks of the future. Here, the conditions complained of by the appellant as causes of delay—i. e., the down timber and the rocky terrain (and even the snow blanket which allegedly concealed them)—were already in existence at the time when the appellant submitted its bid and, of course, at the time when the contract was entered into between the Government and the appellant. Hence, article 9 is inapplicable to the point under discussion here.

II

The appellant also urges that the time for performance should be extended 96 calendar days (instead of 31 calendar days, as determined by the contracting officer) because of the cumulative effect of bad weather prior to the making of the contract upon the inclement weather of the 1948 construction season.

As previously indicated, the contract was entered into on April 12, 1948, and the notice to proceed was received by the contractor on April 26, 1948.

The contractor contends (pp. 5-6 of amplified appeal) that—

The cumulative effect of the above normal precipitation of the preconstruction season of 1947-1948 with the effect of the above normal precipitation of April, May, June and the first half of July 1948 caused the site of the work to remain in such a saturated condition that very little constructive work could be performed prior to July 15, 1948, a delay to even starting the work in a constructive fashion until that date. * * *

Article 9 of the contract, heretofore quoted in pertinent part, permits the contracting officer to extend the time of performance because of "delays in the completion of the work due to unforeseeable causes * * * including * * * unusually severe weather * * *."

It has been emphasized, however, that the cause of delay in each instance must be "unforeseeable." *United States v. Brooks-Callaway*, 318 U. S. 120 (1943). All conditions existing at the time of the bidding must be evaluated by a bidder and reflected in the amount of the bid.

The appellant, therefore, answered its own argument when it admitted (p. 6 of amplified appeal) that—

It is true that weather conditions of the preconstruction season were known at the time of computing and presentation of bids but it was impossible to foresee and evaluate the cumulative effect of these above normal weather conditions with the above normal precipitation of the early part of the construction season.

The contracting officer authorized an extension of 31 calendar days because of unusually severe weather during the construction season.

covered by the contract. It was only such weather that could be taken into account under article 9 of the contract.

III

The appellant requests a 10-day extension of time to cover the period necessary for reconvening its work force after the resumption of work on April 11, 1949, following the stop-order of December 3, 1948.

A contractor cannot be expected, under such circumstances, to retain its labor force at a construction site indefinitely in expectation of a resumption of work. Therefore, upon resumption of work after a lengthy cessation of work due to an order of the Government, a reasonable time should be permitted for the contractor to reassemble its workmen and resources.

After the halt of 128 days in this case, an extension of 10 days to compensate for the time required by the appellant for the full resumption of work appears to be reasonable and should be allowed.

IV

The appellant contends, finally, that the contracting officer erroneously interpreted the specifications in determining that the contractor was only entitled to a 3-day extension of time in connection with the appellant's cooperation with other contractors.

Paragraph 306 of the specifications provides:

On all questions regarding * * * the interpretation of these specifications, the decision of the contracting officer shall be final.

In view of paragraph 306, the decision of the contracting officer on a question involving the interpretation of the specifications is final, and this office is without authority to review it. See *United States v. Moorman*, 338 U. S. 457 (1950).

V

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 24, Order No. 2509; 14 F. R. 307), the decision of the contracting officer dated March 20, 1950, is modified so as to permit an additional 10-day extension of time, but is otherwise affirmed.

MASTIN G. WHITE,
Solicitor.

AUTHORITY OF THE SECRETARY RESPECTING THE APPROVAL OF CONTRACTS BETWEEN INDIAN TRIBES AND ATTORNEYS

Organized Tribes—Unorganized Tribes—Secretarial Discretion.

A statutory provision empowering organized Indian tribes to employ counsel subject only to the requirement that the choice of counsel and the fixing of

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fees shall be subject to the approval of the Secretary of the Interior supercedes, as to such employment, a prior statutory provision regulating in general terms the contractual relations of Indian tribes with private parties.

Where contracts between unorganized Indian tribes and attorneys are required by statute to comply with certain specific requirements in addition to the requirement of receiving the approval of the Secretary of the Interior, the Secretary's authority is not limited to examining such contracts for compliance with the specific statutory requirements, but he may consider such a contract as a whole, including any provisions unrelated to the specific statutory requirements, and approve or withhold approval as his judgment may dictate.

Under a statutory provision governing the employment of attorneys by organized Indian tribes, which imposes the requirement of receiving the approval of the Secretary of the Interior only as to the choice of counsel and the fixing of fees, approval by the Secretary of contractual provisions wholly unrelated to the choice of counsel or the fixing of fees is not required, and the Secretary cannot properly require the inclusion in such a contract of provisions having no reasonable relationship to the choice of counsel or the fixing of fees.

Under a statutory provision empowering organized Indian tribes to employ attorneys subject to the approval of the Secretary of the Interior respecting the choice of counsel and the fixing of fees, the Secretary is vested with wide discretion in determining what factors should be taken into account in passing upon the choice of counsel and the fixing of fees, and he may grant or withhold his approval upon the basis of whatever grounds he deems to be properly related to these matters, provided his action is not arbitrary or capricious.

The exercise of authority by the Secretary of the Interior over contracts between Indian tribes and attorneys does not constitute an unlawful interference with the free choice of counsel by Indian tribes, since the Secretary's authority is conferred by statutes enacted by the Congress in the exercise of the plenary power possessed by that body over Indian tribes and their affairs.

M-36069

JUNE 22, 1951.

TO THE SECRETARY.

This responds to your request for an expression of my opinion on the scope of your authority under the applicable statutory provisions relating to the approval of contracts between Indian tribes and attorneys. It appears from your memorandum that the opinion is desired as a guide in the preparation and promulgation of new regulations governing the negotiation, execution, and consideration of such contracts.

The applicable statutory provisions are now codified in 25 U. S. C., 1946 ed., as sections 81 and 476.

Section 81 is derived from section 2103 of the Revised Statutes, which, in turn, was based upon section 3 of the act of March 3, 1871 (16 Stat. 544, 570), and sections 1 and 2 of the act of May 21, 1872 (17 Stat. 136). Section 81 reads, in part, as follows:

No agreement shall be made by any person with any tribe of Indians * * * for the payment or delivery of any money or other thing of value, in present or

in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

* * * * *
 Second. It shall * * * bear the approval of the Secretary of the Interior * * * indorsed upon it.

* * * * *
 All contracts or agreements made in violation of this section shall be null and void * * *.

Section 81 does not specifically mention contracts between Indian tribes and attorneys. Such contracts are, however, plainly covered by the section if they provide for services relating to any one or more of the matters specified in the section. It appears, in fact, that the impositions to which the Indians had been subjected by unscrupulous members of the legal profession constituted an impelling reason for the enactment of the legislation. As was pointed out in a memorandum dated January 22, 1946 (59 I. D. 189), from the Solicitor to the Commissioner of Indian Affairs—

This legislation was enacted to protect the Indians in their contractual dealings with attorneys and agents, a field in which the Indians were not without sad experience. The Indians had previously been the victims of monstrous and shameful frauds perpetrated by agents and attorneys, and this legislation which drastically curtailed the right to contract was obviously intended as an extreme measure designed to remedy what was regarded as a great evil. * * *

Section 476 is derived from section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984, 987). This section authorizes Indian tribes to organize, and it provides that the constitution adopted by any Indian tribe "shall vest in such tribe or its tribal council" the power, among others, "To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior."²

As the earlier statutory provision (section 81) is, by its terms, applicable to all tribes residing within the territorial limits of the United States, and as the later statutory provision (section 476) is applicable only to those tribes which have adopted constitutions under it, the

¹The omitted words are "and the Commissioner of Indian Affairs." By Reorganization Plan No. 3 of 1950 (15 F. R. 3174), the authority to approve contracts conferred on the Commissioner by section 81 was transferred to the Secretary.

²The employment of counsel for the prosecution of claims of the tribes against the United States is dealt with in section 15 of the Indian Claims Commission Act of August 13, 1946 (60 Stat. 1053, 25 U. S. C., 1946 ed., sec. 70n). This section requires that attorneys for Indian tribes which are organized under the provisions of the Indian Reorganization Act be selected pursuant to the constitution and bylaws of the tribes. These constitutions and bylaws usually paraphrase the provisions in section 476 which require the choice of counsel and the fixing of fees to be approved by the Secretary of the Interior. The employment of attorneys by other claimants is subjected to the provisions of section 81.

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question arose whether section 476 had superseded section 81 with respect to contracts between organized tribes and attorneys. In answering this question in the affirmative, the Solicitor said in a memorandum dated January 23, 1937:³

* * * To the extent of any conflict or inconsistency, it is clear that section 16 is controlling and supersedes the prior law. Requirements of the prior law not directly inconsistent or conflicting may also be superseded as to the particular kind of contract to which section 16 applies if such was the intent of Congress. A consideration of the general background and purpose of the Indian Reorganization Act leaves no doubt that the purpose of the statutory provision in question was to increase the scope of responsibility and discretion afforded the tribe in its dealings with attorneys. Earlier drafts of legislation contained provisions limiting the fees that might be charged. After considerable discussion before the Senate Committee (Hearings before the Committee on Indian Affairs, United States Senate, 73rd Congress, 2d session, S. 2755 and S. 3645, part 2, pages 244-247), it was decided that the Secretary of the Interior should have the added power to approve or veto the choice of counsel. This discussion would have been futile and the statutory provision would have been meaningless if the intention had been to make those contracts subject to the provisions of section 81, Title 25 of the Code.

As the view expressed by the Solicitor in 1937 appears to be correct, the question of the scope of the Secretary's authority must be separately considered under sections 81 and 476.

I

Section 81 prescribes a number of requirements which a contract of employment between an Indian tribe and an attorney must meet, in addition to the requirement that the contract must bear the Secretary's approval indorsed upon it. These specific statutory requirements operate to limit the Secretary's discretion, in that none of them can be dispensed with by the Secretary,⁴ and it is the duty of the Secretary to see to it that the requirements are met by any contract coming before him for approval. It does not follow, however, that the Secretary's authority is limited to examining proposed contracts for compliance with the statutory requirements, and that the Secretary cannot withhold his approval for reasons unrelated to the specific requirements of the statute. The contract itself may well contain many provisions which are unrelated to the specific statutory requirements, and inasmuch as the contract in its entirety is subject to the Secretary's approval, the Secretary clearly would be authorized to consider the contract as a whole, including any provisions unrelated to the specific statutory requirements, and approve or withhold approval as his judgment might dictate.

³ The text of this memorandum appears in the Handbook of Federal Indian Law at p. 281.

⁴ 18 Op. Atty. Gen. 498 (1886); *McMurray v. Choctaw Nation*, 62 Ct. Cl. 458 (1926), cert. denied 275 U. S. 524.

It was the purpose of Congress in section 81 to provide statutory safeguards that would be binding on the Indians and their attorneys, and on the Department as well, but Congress apparently realized the impracticability of covering by statute in advance every factor that should be taken into account and, hence, provided for the additional safeguard of Secretarial approval. In doing so, it was the evident intention of the Congress to enable the Secretary to condition his approval upon such other requirements as he might deem to be necessary for the protection of the Indians.

In *La Motte v. United States*, 254 U. S. 570 (1921), the Supreme Court upheld the validity of regulations promulgated by the Secretary of the Interior for the purpose of prescribing in advance the terms and conditions which leases should contain in order to meet his approval under a statute which authorized the Indians to make such leases "subject only to the approval of the Secretary of the Interior." After pointing out that the failure of the leasing provision to say anything about regulations was unimportant, and that the power to make regulations for the purpose of carrying the leasing provision into effect would be implied, the Supreme Court said (p. 577):

Without doubt the regulations prescribed operate to restrain the Indian from leasing in his own way and on his own terms, but this is not a valid objection. If there were no regulations, the disapproval of a lease satisfactory to him would work a like restraint. Manifestly some restraint is intended, for the leasing provision does not permit the Indian to lease as he pleases, but only with the Secretary's approval.

Statutes providing for the approval by the Secretary of the Interior of contracts made by Indians are numerous, and, whenever the courts have been called upon to consider such statutes, they have uniformly held that the power of approval carries with it wide discretionary authority to determine the conditions under which approval will be granted. Thus, in *Anicker v. Gunsburg*, 246 U. S. 110 (1918), the Court had under consideration the power of the Secretary under section 2 of the act of May 27, 1908 (35 Stat. 312), which provided that leases of restricted lands of members of the Five Civilized Tribes in Oklahoma might be made with the approval of the Secretary of the Interior, under rules and regulations prescribed by him, and not otherwise. The Court said (p. 119):

The statute is plain in its provisions—that no lease, of the character here in question, can be valid without the approval of the Secretary. Such approval rests in the exercise of his discretion; unquestionably this authority was given to him for the protection of Indians against their own improvidence and the designs of those who would obtain their property for inadequate compensation. It is also true that the law does not vest arbitrary authority in the Secretary of the Interior. But it does give him power to consider the advantages and

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disadvantages of the lease presented for his action, and to grant or withhold approval as his judgment may dictate.

See, also, to the same general effect, *Davis v. Williford*, 271 U. S. 484 (1926).

Of course, the authority conferred upon the Secretary by section 81, although very broad, is not unlimited. Approval of a contract could not be withheld capriciously or on purely arbitrary grounds. Moreover, as the power to contract is vested in the tribe, the Secretary could not initiate or make a contract for a tribe.⁵ Subject to these limitations and to the observance of the specific requirements imposed by section 81, it is my opinion that the discretionary authority vested in the Secretary under that section is broad enough to empower the Secretary to grant or withhold approval of contracts between Indian tribes and attorneys in accordance with his view as to what is necessary or advisable in order to protect the interests of the Indians, and to prescribe in advance the terms and conditions which a contract between an Indian tribe and legal counsel must contain in order to meet with the Secretary's approval.

II

The provisions of section 476 which are pertinent to the present inquiry circumscribe the limits of the Secretary's authority by confining the requirement of Secretarial approval, insofar as contracts between organized Indian tribes and attorneys are concerned, to the choice of counsel and the fixing of fees. In this respect, the section differs materially from section 81, under which the contract in its entirety is subject to Secretarial approval. The considerations which may be invoked for withholding approval under section 476 from a contract made by an organized tribe with legal counsel must, therefore, bear some reasonable relationship either to the choice of counsel or to the fixing of fees. For example, as contract provisions wholly unrelated to these matters are not subject to the Secretary's approval, any attempt to require the inclusion in a contract of such unrelated provisions as a condition precedent to the granting of Secretarial approval would be beyond the scope of the Secretary's authority under this section. See *Work v. Mosier*, 261 U. S. 352 (1923); *Ballinger v. Frost*, 216 U. S. 240 (1910).

Wide discretion is, however, vested in the Secretary with regard to determining what considerations ought to be taken into account under section 476 in passing upon the choice of counsel and the fixing of fees.

⁵ *Mott v. United States*, 283 U. S. 747, 751 (1931); *Midland Oil Co. v. Turner*, 179 Fed. 74 (8th Cir., 1910); *Jennings v. Wood*, 192 Fed. 507 (8th Cir., 1911).

Subject to the traditional limitations against arbitrary or capricious action, I believe that the Secretary may grant approval to or withhold approval from a contract between an organized tribe and legal counsel for any reason or reasons which he deems to be properly related to the choice of counsel or the fixing of fees.⁶ Similarly, the Secretary may promulgate regulations prescribing in advance the terms and provisions relating to these matters which a contract between an organized tribe and legal counsel must contain in order to receive his approval.

III

The foregoing discussion outlines in general terms the scope of the Secretary's authority under sections 81 and 476 and the limitations upon the exercise of such authority. This general treatment is necessary for the reason that it is not possible to foresee and provide for every possible contingency or eventuality that might call for the exercise of the Secretary's authority under these respective sections. The views expressed will, I hope, supply guidance for the formulation of regulations governing the employment of attorneys by Indian tribes.

In the formulation of the views stated in this memorandum, consideration has been given to the comments made by lawyers and others on a memorandum that was issued by the Commissioner of Indian Affairs on November 9, 1950. None of the arguments made, and none of the authorities cited, in those comments requires that the views expressed above be modified in any way.

One erroneous thought which appears to run through the various comments received by the Department should be mentioned. This is that the exercise by the Secretary of authority such as I have outlined would interfere with the free choice of counsel by Indian tribes and, therefore, would be unlawful. This objection is without merit, since the Secretary's authority is derived from statutes validly enacted in the exercise of the plenary power possessed by Congress over the property and affairs of Indian tribes. *Lone Wolf v. Hitchcock*, 187 U. S. 553, 565 (1903); *United States v. Kagama*, 118 U. S. 375, 384 (1886); *United States v. Sandoval*, 231 U. S. 28, 43 (1913); *United States v. Nice*, 241 U. S. 591 (1916); *Bowling v. United States*, 233 U. S. 528 (1914); *Winton v. Amos*, 255 U. S. 373 (1921). That this power extends to the regulation of the contract relations between Indians and private parties is no longer open to question. See *Pasley v. Union National Bank*, 278 Pac. 621 (Okla., 1928); *Osage County Motor Co. v. Pappin*, 281 Pac. 217 (Okla., 1929); *Osage County Motor Co. v. United States*, 33 F. 2d 21 (8th Cir., 1929), *cert. denied* 280 U. S. 577.

Whether the existing restrictions on the power of Indian tribes to

⁶ See, in this connection, *Southern Pacific Co. v. Olympian Co.*, 260 U. S. 205, 208 (1922); *Sunderland v. United States*, 266 U. S. 226, 235 (1924).

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employ attorneys of their own choice should be removed in whole or in part is a matter for determination by the Congress. Until that body acts, the existing restrictions are binding on the Indians and their attorneys, and also on the Department.

MASTIN G. WHITE,
Solicitor.

SCRIP APPLICATIONS FOR SUBMERGED COASTAL LANDS

Scrip — Valentine — Gerard — Crow — Porterfield — Wyandott — Sioux Half-Breed — Forest-Lieu Selections — Soldiers' Additional — Public Lands—Withdrawals—Mineral Lands—Surveys—Occupancy Under Claim of Right.

Tidelands and lands beneath navigable inland waters belong to the States within whose boundaries they are situated (or to the States' grantees).

Only public lands can be selected under scrip.

The term "public lands," when used in Federal provisions of law relating to the disposition of land, does not include submerged coastal lands.

Submerged coastal lands cannot be selected under public-land scrip.

Withdrawn lands are not subject to scrip locations.

Land known to be valuable for oil is "mineral" land for the purpose of scrip location.

Submerged coastal lands are not subject to being surveyed.

Land occupied by another person under a claim of right cannot be selected under scrip as vacant or unoccupied or unappropriated land.

M-36084

JUNE 25, 1951.

TO THE SECRETARY.

This responds to your oral request for an expression of my opinion regarding the action that the Department should take upon certain pending applications¹ to select, under various types of land scrip, areas of submerged lands. The earliest of these applications was filed on August 8, 1946, and the latest was filed on May 12, 1951. One of the applications involves submerged lands along the coast of Louisiana, two involve submerged lands along the Texas coast, and the remainder involve submerged lands along the coast of California. The areas applied for vary in size from 40 acres to 1,932 acres.

It will be assumed, for the purpose of this discussion, that all the submerged lands involved in the applications previously mentioned lie seaward of the line of ordinary low tide along the respective coasts of Louisiana, Texas, and California, and that they are all situated outside the inland waters of those States, so that they are subject to the

¹ Los Angeles 064374, 068714, 069033, 069107, 084333, 082864, 084334, and 084335, BLM 022310 and 022604, and Misc. 61877.

paramount rights, full dominion, and power of the United States under the Supreme Court's decisions in *United States v. Louisiana*, 339 U. S. 699 (1950), *United States v. Texas*, 339 U. S. 707 (1950), and *United States v. California*, 332 U. S. 19 (1947). To the extent that any of these areas may actually comprise tidelands (i. e., lands situated between the lines of high and low tide) or lands beneath navigable inland waters, they belong to the States within whose boundaries they are situated (or to the States' grantees), under the doctrine announced by the Supreme Court in *Pollard's Lessee v. Hagan*, 3 How. 212 (1845), and related cases.

I

It seems advisable at the outset to summarize briefly the different provisions of law which are involved in this problem.

Four of the pending applications are based, in whole or in part, upon scrip issued under the act of April 5, 1872, for the relief of Thomas B. Valentine (17 Stat. 649). That act authorized the Federal courts to adjudicate the merits of the claim of Thomas B. Valentine to a certain area of land in Sonoma County, California, under a Mexican grant. It was provided in section 3 of the act (p. 650) that—

* * * a decree under the provisions of this act, in favor of said claim, shall not affect any adverse right or title to the lands described in said decree; but in lieu thereof, the claimant, or his legal representatives, may select, and shall be allowed, patents for an equal quantity of the unoccupied and unappropriated public lands of the United States, not mineral, and in tracts not less than the subdivisions provided for in the United States land laws; and, if unsurveyed when taken, to conform, when surveyed, to the general system of United States land surveys; and the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, shall be authorized to issue scrip, in legal subdivisions, to the said Valentine, or his legal representatives, in accordance with the provisions of this act: * * *

Four of the pending applications are based upon scrip issued under the act of February 10, 1855, for the relief of the heirs of Joseph Gerard (10 Stat. 849). That act provided that the three children of Joseph Gerard—

* * * are hereby permitted to enter, each one of them severally, or his or their heirs, one section of the public lands, without the payment of any consideration for said three sections * * *. [P. 850.]

One of the pending applications is based in part upon scrip issued under the act of February 18, 1907, relating to the land claim of Isaac Crow (34 Stat. 896). That act, in section 1, confirmed the patents theretofore issued by the United States, and the previous allowances of bona fide homestead entries, on lands within the specified sections comprising Isaac Crow's land claim, and then provided in section 3 (p. 897):

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That the heirs, assigns, or legal representatives of Lucretia Williams shall have the right to enter upon any of the public lands of the United States, not mineral, and subject to homestead entry, a quantity of land equal in extent to that heretofore patented or entered * * * within the sections described in the first section of this Act * * *.

One of the pending applications is based in part upon a warrant issued under the act of April 11, 1860, for the relief of the legal representatives of Charles Porterfield, deceased (12 Stat. 836). That act authorized the Secretary of the Interior to issue to the executors of Robert Porterfield, deceased, warrants covering 6,133 acres of land—

* * * according to the usual subdivisions of the public surveys, in quantities not less than forty acres; to be by them located on any of the public lands which have been or may be surveyed, and which have not been otherwise appropriated at the time of such location * * *; to be selected and located in conformity with the legal subdivisions of such surveys * * *.

Four of the pending applications are based in part upon rights claimed with respect to forest-lieu selections under the act of June 4, 1897 (30 Stat. 11, 36), as modified. The 1897 act provided:

That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent * * *.

By the act of June 6, 1900 (31 Stat. 588, 614), Congress required that all subsequent selections of land made under the 1897 act—

* * * shall be confined to vacant surveyed nonmineral public lands which are subject to homestead entry * * *.

The provisions of law relating to forest-lieu selections were repealed by the act of March 3, 1905 (33 Stat. 1264). However, Congress subsequently enacted the act of September 22, 1922 (42 Stat. 1017), for the relief of persons who had relinquished land to the Government under the 1897 act but who had failed to record their selections prior to March 3, 1905, or whose lieu selections were finally rejected. The 1922 act provided that such persons might, under certain circumstances, be permitted to select "not to exceed an equal value of national-forest land, unoccupied, surveyed, and nonmineral in character * * *" (which obviously is inapplicable here), or might, under other stated circumstances, select—

* * * surveyed, nonmineral, unoccupied, unreserved public lands of approximately equal area and value * * *.

Six of the pending applications are based, in whole or in part, upon soldiers' rights to enter additional lands for homestead purposes under section 2306 of the Revised Statutes (43 U. S. C., 1946 ed.,

sec. 274).² That section provided, in effect, that any person who had served honorably in the armed forces of the United States during the Civil War for at least 90 days, and who had theretofore (i. e., prior to June 22, 1874) entered under the homestead laws a quantity of land less than 160 acres—

* * * shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres.

Two of the pending applications are based in part upon Wyandott scrip issued under article 9 of the treaty of January 31, 1855 (10 Stat. 1159, 1162), which provided:

* * * that each of the individuals, to whom reservations were granted by the fourteenth article of the treaty of March seventeenth, one thousand eight hundred and forty-two, or their heirs or legal representatives, shall be permitted to select and locate said reservations, on any government lands west of the States of Missouri and Iowa, subject to preemption and settlement * * *

Three of the pending applications are based in part upon scrip issued under the act of July 17, 1854 (10 Stat. 304). Section 1 of that act authorized the half-breeds or mixed-bloods of the Sioux tribe to relinquish their interests in a certain area of land, and it authorized the President, upon such relinquishment—

* * * to cause to be issued to said persons * * * certificates or scrip for the same amount of land to which each individual would be entitled in case of a division of the said grant or reservation *pro rata* among the claimants—which said certificates or scrip may be located upon any * * * unoccupied lands subject to preemption or private sale * * *: *And provided further*, That no transfer or conveyance of any of said certificates or scrip shall be valid.

II

In beginning our consideration of the legal question posed by the applications mentioned above, it is apparent immediately that none of the applications can be approved by the Department unless it is determined, in the first instance, that the lands applied for are public lands.

An examination of the pertinent statutory provisions set out in part I of this memorandum reveals that the provisions upon which the Valentine, Gerard, Crow, Porterfield, and forest-lieu applications are based specifically indicate that only "public lands" may be selected in pursuance of the rights granted by those statutes.

In the case of the applications which involve soldiers' additional homestead rights under section 2306 of the Revised Statutes, it is pertinent to state that section 2306 comprises part of chapter 5, entitled "Homesteads," of title XXXII of the Revised Statutes, and that it is

² This section was derived from section 2 of the act of April 4, 1872 (17 Stat. 49), as amended by the act of June 8, 1872 (17 Stat. 333).

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plainly stated elsewhere in the chapter that only "public lands" are subject to homestead entry (see, in particular, Rev. Stat. secs. 2289, 2304; 43 U. S. C., 1946 ed., secs. 161, 271).

Insofar as the applications which rely in part upon Wyandott scrip are concerned, it will be noted that, under the language used in the treaty, such scrip may only be used for the selection of lands "subject to preemption and settlement." At the time of the making of the Wyandott treaty on January 31, 1855, the basic provisions of law governing the preemption of and settlement upon lands of the United States indicated specifically that only "public lands" were subject to preemption and settlement (sec. 10 *et seq.*, act of September 4, 1841, 5 Stat. 453, 455). Hence, the right of selection granted by article 9 of the treaty was necessarily limited to public lands.

With regard to the applications which are based in part upon Sioux half-breeds' scrip, it will be observed that the pertinent statutory language indicates that such scrip may be used only for the selection of "lands subject to preemption or private sale." Since none of the land sought in these applications has ever been made subject to private sale, there is left for interpretation only the phrase "lands subject to preemption." With regard to this point, the discussion of Wyandott scrip in the preceding paragraph is equally applicable to Sioux half-breeds' scrip.

It is clear, therefore, that the several provisions of law which are involved in this problem granted rights of selection only with respect to public lands.

The term "public lands," when used in Federal provisions of law relating to the disposition of land, does not include land lying seaward of the line of high tide along the coast. *Mann v. Tacoma Land Co.*, 153 U. S. 273, 284 (1894); *Shively v. Bowlby*, 152 U. S. 1, 49-50 (1894); see *Borax Consolidated, Ltd., et al. v. Los Angeles*, 296 U. S. 10, 17, 22 (1935).

The *Mann* case, cited in the preceding paragraph, is particularly significant for our purpose. That case involved the validity of locations made under Valentine scrip on lands situated below the line of high tide in Commencement Bay, Territory of Washington. The Supreme Court held, in effect, that the locations were invalid because only public lands could be located under Valentine scrip and the lands involved in the case were not in the category of public lands.³

As all of the lands sought in the applications involved here are situated seaward of the line of high tide along the coast, they are not within the category of public lands. For that reason, apart from

³ As Washington was a Territory at the time when the locations were made, title to the lands was vested in the United States at the time of the locations. Hence, the lands were Government lands but not "public lands."

any others, all the applications must be rejected by the Department.

This conclusion is not negated by the decision of the Supreme Court in the case of *Hynes v. Grimes Packing Co.*, 337 U. S. 86 (1949). That case involved, among other things, the interpretation of section 2 of the act of May 1, 1936 (49 Stat. 1250; 48 U. S. C., 1946 ed., sec. 358a), which authorized the Secretary of the Interior to designate as an Indian reservation any "public lands which are actually occupied by Indians or Eskimos" within the Territory of Alaska (as well as other lands specified in the section). Under the authority of this section, the Secretary issued an order which established the Karluk Indian Reservation on Kodiak Island and, where the reservation fronted on Shelikof Strait, placed within the boundaries of the reservation coastal waters to a distance of 3,000 feet from the shore line at mean low tide. The Court held that the statutory phrase previously quoted authorized the Secretary to include the coastal area within the boundaries of the reservation. The Court expressed the view that an interpretation of the statutory language so as "to describe only land above mean low tide is too restrictive in view of the history and habits of Alaska natives and the course of administration of Indian affairs in that Territory." (Pp. 110-111.) The Court stressed that section 2 of the 1936 act "gives no power to the Secretary to dispose finally of federal lands" or "to convey any permanent title or right to the Indians in the lands or waters of Karluk Reservation" (p. 102); and the Court indicated that it was the temporary character of the reservation, and the circumstance that the governing statutory provision was part of a series of legislative enactments designed to improve the economic condition of Alaskan natives, that distinguished the *Hynes* case from other cases holding that the term "public lands" does not include lands below the high watermark along the coast. (Pp. 115-116.)

At the present time, we are considering the meaning of the term "public lands" when used in provisions of law providing for the final disposition of lands. There is not involved here any mere matter of temporary occupancy and use of Government lands, such as the Supreme Court said was involved in the *Hynes* case. Hence, we must interpret the term "public lands" in accordance with the Supreme Court's earlier decisions dealing with statutes providing for the final disposition of land.

III

Furthermore, if the lands involved in the pending applications were otherwise available for selection under scrip, it would be necessary to consider the effect upon them of the general withdrawal order of November 26, 1934. (Executive Order 6910, 43 CFR 297.11), or

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the general withdrawal order of February 5, 1935 (Executive Order 6964, 43 CFR 297.12), or Executive Order 9633 dated September 28, 1945 (10 F. R. 12305).

The order of November 26, 1934, declared that "all of the * * * public land in the States of * * * California * * * be, and it hereby is, temporarily withdrawn from * * * location * * * or entry, and reserved for classification, and pending determination of the most useful purpose to which such land may be put * * *." The order of February 5, 1935, effected a similar withdrawal of "all the public lands" in Louisiana and certain other States. These withdrawals were, in effect, ratified by Congress in section 7 of the Taylor Grazing Act, as amended (43 U. S. C., 1946 ed., sec. 315f).

Executive Order 9633 declared that the lands "of the continental shelf beneath the high seas but contiguous to the coasts of the United States * * * be and they are hereby reserved, set aside, and placed under the jurisdiction and control of the Secretary of the Interior for administrative purposes, pending the enactment of legislation in regard thereto."

Therefore, even if the lands involved in the pending applications were otherwise available for selection under scrip, they would have been withdrawn prior to the respective dates on which the pending applications were filed, and they would still be subject to such withdrawals. So long as lands are withdrawn, they cannot be selected under scrip. See *Chotard v. Pope*, 12 Wheat. 586 (1827).⁴

IV

Perhaps it should also be mentioned that most of the areas involved in these scrip applications were, at the times when the several applications for such areas were filed, known to be valuable for oil. By this, it is meant "that the known conditions at that time were such as reasonably to engender the belief that the lands contained oil of such quality and in such quantity as would render its extraction profitable and justify expenditures to that end." *United States v. Southern Pacific Co. et al.*, 251 U. S. 1, 13-14 (1919): Such areas constitute "mineral" lands, within the meaning of that term as used in public-land statutes. *Burke v. Southern Pacific Railroad Co.*, 234 U. S. 669, 676-679 (1914); *United States v. Southern Pacific Co. et al.*, *supra*.

In this connection, it may be noted that the governing statutory provisions under which the Valentine, Crow, and forest-lieu applica-

⁴ Insofar as public lands within the States of California and Louisiana withdrawn by the orders of November 26, 1934, and February 5, 1935, are concerned, the Secretary of the Interior is authorized, in his discretion, to examine and classify such lands as "proper for acquisition in satisfaction of any outstanding * * * scrip rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification * * *." (43 U. S. C., 1946 ed., sec. 315f.) Of course, no action along this line has been taken with regard to the lands involved in the present applications.

tions are based specifically state that only nonmineral lands may be selected under such provisions of law.

With regard to the applications involving soldiers' additional homestead rights under section 2306 of the Revised Statutes, it has previously been mentioned that this section comprises part of chapter 5 of title XXXII of the Revised Statutes. Another section in the same chapter (Rev. Stat. 2302, 43 U. S. C., 1946 ed., sec. 201) provides that "mineral lands" are not subject to entry under the provisions of the chapter.

The provisions of law under which the Gerard, Wyandott, Sioux, and Porterfield applications were filed do not expressly exclude mineral lands from their scope. However, all the present applications involving Gerard, Wyandott, and Sioux half-breeds' scrip seek to obtain lands situated within the State of California, and the Supreme Court has held that, as early as 1853, the policy of the United States with respect to the disposition of mineral lands in California had been developed to the point where such lands were impliedly excluded from the scope of legislation providing in general terms for the disposition of public lands, and were affected only by legislation expressly providing for the disposition of mineral lands. *Mining Company v. Consolidated Mining Co.*, 102 U. S. 167, 174-175 (1880). The several provisions of law involved in the present Gerard, Wyandott, and Sioux applications are all subsequent in time to 1853.⁵ Consequently, it seems clear that mineral lands in California were, by implication, excluded from the scope of such provisions of law.

It appears that the 1860 statute providing for the issuance of Porterfield warrants, although it does not expressly exclude mineral lands, would be subject to the general rule of implied exclusion stated by the Supreme Court in the case of *United States v. Sweet*, 245 U. S. 563, 567 (1918), as follows:

In the legislation concerning the public lands it has been the practice of Congress to make a distinction between mineral lands and other lands, to deal with them along different lines, and to withhold mineral lands from disposal save under laws specially including them. * * *

It is unnecessary in the present instance, however, actually to pass upon the question of the implied exclusion of mineral lands from the scope of the provisions of law mentioned in the two preceding paragraphs, or upon the question whether surface rights to the mineral lands involved in the several applications under consideration in this

⁵ The promise made in article XIV of the treaty of March 17, 1842 (11 Stat. 581, 583), to grant lands to the Wyandotts related only to "lands * * * set apart for Indian use." The grant of the right to select public lands subject to preemption and settlement was not made until 1855.

⁶ *Cf. Work v. Louisiana*, 269 U. S. 250, 255 (1925), in which the Supreme Court said that "There was, however, no such settled policy in 1849 and 1850 * * *."

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memorandum might be obtained by the applicants under the provisions of 30 U. S. C., 1946 ed., sec. 121. As indicated in other parts of this memorandum, the rejection of the applications is required for reasons apart from the mineral character of lands.

V

There are other pertinent points which might be discussed. For example, there is the circumstance that the lands applied for have never been surveyed and are not subject to being surveyed (see *Mann v. Tacoma Land Co.*, *supra*) and, consequently, could not be selected under provisions of law limiting selections to surveyed lands or lands subject to survey. Also, there is the further fact that a number of the areas applied for were, at the times when the respective applications were filed, occupied under claims of right by other persons engaged in the production of oil from such areas and, accordingly, apart from the other considerations mentioned in this memorandum, would not have been subject to selection as "vacant" or "unoccupied" or "unappropriated" lands. See *Atherton v. Fowler*, 96 U. S. 513, 519 (1877); *Cowell v. Lammers*, 21 Fed. 200, 203 (C. C. D. Calif., 1884).

It seems unnecessary, however, to extend the discussion, because it is already clear that, for reasons previously given, the Department must reject all the pending applications.

MASTIN G. WHITE,
Solicitor.

APPEAL OF SOUTHWEST WELDING & MANUFACTURING CO.

CA-105

*Decided June 29, 1951***Contract Appeal—Article 15 of Standard Construction Contract—Finality of Contracting Officer's Interpretation of Specifications.**

An appeal lies to the head of the Department by a contractor who has made a proper and timely protest from a decision of the contracting officer under a paragraph in the specifications which reads: "Except for such protests or objections as are made of record in the manner herein specified and within the time limit stated, the records, rulings, instructions, or decisions of the contracting officer shall be final and conclusive."

Article 15 of the standard form of construction contract does not preclude the head of the Department from deciding an issue as to both the facts and the law. A decision as to the facts is final and conclusive. A decision as to the law may be reviewed by the courts. *United States v. Moorman distinguished.*

An ambiguous provision in a contract drafted by the Government will be construed against the Government.

ADMINISTRATIVE DECISION

Southwest Welding & Manufacturing Co., 3201 West Mission Road, Alhambra, California, filed an appeal dated July 7, 1950, from a decision of the contracting officer of the Bureau of Reclamation, dated June 8, 1950, which denied its claim for additional compensation under Contract No. I2r-17982 dated April 30, 1948.

There is no controversy regarding the facts. The claim was denied on the ground that, under the contracting officer's interpretation of the terms of the contract, the Government was not obligated to make the additional payment.¹

The contract provided that the contractor should supply the materials and perform the work for "furnishing, delivering, field-welding and radiographing steel penstocks" for the Davis power plant, Davis Dam Project, Arizona-Nevada.² All work other than that described in the contract was to be performed by another (construction) contractor.

I

The Construction Engineer at Davis Dam, in a letter dated February 1, 1949, informed the contractor that, under the contract specifications, it was required to furnish all work, materials, and equipment for field girth welds "which includes alining and holding the edges." In a letter to the Chief Engineer dated March 15, 1949, the contractor submitted a lump-sum bid, in the amount of \$29,003.20, "to cover the necessary fitting-up and tack welding" of the five 22-foot-diameter penstocks at Davis Dam. At the same time, the contractor protested that the latter work had not been included in its original bid "for the reason that it was not specifically stipulated as part of our obligation under the contract," and that "the performance of this work on our part is not to be construed as our acceptance of the liability to perform this operation under the existing contract. It is understood that the payment for same is to be mutually agreed upon."³

In a letter dated March 25, 1949, the Chief Engineer affirmed the position of the Bureau, as previously expressed in the Construction Engineer's letter to the contractor, and concluded that—

* * * Under this interpretation we have no authority for making an adjustment under the contract as proposed by you. * * * However, the matter is a question of interpretation of the specifications and if after completion of all or a part of the work, you submit cost records which the Construction Engineer

¹ For this reason, no formal finding of facts summarizing the case is in the record.

² Article 1 of the contract made Specifications No. 2104, Change Notice No. 1 dated February 16, 1948, and all schedules and drawings part of the contract.

³ The amount was originally estimated by the contractor at \$29,897, subject to a later and more accurate calculation. The amount was finally set at \$29,003.20. See memorandum dated January 18, 1950, from the Chief Engineer to the Commissioner of Reclamation.

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at Davis Dam can check and agree with, we would be agreeable to submitting the matter to the General Accounting Office for a decision.

On February 8, 1950, the Department transmitted to the Comptroller General a request of the Bureau of Reclamation for his decision "on the question of law as to whether, under the provisions of * * * [the contract] the contractor is required to align the edges of penstock sections as part of the field welding of girth joints without payment by the Government of additional consideration therefor."⁴

In a ruling (B-92813) dated April 17, 1950, the Comptroller General sustained the action of the contracting officer in denying the claim. The pertinent portions of his ruling are the following:

If, heretofore, there existed any doubt as to the correct interpretation of the foregoing provisions concerning disputes—which, generally, are made a part of the standard form Government construction contract—under circumstances similar to those prevailing in this case, such doubt was resolved by the Supreme Court of the United States in the case of *United States v. Moorman*, 338 U. S. 457, decided January 9, 1950, which clearly is decisive of the questions here involved. [Italics supplied; page 4.]

In view of the quoted opinion of the Supreme Court in the foregoing case, the conclusion is required that whether or not the question herein presented be one of law or fact it is clearly within the ambit of paragraph 13 of the specifications, and, consequently, a question solely for determination by the contracting officer, with the right of appeal by the contractor as provided in Article 15 of the contract. Accordingly, since the contracting officer has decided that it is the contractor's responsibility, under the specifications, to align the penstock sections for the girth welding operations, there is no legal basis for paying the contractor any amount in excess of the contract price for the required work involved. [Page 6.]

I find it difficult to apply the language quoted from the Comptroller General's ruling to the problem with which we are concerned without first clarifying certain procedural steps which differentiate the *Southwest* contract from the contract involved in the *Moorman* case (referred to hereafter as the *Moorman* contract).

Both contracts were executed on the standard form prescribed for Government construction contracts (U. S. Standard Form No. 23 (Revised)). Article 15 of that form contains the usual "disputes" clause, which is to the effect that "except as otherwise specifically provided," all disputes "concerning questions of fact arising under this contract" shall be decided by the contracting officer, subject to the right of the contractor to take a written appeal within 30 days to the head of the department concerned, or his duly authorized representative, "whose decision shall be final and conclusive upon the parties thereto."

⁴ Attached to the request was a memorandum dated January 18, 1950, from the Chief Engineer to the Commissioner of Reclamation, which set forth the contracting officer's views in the matter. The substance of the memorandum is discussed *infra*, at page 8.

In each of the cases under discussion, the specifications, attached to and made part of the contract, contained additional "protest" provisions. The language employed in each instance provided that the contractor, if it should consider any work demand to be outside the requirements of the contract, or any ruling of the contracting officer or of the inspectors to be unfair, should submit a protest in writing to the contracting officer, who should render a written decision thereon. However, the language used in the respective documents with regard to the finality of the contracting officer's action differentiates the two contracts.

Paragraph 2-16 of the specifications of the *Moorman* contract provided that—

* * * If the contractor is not satisfied with the decision of the contracting officer, he may, within thirty days, appeal in writing to the Secretary of War, whose decision or that of his duly authorized representative shall be final and binding upon the parties to the contract. * * *

In that case, the Supreme Court reversed a decision of the Court of Claims, which had overruled the action of the authorized representative of the Secretary of War in denying the contractor's claim for additional compensation. The Supreme Court's decision was based on the ground that, where a contract contains a provision such as that previously quoted from paragraph 2-16 of the specifications, the Court of Claims has no jurisdiction to hear the case.⁶

Paragraph 13 of the specifications in the *Southwest* case, on the other hand, provides that—

* * * Except for such protests or objections as are made of record in the manner herein specified and within the time limit stated, the records, rulings, instructions, or decisions of the contracting officer shall be final and conclusive.

The Southwest Welding & Manufacturing Co. filed a timely protest in writing against the ruling of the contracting officer denying its claim for additional compensation, as required by paragraph 13 of the specifications, and it took a timely appeal from his written decision to the head of the Department, as required by article 15 of the contract. When these two provisions of the contract are read together, it becomes evident that there was no finality in the action of the contracting officer.

It should be observed that article 15 of the standard form of construction contract, as presently written, does not preclude the head of a department (or his designee), upon the filing of an appeal under the circumstances just reviewed, from deciding issues as to both the law and the facts. Such a decision is final and conclusive as to the facts at issue, but the article reserves to the appellant a right to resort

⁶ See *United States v. Moorman*, 338 U. S. 457, 459 (1950).

⁷ *United States v. Moorman*, 338 U. S. 457, 463 (1950).

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to the courts, if he so desires, for a final decision on any questions of law.

In accordance with this view, I conceive the sense of the ruling of the Comptroller General to be that the head of a department (or his designee) may decide questions concerning both the law and the facts on any contract appeal coming before him. Where the contractual provisions are similar to those in the *Moorman* contract, the decision of the head of the department is final and conclusive. Where the contractual provisions are similar to those in the *Southwest* contract, his decision is final and conclusive as to the facts, but the contractor will still be free to resort to the courts for a final decision with regard to any question of law.

Therefore, it is my conclusion that the appeal of the Southwest Welding & Manufacturing Co. is properly before the head of the Department for consideration and decision.

II

In a memorandum dated January 18, 1950, the Chief Engineer succinctly stated to the Commissioner of Reclamation the issue involved in this appeal—

* * * The controversy arises almost entirely from differing interpretations of the specifications provisions by the contractor on one hand and this office on the other. Based upon our interpretation of the specifications as a whole and more particularly Paragraphs 39, 41, and 50, it is our opinion that the contractor is required to align the edges of penstock sections as part of the field welding of girth joints without payment by the Government of additional consideration therefor. It is the contractor's interpretation based primarily upon Paragraphs 29 and particularly subsection (c) thereof, 30, and 50 that he is obligated only to provide all equipment necessary to *hold* the edges of the sections in line for welding. It is the contractor's position that alinement of edges is one operation, whereas holding the edges in alinement thereafter is a wholly different operation. * * *

On appeal, the contractor states that the ruling complained of is based upon the premise that it was obligated to "align and tack weld" ⁷ the sections prior to field welding; that if this premise is correct, the undertaking of the Government, as stated in paragraph 29 (c) of the specifications, to install the sections in final position ready for field welding becomes meaningless; that paragraph 29 (c) of the speci-

⁷ The terms "align" and "tack weld" are recognized as having technical meanings peculiar to hydraulic engineering operations. To "align" has been described as meaning to place the sections of a penstock that are to constitute a pipe in proper position, horizontally and vertically, and to hold them in circular section, so that the edges of the plates at the girth joints will be in a proper position for welding operations. To hold "in circular section" requires the placing of bracing devices, known as "spiders," inside the pipe, so that it will not be distorted in its circumferential precision by reason of its own weight. To "tack weld" means to make small spot welds in order to hold component parts of a member together until they can be welded more permanently.

cations was an undertaking by the Government, without cost to the contractor, to install all penstock sections and materials in their ultimate position and arranged for immediate field welding; and that the paragraph did not require the contractor, after the Government had performed what it regarded to be its obligation, to make another change in the position of the penstock sections, that is, to set them up or to "align" them, and to do preliminary (tack) welding, before undertaking the permanent welding. (Appeal, page 7.)⁸

The contractor contends further on appeal that, as a matter of fact, not only did it have to place each section in final position, but several sections had been so firmly placed in improper position by the Government (i. e., the construction contractor) at the time when the structural supports were applied that it was forced to undo this work before the sections could be placed in final position and permanently welded; that if the contractor "had to change the position of the sections, as it did, they were not placed in *final* position by the Government"; that if the contractor "had to tack-weld them, as it did," they were not "made *ready* by the Government for field welding"; and that, therefore, the Government "shifted its obligation to perform these tasks to appellant." (Appeal, page 8.)

The specifications contain a section entitled "Special Conditions," paragraph 15 of which restates "The requirement" of the contract and emphasizes the fact that the penstocks are to be furnished "but not installed" by the contractor. The paragraph concludes with the statement that "Installation of the penstocks is not covered by these specifications." The fact that the operations of the fabrication contractor were to be meshed with the operations of at least one other contractor, which was to carry on the heavier phases of the work, is emphasized throughout the specifications.⁹ Careful scrutiny of the

⁸ In a letter dated March 15, 1949 (Appeal, exhibit A), the contractor submitted its bid for the alleged additional work, in accordance with an agreement reached at a meeting held on March 11, 1949, but stated that, "this work not being included in our bid for the reason that it was not specifically stipulated as part of our obligation under the contract. * * * Labor to fit-up and tack weld (56) sections of 22' 0" diameter penstocks at Davis Dam, comprising fitting, tacking, measuring, trimming, rebeveling where necessary, all penstock sections; placing and removing scaffolding and replacing in adjacent tunnels, placing and moving welding machines, hoists, compressors, and other equipment including time losses; all in accordance with attached detail sheet. All sections to be placed in final position by others. [Price bid: \$29,697, lump sum] * * * The amount indicated pertains to those sections which are covered by our contract to weld the girth joints, comprising a total of (56) sections in the five tunnels, including the upstream girth seam of the (5) downstream expansion joints. Our price is also based upon the assumption that the sections are to be placed by the present contractor in accurate position, similarly to Sections 1-1 and 1-2 placed in Tunnel No. 1.

⁹ Additional examples are: Subparagraph 29 (b), which provides that the Government, without cost to the contractor, will transport all completed penstock sections and penstock materials from this contractor's field fabrication plant or storage yard to the installation site; subparagraph (i), which provides that the Government will clean, paint, and embed the penstocks in concrete; paragraph 33, which provides that "The Government will unload railroad cars, and will haul all plate steel, partly fabricated pipe materials, and supplies required for the fabrication of the penstock sections," etc.

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special conditions prescribed under the subheading entitled "Manufacture" discloses no instance in which the term "to align" or the term "to tack weld" was used, and no such work requirements are otherwise described.

The controversial provisions of the specifications appear to be the following:

29.—*Work and materials to be furnished by the Government.*—The Government will, without cost to the contractor, perform the following:

* * * * *

(c) Install all penstock sections and materials in final position ready for field welding of the girth joints.

* * * * *

(h) Cut make-up section to proper length, and field weld the downstream girth joints for the downstream expansion joints and all further downstream sections as shown on Drawings Nos. 351-D-1104 and 351-D-1105.

* * * * *

30.—*Work and materials to be furnished by the contractor.*—The contractor shall furnish all work and materials required for the fabrication and field welding of the penstocks, except work and materials furnished by the Government in accordance with the provisions of paragraph 29, including the following:

* * * * *

(d) Weld and radiograph all field girth joints in accordance with the provisions of paragraph 50, except those provided for in subparagraph 29 (h) above.

(e) Furnish all welding rods, labor, and equipment required for the girth joints which he is required to weld.

* * * * *

50.—*Field welding of girth joints.*—After the Government has transported the penstock materials to the point of installation and installed the sections in final position, the contractor shall weld and radiograph all field girth joints except those specifically noted in subparagraph 29 (h). All field welding and weld testing shall be performed in accordance with the applicable provisions of these specifications. The contractor shall provide all labor, materials, welding electrodes, test plates, and equipment required for the field welding of the girth joints and shall provide all equipment necessary to hold the edges of the sections in line for welding. The cost of field welding and radiographing the girth joints as described herein shall be included in the lump-sum price bid in the schedule.

The aligning and tack welding of penstock sections in an undertaking of the magnitude of the Davis Dam are generally recognized as necessary preliminaries to the final field-welding operation. In the absence of any language specifying that these preliminary operations were to be undertaken by the contractor, the Government's obligation to "install" the penstock sections "in final position ready for field welding," as prescribed by subparagraph 29 (c), would appear to encompass such operations.

Support for this view is found in subparagraph 29 (h), which discloses that this contractor was not the exclusive welding agent for the Government. That provision indicates that the Government (through the construction contractor, or another contractor) was to

perform the field welding of the downstream girth joints. Since the preliminary operations of alignment and tack welding undoubtedly were required in connection with the field welding of the downstream girth joints, it is not unreasonable to assume, in the absence of specific language indicating otherwise, that all preliminary alignment and tack-welding work would be done by the Government.

Paragraph 30, in specifying the work to be performed by the contractor, fails to mention aligning or tack-welding work. It speaks in terms of work to be done and materials to be furnished for the "fabrication and field welding" of the penstocks, and specifically excludes work and materials to be furnished by the Government, as specified by paragraph 29. This paragraph confirms the conclusion expressed immediately above regarding paragraph 29.

Paragraph 50 describes in some detail the operation of field welding the girth joints. Again, no specific mention is made of a requirement to align or tack weld the penstocks. It might be argued by those familiar with such work that the penultimate sentence should imply such a requirement. The ambiguity of the language, however, appears to negative such a construction. After stating, unequivocally, that the contractor shall provide all labor, material, welding electrodes, test plates, and equipment required for the field welding of the girth joints—the unquestioned obligation of the contract—the sentence continues, "and shall provide all equipment necessary to hold the edges of the sections in line for welding." The emphasis here is on the furnishing of equipment. Unquestionably, a penstock fabricator would possess the equipment necessary for the installation of penstocks, and it would not be unusual for the fabricator to arrange for the use of this equipment by other contractors. This procedure is suggested as having been followed in the present case, where the fabrication contractor was, by a specific provision in the first sentence of paragraph 50 of the specifications, excluded from participating in the installation of the penstocks.

The Government draftsmen could easily have amplified the provisions of paragraph 50 to make clear the obligation of the contractor by specifying that it was to furnish not only the equipment, but also the labor and other materials necessary for the performance of the aligning and tack-welding operations, if the Government so intended. However, as presently drafted, the paragraph is not clear-cut and unambiguous.

Paragraphs 39 and 41, dealing with the technicalities of the fabrication of the penstocks and of the welding operations, respectively, were also considered by the contracting officer in reaching his conclusion to deny the contractor's claim. No aid was derived from an

August 31, 1951

examination of these provisions toward the solution of the problem with which we are here concerned.

The contract and the specifications in the present case were prepared by the Government. It is well established that "doubtful expressions" in a contract are to be "construed most strongly against the party who uses the language," and that a "contractor should not be held to have known or suspected that the representatives of the Government who drafted the specifications may have intended, without expressing it, to interpolate some * * * amplifying expression * * *." *Orino v. United States*, 111 Ct. Cl. 491, 518-519 (1948).

Although the matter is not wholly free from doubt, it is my conclusion that the construction accorded the language of the specifications by the contractor should be accepted, and that the claim, in the agreed amount of \$29,003.20, should be allowed.

III

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 24, Order No. 2509; 14 F. R. 307), the decision of the contracting officer dated June 8, 1950, is reversed, and the Southwest Welding & Manufacturing Co. is awarded additional compensation in the amount of \$29,003.20.

MASTIN G. WHITE,
Solicitor.

APPEAL OF ALLIS-CHALMERS MANUFACTURING COMPANY

CA-127

Decided August 31, 1951

Contract Appeal—Escalation Provision—Suspension of Contract—Adjustment of Costs.

The purpose of an escalation provision in a contract is to make available a means of adjusting the contract price to cover the fluctuations in costs during the performance period of the contract.

Where the Government directed a contractor to suspend operations under the contract for a period of time, and the contractor had no actual costs of performance during the period of the required suspension, cost data for the period of the enforced work stoppage should not be included in calculating the amount of the adjustment under an escalation provision in the contract.

ADMINISTRATIVE DECISION

Allis-Chalmers Manufacturing Company, Milwaukee, Wisconsin, filed an appeal dated May 17, 1951, from the action of the contracting

officer in denying the Company's claim for additional compensation in the amount of \$59,157.69 under the escalation provision (paragraph 25) of the specifications of Contract No. I2r-13541, entered into with the Bureau of Reclamation on October 7, 1941.

The contract, which is on Standard Form No. 32, provided for the delivery of four transformers for the Shasta Power Plant, Kennett Division, Central Valley Project, California, for the sum of \$279,700.

Article 1 of the contract provided that deliveries should be made as stated in the schedule of specifications, which fixed the delivery dates for the first, second, third, and fourth transformers as within 300, 315, 330, and 345 calendar days, respectively, after the receipt of notice of the award of the contract.

The delivery dates provided for in the contract were based in part on article 18 of the specifications, which provided that "In preparing bids, bidders should assume that such priority orders as may be necessary to avoid delay will be provided by the Government." The Bureau of Reclamation, however, was unable to secure the necessary priority orders for the work under the contract.

On September 8, 1942, the Bureau of Reclamation, in compliance with orders from the War Production Board to curtail work on contracts not essential to the national defense, notified the contractor to stop construction on three of the four transformers and to divert all materials accumulated for their construction to the Bonneville Power Administration.¹ The provision for these changes was covered by Order for Changes No. 2 dated September 10, 1942, which was transmitted to the contractor on January 8, 1943, and accepted by it on January 19, 1943.

The Government, by a letter dated November 30, 1945, which was received by the contractor on December 3, 1945, requested the contractor to resume work under the contract.

In findings of fact dated April 19, 1951, the contracting officer found, *inter alia*, that the delay in the performance of the contract attributable to the Government's stop-order of September 8, 1942, was excusable.

The present controversy apparently arose when the contracting officer, in computing the amount due the contractor under the escalation provision (par. 25 of the specifications), included in his calculations data respecting the cost of labor and materials during the period of the enforced work stoppage.

The appellant maintains that the act of the Government in ordering the cessation of the work constituted a suspension of the contract

¹ The first transformer was not affected by the stop order. It was shipped by the contractor on January 27, 1943, and the contractor in a letter dated July 28, 1950, waived its right to a price adjustment respecting this transformer.

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during the period of the enforced work stoppage and, therefore, that data respecting the cost of labor and materials during the period of the enforced work stoppage should be disregarded in calculating the amount of the adjustment due the contractor under the escalation provision.

The escalation provision states, in part, as follows:

Sixty (60) percent of the original total contract price for each item or part of an item for which a separate period of time for shipment is provided * * * shall be subject to adjustment at the completion of the contract to compensate for changes in the cost of labor and materials during the period of time allowed for the shipment of such item or part of an item. * * * *Provided*, That, if the time specified in article 1 of the contract is extended by the Government by the terms and conditions of the contract, the average hourly earnings for the months covered by such extension shall be included in the determination of the adjustments. * * *

As previously indicated, the question at issue is whether data respecting the cost of labor and materials during the period of the cessation of operations under the contract due to the Government's stop-order should be included or disregarded in calculating the amount due the contractor under the escalation provision. The exclusion of such data from the calculations in this case would be advantageous to the contractor, because such costs were lower during the period mentioned than during the subsequent period of the resumption of work under the contract.

It will be noted that the escalation paragraph provides for an adjustment to compensate for changes in the cost of labor and materials occurring "during the period of time allowed for * * * shipment." When this quoted phrase is considered in connection with the proviso respecting an extension of the contract by the Government, it seems to be clear that an adjustment under the escalation provision will be based upon, and only upon, data relating to the period or periods of time actually allowed the contractor by the Government for the performance of work upon the various items under the contract. Obviously, the period of time during which the contractor was compelled by the Government's stop-order to desist from performing work on three of the transformers cannot be regarded as time allowed by the Government for the performance of work on these items of the contract. Hence, data regarding the cost of labor and materials during the period covered by the stop-order in this case would not be pertinent in calculating the amount of the adjustment due the contractor on the contract price for the three transformers affected by the stop-order.

A consideration of the purpose of the escalation provision further supports the interpretation urged by the contractor. It is intended

to provide a means of adjusting the contract price to cover changes in labor and material costs occurring during the performance period of the contract. 20 Comp. Gen. 695 (1941); Williston on Contracts (revised ed.), vol. 9, pages 307-309. Of course, during the period when the performance of work on the three transformers was inhibited by the Government's stop-order, the contractor had no actual costs of performance as to these items, so that the inclusion of cost data as to that period would be based upon theoretical rather than practical considerations.

For the foregoing reasons, it is my conclusion that the construction accorded the language of the escalation paragraph by the contractor is correct, that data concerning the cost of labor and materials during the period of the work stoppage directed by the Government should not be included in calculating the amount of the adjustment under paragraph 25 of the specifications, and that the claim in the amount of \$59,157.69, if correctly calculated in accordance with the theory adopted in this decision, should be allowed.

Therefore, pursuant to the authority delegated to me by the Secretary of the Interior (sec. 24, Order No. 2509; 14 F. R. 307), the case is remanded to the contracting officer for the allowance of additional compensation to Allis-Chalmers Manufacturing Company in such amount as may be proper in accordance with the views expressed in this decision.

MASTIN G. WHITE,
Solicitor

RELEASED TIME FOR RELIGIOUS INSTRUCTION

First Amendment—Guam Organic Act.

A released-time program under which pupils are released from public schools for purposes of religious instruction is not *per se* unconstitutional as violative of the First Amendment.

A released-time program under which public-school pupils would be released during one period in the school day for religious instruction under the auspices of churches designated by their parents or guardians, but under which the religious instruction would be given at places provided by the churches and the public-school authorities would assume no responsibility for the recruitment of pupils for religious instruction, would keep no attendance records, would give no school credits, and would not approve or supervise the religious teachers, could be conducted without violating the First Amendment.

The First Amendment does not apply to Guam.

A released-time program for Guam, which would not involve the use to any extent, either directly or indirectly, of public money or property, could be conducted without violating section 5 (p) of the Guam Organic Act.

M-36106

OCTOBER 30, 1951.

TO GOVERNOR CARLTON SKINNER, OF GUAM.

I am informed by the Director of the Office of Territories that you have requested an expression of my opinion as to the validity of a released-time program proposed by the Bishop of Guam.

The materials which you have forwarded in this connection include correspondence between your office and the Bishop, in which the Bishop makes the following statement:

* * * the only kind of released time with which we are acquainted is the New York system. It is that system which we should like to have introduced on Guam in favor of the students of George Washington High School.

This statement is supplemented by a memorandum submitted by the Bishop, outlining the features of the proposed program. A Committee on Released Time for Religious Education will be formed, composed of representatives of the Roman Catholic Church and of other denominations if other churches wish to participate. The committee will prepare, print, and distribute, at its expense, to parents or guardians of pupils, cards which the parents or guardians may sign if they wish to request that the pupils under their care be released from school to receive religious education at a time to be agreed upon by the committee and the Department of Education of Guam. Pupils will present these cards, signed by the parents or guardians, to their teachers or to the principal of the school, as the Department of Education decides, and the pupils will then be released during the prescribed period. It is contemplated that this will be the last period of the school day. Religious instruction will be given off the school premises, at places provided by the participating churches and maintained at their expense. The school authorities will not distribute cards relating to the program, recruit pupils for religious instruction, keep any attendance records respecting the program, give school credits for religious courses, or approve or supervise religious teachers. The committee will assume full responsibility for teachers, textbooks, and religious instruction.

It is my understanding that George Washington High School is the only public high school on Guam.

The New York system of released time for religious education, referred to in Bishop Baumgartner's letter, has been recently and exhaustively reviewed by the courts of New York in *Zorach v. Clauson*. The Supreme Court of New York (99 N. Y. S. 2d 339), the Appellate Division of the Supreme Court (102 N. Y. S. 2d 27), and the New York Court of Appeals (303 N. Y. 161, 100 N. E. 2d 463) have each upheld a New York City released-time program. The proposed pro-

gram for Guam is substantially identical with the New York City program, except for the fact that the New York City program is based upon express statutory authorization for absences from school for religious observance and education, whereas there is no such statutory authorization respecting Guam.

By the same token, the proposed program for Guam differs substantially and significantly from the program examined by the Supreme Court of the United States in *People of the State of Illinois ex rel. McCollum v. Board of Education of School Dist. No. 71, Champaign County, Illinois*, 333 U. S. 203 (1948), and found to be constitutionally invalid. There, the classes in religious education were conducted in the regular classrooms of the public-school building. Pupils not enrolled for religious courses were required, during the periods of religious instruction, to leave their classrooms and go elsewhere in the building. Reports of attendance at and absence from the religious classes were made to the pupils' public-school teachers. The religious instructors were subject to the approval and supervision of the superintendent of schools. It was this plan of religious education which the Supreme Court found to be in contravention of the First Amendment to the Constitution, as applied to the States by the process of judicial construction of the Fourteenth Amendment.

The New York courts, in the *Zorach* case, construed the *McCollum* case as not holding that all released-time programs are *per se* unconstitutional, and concluded that the differences between the Champaign County, Illinois, program and the New York City program were such as to make the *McCollum* decision not controlling in the case before them. On the facts before the New York courts, it was concluded that the New York City program was not unconstitutional.

I share the view of the New York courts that the *McCollum* decision did not necessarily outlaw all released-time programs, and that programs similar to the New York City program (e. g., the proposed program for Guam) are not violative of the First Amendment. Moreover, it is pertinent to note that the First Amendment, against which the Champaign County, Illinois, and the New York City programs were measured in the *McCollum* and *Zorach* cases, is not applicable to Guam. See *De Lima v. Bidwell*, 182 U. S. 1 (1901); *Downes v. Bidwell*, 182 U. S. 244 (1901).

However, section 5 (p) of the Organic Act of Guam (64 Stat. 384) must be considered in connection with this problem. Section 5 (p) provides as follows:

No public money or property shall ever be appropriated, supplied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, sectarian institution, or association, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary as such.

November 14, 1951

As the proposed program of released time for religious instruction would not involve the use to any extent, either directly or indirectly, of public money or property in connection with the program, I do not believe that it would be in violation of section 5 (p) of the Organic Act of Guam.

It is my opinion, therefore, that the proposed released-time program, as outlined by Bishop Baumgartner, would not be legally objectionable.

MASTIN G. WHITE,
Solicitor.

JAMES DES AUTELS

A-26245

Decided November 14, 1951

Noncompetitive Oil and Gas Lease—Application—Tender of Rental and Filing Fee—Modification of Application—Special-Use Permits—Suspension of Application.

An application for a noncompetitive oil and gas lease must be rejected where the amount tendered to cover the filing fee and rental is insufficient for the acreage included in the application.

Where the amount tendered as filing fee and rental on an application for a noncompetitive oil and gas lease is insufficient for the acreage sought, and the application is subsequently modified to eliminate the excess acreage, the modified application is effective only as of the date of modification; and it is subordinate to proper applications filed by other persons during the interim.

The pendency of applications for a noncompetitive oil and gas lease on an area of land does not bar the Department from turning the land over to a military department for military use and thus making the land unavailable for oil and gas leasing.

Where land is unavailable for oil and gas leasing because it is being used under a 5-year special-use permit for a military purpose, applications for the leasing of such land will be rejected, rather than suspended pending the termination of the military use.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

James Des Autels has appealed to the head of the Department from a decision dated April 4, 1951, by the Assistant Director of the Bureau of Land Management, which rejected his application for an oil and gas lease because the land described in the application was included in an area used by the Department of the Army under a special-use permit for an antiaircraft firing range (Fort Bliss antiaircraft range No. 2).

Mr. Des Autels' application, which was filed on October 18, 1948, was for several subdivisions of public land, which were stated in the appli-

cation to contain an aggregate of 1,280 acres. The application was accompanied by a filing fee of \$16 and a payment of \$320 for one-half of the first year's rental, which were the correct amounts for 1,280 acres. Actually, the subdivisions described in the application are portions of irregular sections and contain a total of 1,333.02 acres. On the basis of the correct acreage of the land applied for, a filing fee of \$18 and a payment of \$333.50 for one-half of the first year's rental should have been submitted by Mr. Des Autels.

Upon discovering his error, Mr. Des Autels modified his original application so as to eliminate 320 acres from the area for which he had applied. After this modification, which was received by the land office on February 25, 1949, the moneys previously paid were more than sufficient for the required filing fee and rental on the reduced acreage.

The Department's regulations in effect at the time when the application was filed provided that "Any application not accompanied by the minimum [filing] fee and rental payment will be rejected." (43 CFR, 1946 Supp., 192.42.) Under this regulation, it was necessary to reject Mr. Des Autels' original application, regardless of the fact that he may have made an honest mistake as to the acreage covered by his application.

After Mr. Des Autels modified his application, it would have been appropriate to accept it as complying with the regulation. However, the modified application could have been considered as effective only when the modification was made, i. e., on February 25, 1949. *Jean C. James, A-25956* (November 16, 1950). Prior to that date, applications had been filed by other persons on December 30, 1948, for all the acreage remaining in Mr. Des Autels' modified application. Consequently, the modified application was subordinate to the applications filed on December 30, 1948.

On November 7, 1949, the land applied for was included in a 5-year special-use permit issued by this Department to the Department of the Army. It was desired by the Army for inclusion in an anti-aircraft firing range.

The fact that this Department had pending before it on November 7, 1949, applications from the appellant and other persons who desired to lease this land for oil and gas development did not bar the Department from turning the land over to the Department of the Army for military use. None of the applicants had any vested rights in the land. This was certainly true of the appellant, whose application was subordinate to other applications for the same land.

Applications for oil and gas leases on land subsequently included in use permits issued for military or naval purposes have uniformly been rejected by the Department. *Elgyn O. Snow, A-23980* (January

December 6, 1951

31, 1945); *E. R. Clark et al.*, A-24159 (July 9, 1945); see, also, *H. C. Thomas*, A-24610 (June 3, 1947).

In response to an inquiry from the Bureau of Land Management, the Department of the Army reported on February 26, 1951, that prospective military operations contemplated the exclusive use of the land involved in the present application; that the granting of oil and gas leases on land in the area would interfere with military operations; that the range is used every day and frequently at night; and, accordingly, that a dual use of the property would present insurmountable obstacles. The Department of the Army requested that applications for oil and gas leases on land in the area not receive favorable consideration.

In view of the considerations mentioned above, Mr. Des Autels' modified application was properly rejected.

Mr. Des Autels has requested that his application be suspended until such time as the Department of the Army no longer has any use for the land. Although the use permit involved in this case is for a 5-year term rather than for an indefinite period, the present indications are that it will be necessary to extend the permit at the end of the initial term. Moreover, even for a 5-year period, it is undesirable as a matter of administrative practice to have applications for oil and gas leases remain on file in a suspended status. The Department adheres here to the general rule that applications for oil and gas leases on lands that are not available for leasing will be rejected.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the decision of the Assistant Director of the Bureau of Land Management is affirmed.

MASTIN G. WHITE,
Solicitor.

EMIL USIBELLI AND A. BEN SHALLIT

A-26277 (Supp.)

Decided December 6, 1951

Coal Prospecting Permit—Preference-Right Coal Lease—Nenana Coal Field, Alaska—Appeal—Discretionary Action—Delegated Secretarial Authority.

Congress has not placed all land within the limits of the Nenana coal field, Alaska, outside the scope of the provisions of law relating to the issuance of coal prospecting permits on Alaskan land.

A coal prospecting permit may be issued on unclaimed land within the limits of the Nenana coal field, Alaska, if such land is undeveloped from the stand-

point of coal production and if prospecting or exploratory work on the land is necessary to determine the existence or workability of coal deposits on the land.

The determination by a bureau official, under a delegation of authority from the Secretary, that prospecting or exploratory work is necessary to determine the workability of coal deposits on an unclaimed, undeveloped area of public land involves an exercise of judgment, and an interested party who wishes the head of the Department to reverse such a determination must take timely action to bring the matter to the attention of the head of the Department.

Where a party protested against favorable action being taken by the Bureau of Land Management on an application from another person for a coal prospecting permit on an area of unclaimed, undeveloped land, and the protest was dismissed and the prospecting permit was issued because it was believed within the Bureau that prospecting work was necessary to determine the workability of coal deposits on the land, and no appeal from such actions was taken by the protestant to the head of the Department within the time allowed him for that purpose, the discretionary Bureau actions became final.

Where the holder of a coal prospecting permit, as the result of prospecting work done on the land covered by the permit, has demonstrated that the land contains coal in commercial quantities and has submitted an application for a preference-right coal lease on the land, the long-established policy of the Department permits the applicant to begin the commercial mining of coal from the land without awaiting the actual issuance of a lease to him.

Where the holder of a valid coal prospecting permit has complied with its terms and has demonstrated through his prospecting work that the land contains coal in commercial quantities, he is entitled as a matter of law to a lease on the land covered by the permit.

SUPPLEMENTAL DECISION

On October 24, 1951, Emil Usibelli filed a petition requesting, in effect, reconsideration of a departmental decision (A-26277) dated October 2, 1951, which dismissed Mr. Usibelli's protest against favorable action being taken on an application from A. Ben Shallit for a preference-right coal lease on 1,120 acres of land described as sec. 15 and the N $\frac{1}{2}$ and the SE $\frac{1}{4}$ of sec. 16, T. 12 S., R. 6 W., F. M., Alaska. This land is situated within the area commonly known as the Nenana coal field.

A brief in opposition to the petition was filed on behalf of Mr. Shallit. On October 31, 1951, counsel for both parties presented oral argument on the petition.

A coal prospecting permit on the land involved in this controversy was issued to Mr. Shallit under date of July 22, 1949. The issuance of the permit was based, and the request for the issuance to Mr. Shallit of a preference-right lease on the same land is based, upon the statutory provision which is codified in 48 U. S. C., 1946 ed., sec. 444, and which reads in pertinent part as follows:

Where prospecting or exploratory work is necessary to determine the existence or workability of coal deposits in any unclaimed, undeveloped area in

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Alaska, the Secretary of the Interior may issue prospecting permits for a term of not to exceed four years, under such rules and regulations and conditions as to development as he may prescribe, * * * for not to exceed two thousand five hundred and sixty acres, and if within the time specified in said permit the permittee shows to the Secretary of the Interior that the land contains coal in commercial quantities, the permittee shall be entitled to a lease * * * for all or any part of the land in his permit.

I

In the first place, the petitioner contends that, as a matter of law, coal prospecting permits cannot be issued under section 444 of Title 48, United States Code, on any land within the area commonly known as the Nenana coal field, and, therefore, that the document which was issued to Mr. Shallit in 1949 was only a purported prospecting permit which was ineffective to confer any rights upon him respecting the land covered by the document.

It is asserted by the petitioner, in connection with this point, that none of the land within the limits of the Nenana coal field comes within the category of an "undeveloped area," as that term is used in section 444 of Title 48, United States Code. In support of this view, the petitioner refers to the portions of sections 1 and 3 of the act of October 20, 1914 (38 Stat. 741, 742; 48 U. S. C., 1946 ed., secs. 432, 434), which provide, respectively, as follows:

That the Secretary of the Interior be, and hereby is, authorized and directed to survey the lands of the United States in the Territory of Alaska known to be valuable for their deposits of coal, preference to be given first in favor of surveying lands within those areas commonly known as the Bering River, Matanuska, and Nenana coal fields, and thereafter to such areas or coal fields as lie tributary to established settlements or existing or proposed rail or water transportation lines * * *. [Sec. 1.]

That the unreserved coal lands and coal deposits shall be divided by the Secretary of the Interior into leasing blocks or tracts of forty acres each, or multiples thereof, and in such form as in the opinion of the Secretary will permit the most economical mining of the coal in such blocks, but in no case exceeding two thousand five hundred and sixty acres in any one leasing block or tract; and thereafter, the Secretary shall offer such blocks or tracts and the coal, lignite, and associated minerals therein for leasing, and may award leases thereof through advertisement, competitive bidding, or such other methods as he may by general regulations adopt, to any person above the age of twenty-one years who is a citizen of the United States, or to any association of such persons, or to any corporation or municipality organized under the laws of the United States or of any State or Territory thereof * * *. [Sec. 3.]

The petitioner reads the provisions of section 1 set out above as constituting a declaration by the Congress that the entire area within limits of the Nenana coal field is known to be valuable for coal, and he believes that this takes the whole area outside any concept of an "undeveloped area" as that term is used in section 444 of Title 48, United States Code. The petitioner then proceeds to the conclusion that land

within this area can be made available for coal development only pursuant to leases issued under the quoted portion of section 3. Thus, it is the petitioner's view that the whole of the area within the limits of the Nenana coal field is, in effect, withdrawn by Congress from the scope of the provisions of section 444 of Title 48, United States Code, authorizing the issuance of coal prospecting permits on any "undeveloped area" in Alaska.

This Department's past administrative construction of the provisions of law mentioned in this supplemental decision has been contrary to the view urged by the petitioner. In its administration of these provisions of law, the Department has not regarded all land within the limits of the Nenana coal field as necessarily outside the scope of section 444 of Title 48, United States Code, and thus subject to coal development only under leases issued pursuant to section 3 of the 1914 act. Section 444 has been in existence since March 4, 1921 (41 Stat. 1363), and, since that date, a substantial number of coal prospecting permits under the provisions of this legislation have been issued by the Department on land within the area of the Nenana coal field.¹ The earliest of these permits was issued on February 15, 1922.

The petitioner's argument does not convince me that the Department's long-standing interpretation of section 444 of Title 48, United States Code, as authorizing the issuance, in proper cases, of coal prospecting permits on land within the area of the Nenana coal field has been erroneous.

The legislation which is codified in section 444, Title 48, United States Code, was originally enacted on March 4, 1921 (41 Stat. 1363), in the form of an amendment adding a proviso to section 3 of the act of October 20, 1914.² Thus, this authorization for the issuance of coal

¹ The following coal prospecting permits on land within the Nenana coal field have been issued by the Department:

Permit No.	Date issued	Acreage	Permittee
Fairbanks 01068.....	Feb. 15, 1922	200.00	Healy River Coal Corp.
Fairbanks 01053.....	Feb. 16, 1922	2,560.00	Broad Pass Coal & Dev. Co.
Fairbanks 01060.....	Apr. 29, 1922	1,920.00	J. Van Orsdel.
Fairbanks 01099.....	Feb. 17, 1923	2,560.00	Mt. McKinley Bitum. Coal Corp.
Fairbanks 01091.....	May 17, 1923	1,280.00	M. Singleton.
Fairbanks 01100.....	June 23, 1923	1,920.00	R. F. Roth.
Fairbanks 01105.....	June 28, 1923	640.00	E. Van Kirk.
Fairbanks 01104.....	Nov. 13, 1923	1,280.00	R. Calderhead.
Fairbanks 04684.....	Aug. 14, 1942	2,562.54	Val Dievold.
Fairbanks 05084.....	Aug. 20, 1943	619.50	O. E. Maki, Mike Myntti.
Fairbanks 06089.....	Apr. 5, 1946	1,120.00	U. S. Army.
Fairbanks 06292.....	May 14, 1948	640.00	W. Wurtz.
Fairbanks 07345.....	July 1, 1949	2,548.88	Wilson J. Smith.
Fairbanks 07350.....	July 22, 1949	1,120.00	A. B. Shallit.
Fairbanks 08771.....	May 24, 1950	640.00	O. E. Maki, Nels Jackson.

Fairbanks 01100 was amended October 26, 1923, to include an aggregate of 2,080 acres.

² The amendatory statute erroneously referred to the basic legislation as the act approved October "24", 1914.

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prospecting permits was actually made a part of and was superimposed upon section 3 of the 1914 act, and it provided a means whereby coal prospecting permits could be issued on any "undeveloped area" in Alaska which otherwise met the requirements of the amendment, including, of course, undeveloped areas which theretofore had been open to coal development only under the leasing procedure provided for in the original portion of section 3 enacted in 1914. I find nothing in the language of the 1921 amendment, or in its legislative history, which warrants the conclusion that Congress intended to except from its provisions all land within the limits of the Nenana coal field, irrespective of whether particular tracts are or are not in fact undeveloped from the standpoint of coal production. Hence, I do not believe that the Department has acted improperly heretofore in taking the view that each application for a coal prospecting permit under the 1921 amendment, whether it relates to land situated within the limits of the Nenana coal field or elsewhere, is to be considered on its merits, in relation to the facts of the particular case.

For the reasons indicated above, I regard as untenable the petitioner's primary contention that the whole of the area known as the Nenana coal field is necessarily outside the scope of the provisions of section 444 of Title 48, United States Code, authorizing the issuance of coal prospecting permits on undeveloped land in Alaska.

II

The petitioner's next contention is that, in any event, the coal prospecting permit involved in this controversy should not have been issued to Mr. Shallit in view of the fact that, according to petitioner, neither prospecting nor exploratory work was "necessary to determine the existence or workability of coal deposits" on the land covered by the permit.

With regard to this point, the petitioner refers to official reports by this Department which were outstanding at the time when the prospecting permit was issued to Mr. Shallit and which showed the presence of substantial quantities of coal on the land covered by the Shallit prospecting permit, and he also refers to the fact that, at the time of the issuance of the prospecting permit to Mr. Shallit, successful coal-mining operations were being conducted on land contiguous to that covered by the Shallit prospecting permit.

There appears to be no doubt that "the existence * * * of coal deposits" on the land covered by the Shallit prospecting permit was known at the time of the issuance of the permit. This did not, however, necessarily require the disapproval of Mr. Shallit's application for a coal prospecting permit. It will be noted that the use of the dis-

conjunctive "or" in the statutory standard, "the existence or workability of coal deposits," made it necessary for the official who passed upon Mr. Shallit's application for a coal prospecting permit to consider—even though the existence of coal deposits on the land applied for was known—the question whether prospecting or exploratory work was "necessary to determine the * * * workability" of the coal deposits on the land.

The record indicates that the prospecting permit was issued because of the belief of the Associate Director of the Bureau of Land Management, who issued the permit under a delegation of Secretarial authority, that prospecting was necessary in order to determine the workability of the coal deposits on the land, from the standpoint of quantity and quality. The making of this determination involved an exercise of judgment upon the part of the Associate Director. He was aided in this respect by advice which had been received from the Geological Survey in a report dated January 14, 1949.

If the petitioner believed that the Associate Director was mistaken in deciding that prospecting was necessary in order to determine the workability of the coal deposits on the land applied for by Mr. Shallit, the petitioner should have taken advantage of his right to secure a timely review of the matter by the head of the Department. It appears that the petitioner was cognizant of the pendency of Mr. Shallit's application for a coal prospecting permit, and that he filed a protest against the approval of the application. This protest was dismissed by the Acting Director of the Bureau of Land Management in a decision dated August 29, 1949.³ Formal notice of this action was received by the petitioner on September 20, 1949. The petitioner then had a right to appeal to the head of the Department respecting the dismissal of his protest, but he failed to do so. Upon the expiration of the period allowed for the taking of such an appeal, the determinations made in the Bureau of Land Management regarding the issuance of the coal prospecting permit to Mr. Shallit and the dismissal of the petitioner's protest became final.

Thus, a legal relationship between the Government and Mr. Shallit, under which he obtained as to the land involved in this controversy the rights provided for in section 444, Title 48, United States Code, was created upon the issuance of the coal prospecting permit to him and the expiration of the period that was available to the petitioner under the Department's Rules of Practice for the taking of an appeal to the head of the Department with respect to the handling of the

³ The protest should have been acted upon, of course, before any prospecting permit was issued to Mr. Shallit. In this connection, the record indicates that the prospecting permit, although dated July 22, 1949, was not transmitted to Mr. Shallit until October 6, 1949, which was after the dismissal of Mr. Usibelli's protest.

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matter in the Bureau of Land Management. Obviously, the Shallit prospecting permit could not be invalidated at this late date on a dilatory showing by the petitioner that the officials of the Bureau of Land Management were mistaken in concluding that prospecting was necessary in order to determine the workability of the coal deposits on the land applied for by Mr. Shallit. An utterly chaotic condition in administration would result if legal rights, established as the result of the bona fide exercise of judgment by Bureau officials in the performance of delegated Secretarial functions, were subject to cancellation upon the basis of the sort of belated review by the head of the Department requested by the petitioner.

III

The petitioner adverts to what he regards as the unfairness of issuing a coal prospecting permit to Mr. Shallit, in view of the fact that, when the petitioner discussed with representatives of the Department in 1946 his desire to obtain land in the Nenana coal field for coal development, the Department's representatives did not mention the possibility of his obtaining a coal prospecting permit, but, instead, only discussed the possibility of his obtaining a coal lease through competitive bidding.

As stated in the departmental decision of October 2, 1951, the records of the Department indicate that the 1946 contacts with the petitioner revolved around his desire to obtain a coal lease on land within the Nenana coal field, and that the petitioner did not at that time reveal any interest in obtaining a coal prospecting permit.

Moreover, any objection of this sort that the petitioner may have had to the issuance of a coal prospecting permit to Mr. Shallit should have been brought to the attention of the head of the Department at an appropriate time through the utilization of the appeal procedure provided for that purpose. (See the discussion in part II above.) As the Associate Director of the Bureau of Land Management had lawful authority to issue a coal prospecting permit to Mr. Shallit on the land involved in this controversy, it is now too late for the petitioner to seek to invalidate the permit upon the ground that the Bureau official, in the exercise of his discretion, ought not to have issued the permit.

IV

A further argument is made by the petitioner to the effect that Mr. Shallit has not complied with certain of the conditions prescribed in his coal prospecting permit, and, therefore, that the permit is subject to cancellation and cannot form a proper predicate for the issuance

of a preference-right lease pursuant to section 444, Title 48, United States Code, on the land covered by the permit.

The petitioner, in this connection, refers to the fact that the coal prospecting permit was issued to Mr. Shallit on the condition that he would "remove from said premises only such coal * * * as may be necessary to prospecting work," and on the condition that he would "begin prospecting work within 90 days from date hereof and * * * diligently prosecute the same during the period of such permit in accordance with the * * * best known methods." The petitioner asserts that Mr. Shallit has failed to comply with these conditions.

A. With regard to the petitioner's contention that Mr. Shallit has failed to comply with the condition in his coal prospecting permit to the effect that he would "remove from said premises only such coal * * * as may be necessary to prospecting work," the record shows that Mr. Shallit has mined 50,249.15 tons of coal from the land covered by his coal prospecting permit.

In connection with this point, it appears that the mining of the substantial tonnage of coal mentioned in the preceding paragraph was begun in November 1950, several months after Mr. Shallit made application on July 5, 1950, for a preference-right coal lease on the land covered by his coal prospecting permit.

In the administration of coal lands on the public domain, it has been the policy of the Department for many years to allow the holder of a coal prospecting permit to begin the mining of coal in commercial quantities from the land upon the filing of an application for a preference-right coal lease on the same land. This goes back to a departmental decision dated November 11, 1922, in the case of the *Elk Coal Company*, A-3333,⁴ which involved a situation where a company holding a coal prospecting permit had mined more than 25,000 tons of coal after the filing of an application for a preference-right coal lease on the same land and prior to the issuance of a lease to the company. The prospecting permit held by the company in that case, like the prospecting permit held by Mr. Shallit in the present case, contained a condition to the effect that the permittee would "remove from the premises only such coal * * * as may be necessary to prospecting work." In the departmental decision, First Assistant Secretary Finney stated:

No express provision is made in the regulations with respect to mining or to the rate of royalty after the filing of a leasing application, but it was not contemplated that after a permittee had established the existence of coal in commercial quantities and had filed his application for a lease he should be required to cease all mining operations, and in general, in the absence of some special reason for contrary action in a particular case, it is believed that the rate of royalty as fixed in the lease should be considered applicable from the date of the application therefor. * * *

⁴ Seattle 04758, now Spokane 015591.

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The policy mentioned above was incorporated in departmental instructions issued on May 23, 1924 (50 L. D. 501), the following language being used (p. 503) :

Where a permittee has discovered coal and has applied for a lease, such application supersedes the permit, and when lease is granted it relates back to the time of application. There can be no interval, for the permittee must account for the coal in accordance with the terms of his permit until lease is applied for, and thereafter in accordance with the terms of the lease. * * *

The rule that an application for a preference-right coal lease supersedes the coal prospecting permit on which it is based was reaffirmed as recently as June 12, 1951, in the case of *Leonard E. Hinkley and Stevens T. Harris*, A-26187.

Although the precedents cited above respecting the point now under consideration related to coal prospecting permits issued on lands in the continental United States, they would be equally applicable to coal prospecting permits issued on lands in Alaska. Except for the length of time for which coal prospecting permits may be issued, the statutory provisions governing the issuance of coal prospecting permits on lands in Alaska are the same as the statutory provisions governing such permits on lands in the United States. See 48 U. S. C., 1946 ed., sec. 444, and 30 U. S. C., 1946 ed., Supp. IV, sec. 201 (b). Likewise, the provisions of the departmental regulation (43 CFR 70.4) defining the rights of permittees under coal prospecting permits on Alaskan lands are the same as the provisions of the departmental regulation (43 CFR 193.20, 16 F. R. 2892) defining the rights of permittees under coal prospecting permits issued on lands in the continental United States; and the same language respecting the point now under consideration is used in coal prospecting permits on Alaskan lands and in coal prospecting permits on lands in the continental United States.

Inasmuch as the mining of coal in commercial quantities by Mr. Shallit from the land covered by his coal prospecting permit did not occur until after the filing on July 5, 1950, of his application for a preference-right coal lease on the same land, his action in proceeding with the development of the property on a commercial basis was in accordance with the long-established departmental policy of regarding such development as permissible after the filing by a permittee of an application for a preference-right coal lease. Hence, the Department would not be justified in departing from its previous policy, extending over a period of many years, by attempting in this case to cancel Mr. Shallit's coal prospecting permit upon the ground that, prior to the actual receipt of a coal lease, he removed coal in commercial quantities from the land covered by his coal prospecting permit.

B. We turn now to the petitioner's contention that Mr. Shallit has failed to comply with the condition in his prospecting permit to the

effect that he would "begin prospecting work within 90 days from date hereof and * * * diligently prosecute the same during the period of such permit in accordance with the * * * best known methods."

The record indicates that, although Mr. Shallit's prospecting permit was issued under the date of July 22, 1949, the permit actually was not transmitted to Mr. Shallit until October 6, 1949. At Mr. Shallit's request, the manager of the district land office at Fairbanks thereafter granted to him an extension until June 1, 1950, of the time for the beginning of prospecting work under the permit. This action appears to have been proper under the circumstances, and it is ratified. In this connection, it should be noted that, at the time of the receipt of the prospecting permit by Mr. Shallit, the 90-day period mentioned in the permit for the beginning of the prospecting work was about to expire, and, in addition, that the onset of severe winter weather was imminent. Compliance with the 90-day requirement in the permit with regard to the beginning of prospecting work was infeasible because of the delay in delivering the prospecting permit to Mr. Shallit.

The record contains copies of reports submitted by Mr. Shallit to the district mining supervisor in Juneau for each month from March 1950 through September 1951. These reports, which were sworn to by Mr. Shallit, indicate the extent of the prospecting and exploratory work performed each month upon the area covered by the prospecting permit, prior to the beginning of the commercial mining of coal from the area.

According to Mr. Shallit's monthly reports for March and April 1950, Mr. Shallit made engineering and economic studies regarding the area covered by the permit and the preparation and transportation of coal, and he also made a reconnaissance study of the geology of the area. Corroborating evidence is provided by a report from the district mining supervisor at Juneau, which states that in April 1950 Mr. Shallit conferred with the supervisor relative to prospecting and marketing studies which Mr. Shallit was making.

The monthly reports which Mr. Shallit submitted for May and June 1950 state that the prospecting and exploratory work completed during these months consisted of detailed mapping of surface exposures, tracing of outcrops and the exposure of cross sections by surface trenching,⁵ measurement of the thickness of exposures, geologi-

⁵ The nature of the trenching was subsequently explained by Mr. Shallit in a deposition, a copy of which was furnished to the Department by the petitioner. According to Mr. Shallit, it consisted in the digging of holes which varied in size from "6 inches to 8½ feet deep" and from "2 feet wide to 8 or 10 feet wide." Mr. Shallit described at least 18 different locations within the permit area where he had dug these holes. A report in the record indicates that the district mining supervisor and the territorial mining inspector inspected the permit area in September 1950 and noted a series of 19 pits and trenches which had been dug in order to check the geological structures and expose coal within the permit area.

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cal interpretation of the continuation of beds, detailed study of transportation and loading-site problems, and completion of engineering reports. On June 26, 1950, Mr. Shallit submitted to the district mining supervisor a proposed development and mining plan, called a status report, which dealt with various technical problems involved in mining the area covered by the permit. Eight detailed maps were enclosed with the report.

Mr. Shallit's monthly reports for the period from July 1950 through October 1950 show that trenching and stripping operations within the permit area were carried on, and that a road, camp buildings, a loading site, and at least six bridges were built. A corroborating report from the district mining supervisor indicates that Mr. Shallit's prospecting operations during this period uncovered a bed of coal approximately 350 feet long in the footwall of bed number 1; that experimental stripping was performed on beds numbered 2, 3, and 6; that the coal in bed number 2 was frozen; and that bed number 3 had been trenched with a bulldozer.

Mr. Shallit's subsequent monthly reports indicate that the commercial mining of coal (under his application for a preference-right coal lease) began in November 1950.

Controverting evidence has been submitted by the petitioner in the form of affidavits from himself and three other persons stating, in substance, that on or about August 1, 1950, they examined parts of the area covered by Mr. Shallit's prospecting permit and found no evidence to indicate that any prospecting had been done by Mr. Shallit within the area. In addition, the petitioner's affidavit stated that he had examined the permit area from the air and had found no evidence that prospecting work had been done by Mr. Shallit.

Upon considering the whole record, it is concluded that the preponderance of the evidence supports the finding that, during the period between June 1, 1950 (when Mr. Shallit was required to begin his prospecting operations under the permit, as modified), and the beginning of the commercial mining of coal from the permit area in November 1950 pursuant to Mr. Shallit's application for a preference-right coal lease, Mr. Shallit complied with the condition in his prospecting permit to the effect that he would "diligently prosecute" prospecting work on the permit area in accordance with the "best known methods," and that, as a result of Mr. Shallit's operations, it was demonstrated that the land contains coal in commercial quantities. That being so, Mr. Shallit is entitled, under the provisions of 48 U. S. C., 1946 ed., sec. 444, to a lease on the land covered by his coal prospecting permit.

V

For the reasons indicated above, it is concluded that no error was made in the departmental decision dated October 2, 1951.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509; 14 F. R. 307), the petition for reconsideration of the departmental decision (A-26277) dated October 2, 1951, is denied.

MASTIN G. WHITE,
Solicitor.